

AWARD NO. 324
Case No. 324

File No. Brock-TA-08-19-INV/MW-FTW-19-96-LM-618 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 [sixty (60) day suspension] of Mr. T. Brock, issued by letter dated October 23 2019 and received by the Organization on October 28, 2019, in connection with his alleged failure to protect his assignment in that on August 28, 2019, he allegedly abandoned his position prior to his assigned quitting time without authorization from the proper authority; and his alleged conduct unbecoming an employee in that on August 30, 2019, supervision discovered that he attempted to request pay for time that he allegedly did not work on August 28, 2019, was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Brock-TA-08-19-INV/MW-FTW-19-96-LM-618 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant T. Brock shall now have his discipline 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 removed from service); (2) any general lump-sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the 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 suspended from service."

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.

On August 28, 2019, Claimant T. A. Brock was employed as a track laborer, assigned to assist the S-3 Production Gang. Claimant left the property in his personal vehicle between 2:00 and 2:30 p.m., after having been on duty for 6 to 6.5 hours. Claimant wrote 8 hours regular pay for the day, however, in the payroll book at the Danville Maintenance of Way headquarters.

By notice dated September 5, 2019, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with failure to protect his assignment in that on August 28, 2019, he abandoned his position prior to his assigned quitting time without authorization from proper authority, and conduct unbecoming an employee in that on August 30, 2019, supervision discovered that he attempted to request pay for time he did not work on August 28, 2019. The hearing was held October 1, 2019, after which Claimant was found to be guilty as charged, and by notice dated October 23, 2019, he was assessed a 60-day actual suspension.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that the Carrier violated the 2001 Discipline Agreement, Section A, when the notice of discipline was not issued within 20 days after completion of the investigation, noting that the hearing was held October 1 and the notice of discipline was not issued until October 23. The Organization argues that the Carrier missed its opportunity to discipline Claimant and that the discipline therefore should be overturned.

The Organization further contends that Claimant was denied his right to a fair and impartial hearing when the Carrier relied upon written statements from two employees, yet it failed to make those alleged witnesses available for testimony and cross-examination. It cites prior awards for the principle that it is the Carrier's obligation to present all witnesses who have pertinent information

to develop the facts under investigation. The Organization asserts that the Carrier deprived Claimant of his right to face and cross-examine his accusers.

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 intended to defraud the Carrier when he left work early on August 28, 2019, after not feeling well. It states that the record shows there is no written policy requiring an employee to notify Carrier supervision of a need to leave early to conduct personal business, such as going to see a doctor. Here, the Organization notes Claimant's testimony that he did notify his foreman that he was leaving early, as well as his testimony that claiming pay for 8 hours was normal procedure. It avers that Claimant would have been in violation of Carrier rules if he had remained at work while he was sick and not alert and attentive, and it reiterates that the Carrier failed to meet its burden of producing evidence to support the discipline decision.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. The Organization points out that Claimant has 15 years of service and it contends that, even if the charges had been proven, which it denies, a 60-day suspension was harsh and excessive, rather than progressive, for an offense of this nature. The Organization concludes that the suspension was not warranted for the type of offense alleged, and that the claim should be sustained.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment. It states that Claimant received a fair and impartial hearing, and it points to award authority which has upheld the introduction of written statements in a railroad disciplinary hearing. The Carrier further argues that Claimant's admission to most of the relevant facts obviates any procedural challenges.

Regarding the date of the notice of discipline, the Carrier states that it was only two days beyond the 20 days described in the agreement, and that it was due to clerical error. It denies that the error should require the discipline be set aside, stating that there is no specific provision for that

consequence in the agreement. It cites prior awards for the proposition that, absent a specific provision in the agreement, and absent evidence of prejudice, a tardy decision does not negate a discipline assessment. The Carrier avers in this case that no evidence of prejudice is evident.

