

PUBLIC LAW BOARD NO. 5332

**SYSTEM COUNCIL NO. 6
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS**

and

NORFOLK SOUTHERN RAILWAY COMPANY

Case No. 210

Statement of Claim:

Claim on behalf of Electrician R.L. Swope in Altoona, Pennsylvania, for reinstatement with seniority rights unimpaired and made whole for all losses sustained. These begin the date removed from service, continue to the present date and include, but are not limited to, lost wages, vacation rights, health and welfare and insurance benefits, pension benefits such as Railroad Retirement and Unemployment Insurance, and any other benefits that would have been earned during the time Electrician Swope is unjustly withheld from Carrier's service. We also request his personal record be cleared of this matter.

Background

In November 2020, Claimant R.L. Swope—an employee with fifteen years of service—was employed at the Carrier's Juniata Locomotive Shop in Pennsylvania. By letter dated December 9, 2020, Claimant was instructed to report for an investigation:

... to determine your responsibility, if any, in connection with your reporting to work while symptomatic and/or sick; and/or failing to follow the proper mark off procedure to absent yourself from your work assignment on November 30, 2020, while you were assigned as an Electrician 1st shift, at Juniata Locomotive Shop.

An investigative hearing was held on December 18, 2020. Senior General Foreman Brad Kirk read into the record a written statement he had prepared on December 6, 2020, reporting:

On Monday, November 30, 2020, at approximately 7:35 a.m., Working Gang Leader [WGL] Pat Kinney informed me that Electrician Swope signed out and went home sick at 7:15 a.m. Mr. Kinney stated that Mr. Swope had told him he could not taste or smell and suspected he had COVID symptoms.... Mr. Swope did not make contact with any supervisor prior to signing out and leaving the property. Mr. Kinney had mentioned that Mr. Swope was wearing a mask and gloves at the safety meeting, and he had also distanced himself from other

employees. I immediately assigned employees to disinfect and wipe down the area and escalated the situation accordingly.

Kirk also presented a copy of a November 30, 2020 email sent by Juniata Office Manager Amanda Carpenter to Jennifer Bailey, with "Subject: Rodney Swope." The email stated:

At approximately 7:40 a.m. today, I received a call from Rodney Swope [], who was calling to inform me that he could not taste or smell and wanted to see about being off for COVID. He proceeded to tell me that he had just come into work to get a paper from his Gang Leader and then left. He said he did not make contact with a supervisor while here. Mr. Swope stated he did wear a mask and stayed six feet from everyone while he was here. He said he also signed in and out on the payroll time sheet. I questioned as to why he came into work if he had symptoms. He said he didn't know how else to mark off or what to do.

I reminded Mr. Swope of the instructions to not come to work if sick or having symptoms and also how to properly mark off or absent himself from his position.... Mr. Swope [said] he didn't know....

Additionally, Kirk presented a packet of documents comprised of (1) Safety Bulletin, Local 111 (LB 111), (2) Operations Bulletin 40 (OB-40), (3) a print of a "Stay at Home" slide shown at employee safety meetings in November 2020, and (3) payroll documentation of Claimant's presence for a pertinent November safety meeting.

LB 111, governing "Proper Procedure/Absent From Your Work Assignment," states in pertinent part:

These instructions apply to all employees assigned to Juniata Locomotive Shop... Reporting for Duty [quoting General Conduct Rule 919].... "[Employees] must not absent themselves from duty ... without proper authority."

Proper authority for the purpose of this instruction is a non-agreement supervisor who must be contacted to acknowledge your intent to absent yourself from your work assignment. In the event that it becomes necessary to mark off, there are only two acceptable methods to do so[:]

- a) Call your direct non-agreement supervisor. If you are unable to reach your direct non-agreement supervisor;
- b) Call 814-949-1300; leave the date, your full name, employee #, department, your supervisor's name, reason for calling off, anticipated number of days you will be off and a phone number where you can be reached.

