

AWARD NO. 328
Case No. 328

File No. Thomas-P-G-06-21-INV/MW-ATLA-21-35-BB-463 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) 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. P. Thomas, issued by letter dated August 10, 2021, in connection with his alleged: (1) failure to protect his assignment and excessive absenteeism in that he failed to protect his assignment on: March 30, April 6, 7, May 6, 25, 26 and June 1 and 7, 2021, and continuing, when he was absent from and unable to protect his assignment; (2) failure to protect his assignment and conduct unbecoming an employee in that supervision discovered on June 11, 2021, he was tardy and/or abandoned his assignment without authorization on multiple dates and times, beginning on or about April 11, 2021; (3) conduct unbecoming an employee, in connection with the above charge, in that he falsely reported payroll for time that he did not work; (4) conduct unbecoming an employee in that supervision discovered that he falsely reported and accepted meal allowances ('CC') that he was not due on multiple dates beginning August 21, 2020; and (5) failure to follow instructions and conduct unbecoming an employee in that he used a Company issued credit card in November 2020 without proper authorization and failed to reimburse the Carrier after being instructed by supervision was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Thomas-P-G-06-21-INV/MW-ATLA-21-35-BB-463 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant P. Thomas 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.

This is the first of two cases on our current docket involving Claimant P. G. Thomas, Jr., both of which involve dismissal assessments. We assess the second dismissal in Case No. 329.

During the time frames relevant to this case, Claimant was employed by the Carrier as a fixed headquarters bridge foreman. By notice dated June 9, 2021, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with:

- “1. Failure to protect your assignment and excessive absenteeism in that you failed to protect your assignment on: March 30; April 6, 7; May 6, 25, 26; and June 1, 7, 2021, and continuing, when you were absent from and unable to protect your assignment.
2. Conduct unbecoming an employee, in connection with the above charge, in that you falsely reported payroll time that you did not work on May 6, 2021.
3. Conduct unbecoming an employee in that Supervision discovered that you falsely reported and accepted meal allowances (‘CC’) that you were not due on multiple dates

beginning August 21, 2020.

4. Failure to follow instructions and conduct unbecoming an employee in that you used a Company-issued credit card in November 2020 without proper authorization and failed to reimburse the Carrier after being instructed by Supervision.”

The notice was amended to include a charge regarding Claimant’s alleged failure to protect his assignment and conduct unbecoming an employee in that Supervision discovered on June 11, 2021, that he was tardy and/or abandoned his assignment without authority on multiple dates and times, beginning on or about April 11, 2021.

After postponements, the hearing was held July 22, 2021, at which Claimant’s manager presented testimony and documentation regarding the dates of Claimant’s absences, a payroll entry Claimant had submitted for a date he did not work, and payroll entries submitted by Claimant for several dates on which Claimant sought meal allowances not applicable to fixed headquartered employees. He also submitted documentation regarding a charge on Claimant’s company credit card which was for Claimant’s personal utility bill, as well as a written statement from a contractor who had been working on bridges where Claimant was flagging which listed several dates on which Claimant allegedly was tardy or left work early. After the hearing, Claimant was found to be guilty as charged, and by notice dated August 18, 2021, 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 provide Claimant with various procedural rights and protections. Specifically, the Organization alleges that the Carrier relied on a written statement from the contractor regarding dates Claimant allegedly was tardy or left early, but that the Carrier failed to produce the contractor at the hearing so he could be cross-examined.

The Organization further asserts that the Carrier improperly charged Claimant for dates that fell outside the thirty (30) day time limit for issuing charges. It states that the charging officer, who was Claimant’s direct supervisor, was always the one who reviewed and approved Claimant’s

payroll, and it submits that there is no question that the manager was well aware of situations which he would later deem to be chargeable offenses for longer than thirty (30) days. The Organization asserts that the decision to charge Claimant outside the contractually mandated window of first knowledge is a violation of the applicable agreement, and it argues that the discipline should be overturned on that basis alone.

With respect to the merits, the Organization submits that the Carrier failed to meet its burden of proof in connection with all of the charges. It contends that the Carrier did not establish that Claimant intended to claim improper payments, arguing that the Carrier's burden of proof on such charges is elevated, and that the proof must be at least clear and convincing. The Organization states that the record establishes that Claimant had no malicious intent towards the Carrier, citing his testimony that he had made a mistake and that if he had been informed that he had been entering time incorrectly, he would have rectified the situation immediately. It also cites Claimant's testimony regarding the credit card charge in which he said he was unaware that someone else had used the card in error, and that he offered to reimburse the Carrier. The Organization posits that the Carrier failed to establish that Claimant intended to mislead the Carrier or that he willfully disregarded the Carrier's interests, and it states that he did his best to explain the purchases and time roll entries.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. The Organization points out that Claimant has 16 years of service with only minor discipline on his record, and it contends that such discipline is not relevant to the facts of this case. The Organization concludes that dismissal was not warranted, and that Claimant should be returned to service.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment. With respect to the time limit arguments raised by the Organization, the Carrier cites arbitral precedent as holding that time limits do not begin running until a Carrier officer with authority to administer discipline has knowledge of potential wrongdoing. It asserts that it had a reasonable time to perform necessary inquiry into the circumstances to determine if there was a

reasonable belief of potential wrongdoing. The Carrier states that the charging manager's review of Claimant's records was not triggered until Claimant's June 7, 2021, absence, and it avers that the June 14, 2021, charges were then initiated within the timelines set forth in the agreement.