With respect to the merits, the Carrier maintains that the record contains substantial evidence to support the discipline assessed, stating that there is no question that Claimant was guilty of the charges levied. It asserts that the evidence establishes that he left the property without authorization from proper authority, and that he then attempted to claim a full day's pay. The Carrier cites the testimony of the charging manager who interviewed Claimant on August 30, 2019 as establishing that Claimant admitted to him both that he left early without permission and that the request for a full day's pay equated to padding his payroll.

The Carrier states that Claimant's contention that he was sick and that he was entitled to a full day's pay, even though he left work early, was not credible. It argues that he had told a coworker he left because he wasn't working any overtime, which was inconsistent with what he later told the charging manager, and it posits that this demonstrates Claimant was dishonest in his testimony and that his testimony is not entitled to any weight. The Carrier also contends that Claimant should have been aware that simply letting his agreement foreman know that he was leaving early did not constitute proper authorization, pointing to testimony from the charging manager that only a non-agreement supervisor is proper authority.

With respect to the level of discipline imposed, the Carrier states that Claimant's actions equated to dishonesty, and it states that significant discipline is warranted, citing prior cases in which dismissal was upheld when similar conduct was proven. The Carrier states that the assessment of a suspension rather than dismissal was therefore extremely lenient, and it concludes that there are no mitigating circumstances which warrant modification of the discipline.

We have carefully reviewed the record in this case and the parties' arguments, and we find no procedural barrier to our consideration of the merits. As the Carrier notes, prior awards have held that a Carrier's failure to render a discipline decision within the agreement time frames does not

necessarily require that the discipline be negated if the applicable agreement does not state that such an outcome is required, and no prejudice has been shown. See, e.g., Third Division Award No. 29486. The agreement in question here is similar to the one reviewed in that award, and we find that a similar conclusion with respect to the tardy notice of discipline is appropriate here.

We also find no indication that Claimant was prejudiced by the proceedings. There is no absolute bar to the entry of written statements in a disciplinary hearing, and in this case, we do not find that the hearing officer's allowance of the written statements deprived Claimant of a fair and impartial hearing. The statements were essentially consistent with Claimant's own testimony, in which he admitted having left in his personal vehicle between 2:00 and 2:30 p.m. on the date in question. The main issue developed during the hearing was Claimant's alleged understanding of whether his actions were permitted, which the statements do not actually address. We therefore find no indication that Claimant was prejudiced by the admission of the statements.

With respect to the merits, we find that the Carrier has provided sufficient evidence to establish that Claimant was responsible for only a portion of the charges. Claimant testified without contradiction, as the foreman was not present to testify otherwise, that he notified the foreman he was leaving early because he wasn't feeling well. Although the charging manager testified that Claimant's notification to another agreement employee is not sufficient, and that he should have notified a non-agreement supervisor, he also conceded that there was no written directive on that point. We therefore find that discipline based on that charge was not warranted.

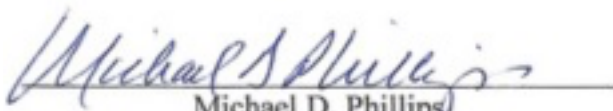
With respect to the charge of attempting to claim excess pay, however, we find that sufficient evidence was produced to substantiate the finding of guilt. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support 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 claimed more time than he was entitled to. Although Claimant


contended that he was entitled to the entire 8-hour day because his driving time after leaving the worksite would have added to his work time, we think the Carrier could reasonably conclude that the time report was excessive, and that Claimant was not entitled to claim time after he left the job site early. Claimant's contradictory testimony raised a credibility issue in our view, and it has been held in numerous prior awards that such credibility issues are left for the hearing officer to make, not this appellate board. We will not overturn the credibility determination made here.

Having found substantial evidence to support the finding of guilt on that charge, the next question before us concerns the level of discipline assessed. While the charges in question are indeed significant, we do believe the fact that only half of the charges were established warrants a lesser degree of discipline than was imposed here. On the specific facts of this case, we believe that the 60-day suspension should also be reduced accordingly, and that Claimant is entitled to lost wages for the time he was suspended in excess of 30 days.

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