In addition, when absenting yourself from your assignment and/or duty, do so as soon as it is known that you must absent yourself from your assignment and/or duty....

OB-40, dated November 20, 2020, as well as the “Stay at Home” slide, instruct employees to stay home if they have been exposed to COVID-19, are sick, are undergoing testing for COVID-19, have tested positive for COVID-19, have an immediate household member who has tested positive, or have been directed by a medical professional to quarantine. Both OB-40 and the slide further instruct employees to alert the Carrier if they suspect or confirm that they have COVID: “Alert your supervisor and also notify NS Health Services via email....”

Kirk acknowledged that the employee instructions did not explicitly state what employees should do if they became sick at work. Kirk stated that a notice (Notice) that he was shown at hearing—without the Carrier’s official heading, a date, or any signature—was not prepared by the Carrier and did not contain official Carrier instructions. The Notice provided in part: “Call Immediate Supervisor. If you can’t reach them call Amanda Carpenter....”

He also testified that on November 30, 2020, Claimant’s direct supervisor was on vacation. According to Kirk, Claimant could have called the phone number included in LB 111 and left a detailed message, or he could have informed any non-agreement supervisor on-site. Several such supervisors were on property on November 30. Kirk further stated that Claimant could have had someone with a radio, such as a working gang leader, contact a supervisor.

Kirk emphasized that WGL Kinney was not a proper authority under LB 111 because working gang leaders are in charge in a supervisor’s absence only with regard to job assignments during their shift. According to Kirk, Claimant failed to comply with LB 111’s instructions to notify a proper authority that he needed to mark off, and to absent himself as soon as possible after becoming aware of the need for his absence.

Kinney testified that at the 7:00 a.m. safety meeting on November 30, he noticed that Claimant was wearing a mask and standing a locomotive's length from the rest of the meeting attendees. Kinney did not see Claimant leave, but subsequently realized that Claimant had left a message on his phone. Claimant told Kinney that he was going to call Carpenter to tell her he was going home. According to Kinney, when he saw Kirk at approximately 7:20 a.m., he told Kirk that Claimant had gone home with COVID-19 symptoms. Kinney stated that employees marked off through him frequently, and he did not realize they were required to contact a supervisor. He further testified that he believed Claimant had correctly called Carpenter because Claimant was going out for COVID, likely in excess of three days.

Testifying on his own behalf, Claimant stated that he did not notice any COVID symptoms on November 30, until after he signed in at 7:00 a.m. He was drinking chocolate milk when it seemed to him that he could not taste or smell it. He put on a mask and gloves. According to Claimant, he stood at the back of the safety meeting for a period of time, trying to recall how to mark off. He had been with Kinney's gang only since November 9, and did not have his supervisor's phone number. Claimant testified that after he failed to find his direct supervisor, Kinney was still giving out assignments. Claimant signed out, and messaged Kinney and waited for a response. When he received no response, he reasoned that he would be off for more than three days while he found a COVID testing site and waited for the results. Claimant testified that he then called Carpenter, at 7:37 a.m., to inquire about medical leave.

Claimant denied telling Carpenter that he had only come in to pick up a paper. He stated that he had picked up a copy of the Notice when he was signing out. He believed the Notice was official information that might take priority over LB 111. Claimant testified that he was confused by differences in the information employees were receiving about when and how to mark off. He

also was unable to think clearly in what he felt was an emergency situation. Claimant stated that his COVID test result was negative.

By letter dated January 15, 2021, Claimant was informed that he had been found guilty of the charges against him, and had been assessed a fifteen-day deferred suspension with a nine-month probation period.

Contentions of the Parties

The Carrier contends that the evidence adduced at hearing demonstrated that Claimant failed to properly mark off on November 30, 2020. According to the Carrier, there are only two ways to mark off appropriately under LB 111: either notify one's direct non-agreement supervisor, or call the provided phone number to leave a message containing the specified information. Noting that Claimant is a long-term employee who could be expected to know the proper procedure for marking off, the Carrier asserts that Claimant's testimony that he was confused on November 30 was self-serving and without merit.

