

AWARD NO. 323
Case No. 323

File No. Lewis-JG-10-19-INV/MW-DEAR-19-73-SG-693 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) DIVISION – IBT RAIL CONFERENCE
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY
) (FORMER SOUTHERN RAILWAY COMPANY)

STATEMENT OF CLAIM:

Claim on behalf of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. J. Lewis, issued by letter dated October 17, 2019, in connection with his alleged: (1) failure to protect his assignment as he was absent from his assignment without permission from the proper authority from September 3 through 5, 2019 and (2) conduct unbecoming an employee in connection with the referenced absenteeism when he allegedly made false and misleading statements to supervision about the events that occurred was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Lewis-J-G-10-19-INV/MW-DEAR-19-73-SG-693 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant J. Lewis shall now have his dismissal set aside with all notations thereof removed from all Carrier records and he shall also be restored to the Carrier's service with all seniority and restored to all financial and benefit losses, such as vacation and health insurance benefits occasioned as a result of the violation, including: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully dismissed); (2) any general lump-sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been removed from service; and (4) health, "dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly dismissed."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

During the period relevant to this case, Claimant J. G. Lewis was assigned to a laborer position on Gang T&S 24. After the gang observed the Labor Day holiday on September 2, 2019, Claimant did not report for service on September 3, 4 and 5, 2019. When a Carrier manager met with Claimant regarding the absences, he did not believe that Claimant had been forthcoming about an alleged medical issue or other circumstances associated with the absences.

By notice dated September 20, 2019, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with failure to protect his assignment when he was absent from his assignment without permission from September 3 through September 5, 2019, and conduct unbecoming an employee in connection with that charge when he made false and misleading statements to supervision about the events that occurred. The hearing was held October 1, 2019, after which Claimant was found to be guilty as charged, and by notice dated October 17, 2019, he was dismissed from service.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that Claimant was denied his right to a fair and impartial hearing when the Carrier failed to issue precise charges, stating that the notice of investigation did not reference the specific rule Claimant was alleged to have violated. The Organization asserts that the lack of a rule citation is a violation of the applicable agreement, and it argues that the discipline should be overturned on that basis alone.

In response, the Carrier maintains that Claimant received a fair and impartial hearing, and it argues that there is no agreement requirement to cite a specific rule in a notice of investigation. The Carrier states that the purpose of a notice of investigation is to make the employee aware of the

matter to be investigated so that a defense may be prepared, and it avers that the notice of investigation in this case did just that.

We have carefully reviewed the parties' arguments on that issue, and we find no procedural barrier to our consideration of the merits. We find that the notice of investigation adequately apprised Claimant and his representative of the matter to be investigated.

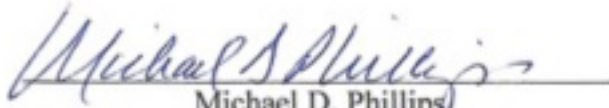
With respect to the merits, the Organization maintains that the discipline assessment was unwarranted, arguing that the Carrier failed to meet its burden of proof in connection with all of the charges. It contends that the Carrier did not provide sufficient evidence to establish that Claimant was culpable for the alleged violation. The Carrier replies that the record contains substantial evidence to support the discipline assessed, stating that there is no question that, based on the testimony of the charging manager and of Claimant himself, Claimant was guilty of the charges levied.

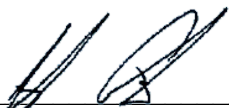
We find that the Carrier has provided sufficient evidence to establish that Claimant was in violation of the cited rules. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in prior awards as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant's statements to his manager were misleading in some respects, and we hold that the evidence produced is sufficient to meet the Carrier's burden of proof.


Having found substantial evidence to support the finding of guilt, the next question before us concerns the level of discipline assessed. On that point, we find that the record contains sufficient mitigating factors which warrant a lesser degree of discipline than was imposed here. On the specific facts of this case, we believe that Claimant should be afforded one last chance to continue his career and to demonstrate that he can be a safe and productive employee. Claimant should be aware that he cannot expect a similar outcome if any further such incidents occur. Claimant is

therefore to be returned to service, with seniority intact, but without pay for time out of service. This holding is based on the unique facts presented, and it should not be considered precedent for any other matters, other than those pertaining to Claimant.

AWARD: Claim sustained in accordance with the findings. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.


Michael D. Phillips
Chairman and Neutral Member


Adam Gilmour
Employee Member


Scott Goodspeed
Carrier Member

Dated: November 13, 2023