With respect to the absence of the contractor from the hearing, the Carrier notes that he was not a Carrier employee, and it cites awards which have recognized that Carriers do not have subpoena power to compel non-employees to appear at a disciplinary investigation. It adds that those awards have found no prohibition against the use of written statements, even from someone who is not available for cross-examination.

The Carrier also asserts that the evidence adduced at the hearing fulfilled its burden of producing substantial evidence to establish Claimant's guilt. It states that the testimony and statements presented during the hearing conclusively proved that Claimant was guilty of each of the charges. With respect to the first charge of excessive absenteeism, the Carrier states that Claimant was absent on ten (10) working days out of the last forty-one (41), or almost 25% of the time between March 8 and June 8, 2021. The Carrier argues that Claimant's last minute text messages to his manager regarding his absences did not result in the absences being condoned, and it posits that such performance would be considered unacceptable in any workplace.

The Carrier also asserts that a review of Claimant's work history and payroll records revealed that he claimed a full day's pay on dates which the contractor confirmed Claimant was late or left early, that he falsely reported and accepted meal allowances he was not due on May 6, 10, and 11, 2021, and that he falsely claimed and accepted pay, travel time, mileage and meal allowances on May 6, 2021, despite having notified his manager that he would be taking a personal leave day that day. It adds that the records confirm Claimant used his company credit card for payment of his personal power bill of over \$600, and that he failed to reimburse the Carrier after being instructed to do so. The Carrier states that it was Claimant's responsibility to submit payroll accurately and honestly, but that he did not do so, even after being cautioned about submitting meal claims which were not applicable to fixed headquarters employees such as Claimant.

With respect to the level of discipline imposed, the Carrier states that it is imperative that employees be honest and that they not use company assets for their own purposes. It points to prior awards which have upheld dismissal for similar conduct. It states that it is well within its rights to treat the violation as it did, and that it has no obligation to retain in its employ an individual who commits dishonest misconduct. The Carrier states that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that dismissal is appropriate in light of the seriousness of the offense.

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. With respect to the timing of the notice of investigation and hearing, we concur with the holdings of the cases cited by the Carrier that time limits for such matters do not commence until a manager with authority to initiate disciplinary proceedings has knowledge of the alleged misconduct. It appears that the majority of the charges were initiated within thirty (30) days of the date Claimant's manager had knowledge of the alleged offenses, and we address below any of the specific charges which we find were outside the agreement timeframe.

We concur with the Organization that the dates on which Claimant claimed camp car meals in 2020 were not progressed in a timely manner, as the charging officer testified that he had knowledge of those events in December of 2020. We also find that the charge pertaining to Claimant's use of the company credit card was untimely. Claimant's manager was aware of that charge in 2020, and while it appears that Claimant did not follow up on reimbursing the company, we find that the lack of any action on the Carrier's part for over six months makes that charge outside the agreement timelines as well.

Nevertheless, we find that the Carrier has provided sufficient evidence to establish that Claimant was guilty as charged of submitting false payroll regarding May 6, 2021, and of submitting meal claims to which he was not entitled for multiple dates in May 2021, which were not subject of the manager's prior discussions with Claimant. Whether we apply the standard of substantial evidence, or an elevated standard of proof as suggested by the Organization, we believe that the


record adequately establishes that Claimant claimed pay and expenses to which he was not entitled, and we find that the Carrier was within its right to determine that the claims were not inadvertent, especially after Claimant had been approached about improper meal claims previously. At best, his testimony presented a credibility issue which the Carrier was not obligated to resolve in Claimant's favor, and which we are not in position as an appellate body to second guess.


We also find that the Carrier met its burden of providing substantial evidence regarding the charge of excessive absenteeism. It is well established in this industry that, even if an employee has good reasons to be absent, at some point the number of absences may be considered excessive, and we find that the number of absences in question here was indeed excessive. We are not convinced, however, that the Carrier's burden was met regarding the charges of being tardy and/or leaving early. Claimant testified that, as a headquartered employee, he would have to obtain materials or be present at the headquarters at the beginning of the shift for other purposes, which would explain why he was not at the work site the same time the contractors arrived. While there is no absolute bar to admission of hearsay statements, and Claimant conceded that he had left work early on one occasion to go to his son's ballgame, we find the contractor's statement by itself to be insufficient to establish that Claimant abandoned his assignment on multiple occasions.

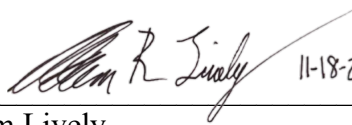
Having found that a portion of the charges were proven, we turn to the level of discipline. As the Carrier notes, many prior awards have upheld dismissal for offenses such as were proven here, as those actions break the bonds of trust necessary in the employment relationship. Even if we were inclined to afford Claimant another opportunity to continue his career, as noted above, we address another dismissal assessment against Claimant in Case No. 329. In that case, we find that the charges were proven, and that there is no basis to overturn the discipline. Inasmuch as any return to service finding in this case would not be implemented due to our finding in Case No. 329, we

find no basis to disturb the dismissal assessed in this case.

AWARD: Claim denied.


Michael D. Phillips
Chairman and Neutral Member


Adam Gilmour
Employee Member

 11-18-2024
Adam Lively
Carrier Member

Dated: November 18, 2024