The Organization emphasizes that Claimant did not come to work with COVID symptoms on November 30. Rather, he discovered what he believed could be symptoms just before the safety meeting. According to the Organization, Claimant removed himself from duty in the safest manner possible. He attempted to notify his supervisor, but his supervisor was on vacation and unavailable. Claimant also notified Kinney, which Kinney credibly testified was a practice many employees followed to mark off. Additionally, the Notice that had been posted at sign-in stations around the shop instructed employees to call Carpenter. The Organization submits that the Carrier failed to prove that Claimant had not properly marked off on November 30. Furthermore, even assuming *arguendo* that Claimant had not properly marked off, the discipline imposed was excessive and harsh.

Opinion

The facts in the instant matter must be viewed in the unique context of the progression of the COVID-19 virus, and medical measures to prevent the virus, in the United States. The Board takes arbitral notice that the Food & Drug Administration did not approve the first vaccine against COVID-19 until December 11, 2020. In November 2020, people with any COVID symptoms were expected to be tested for COVID, and quarantine themselves at home while they waited for results.

Claimant's testimony that he did not suspect he had COVID symptoms until after he had signed in for work on November 30, 2020 is unrefuted by any testimony. It is undisputed that his direct supervisor was unavailable. Claimant's assertion that he contacted Office Manager Carpenter as a step listed on the unofficial Notice is plausible. However, the Notice cannot excuse Claimant's failure to comply with LB 111. Nothing about the Notice indicates that it was an official communication from the Carrier. An employee of Claimant's years of service surely has seen numerous official Carrier communications, and should have known that the Notice did not fit the description.

The Carrier responsibly promulgated procedures for employees to properly mark off and to report COVID symptoms. The mark-off procedure was published to employees in LB 111, which explicitly states: "[i]n the event that it becomes necessary to mark off, *there are only two acceptable methods to do so.*" LB 111 further specifically requires employees absenting themselves to "do so as soon as it is known that you must absent yourself from your assignment and/or duty...." Claimant did not deny familiarity with LB 111. Furthermore, OB-40 and the "Stay at Home" slide's additional instructions regarding notifying the Carrier of COVID symptoms did not contradict LB 111 in any way. The Board is satisfied that the Carrier proved

Claimant failed to follow proper marking off procedures on November 30.

Nevertheless, the Board is mindful of the context in which Claimant's actions on November 30 took place. There was no vaccine for COVID in November. As the testimony of all three witnesses at hearing reflected, everyone had some degree of confusion as to whether employee procedures were different in the case of the rapidly spreading COVID virus. Claimant's assertion that he was confused as well as panicked is not unreasonable in these circumstances. Moreover, the Board is convinced that the procedure Claimant followed on November 30 was motivated by a genuine desire to avoid infecting others if he was carrying the COVID virus. In light of these mitigating facts, the Board concludes that the fifteen-day deferred suspension and nine months' probation imposed by the Carrier was excessive. Claimant's discipline will be reduced to a letter of reprimand.

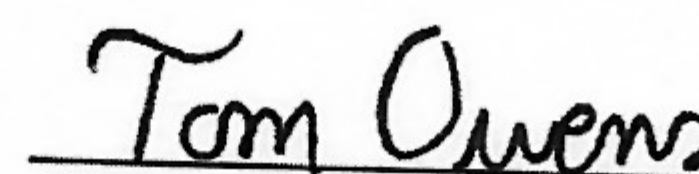
Award:

The claim is sustained in part. In accordance with the above Opinion, the discipline assessed Claimant shall be reduced to a letter of reprimand.


JOAN PARKER
Neutral Member


CARRIER MEMBER

DATED: 08/02/2022


ORGANIZATION MEMBER

DATED: 08/01/2022