

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5332**

Parties to Dispute:

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

-and-

NORFOLK SOUTHERN RAILWAY
COMPANY

AWARD

Case No. 159

Claimant P. N. Symosky

STATEMENT OF CLAIM:

“Claim on behalf of Electrician P. N. Symosky 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 P. N. Symosky is unjustly withheld from Carrier’s service. We also request his personal record be cleared of the matter.”

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

After hiring on with Norfolk Southern on January 16, 2004, Claimant Symosky was dismissed from service on October 2, 2016 after being found in violation of Carrier’s Mechanical Safety Bulletin 0078. That Bulletin provides in part as follows:

...employees working within the confines of a shop area, where PPE is required, will be governed as follows:

1. Employees must have all personal electronic devices, including earpieces, turned off and stored out of sight and not on the employee’s person.

There is no question that Carrier properly found Claimant to have run afoul of this important safety rule. According to the record developed at Claimant’s Formal

Investigation conducted on September 16, 2016, at approximately 1:45 p.m. on Friday, August 28, 2016, Mechanical Supervisor Ford, in the course of attempting to deliver correspondence to Claimant, had approached him in the electrical inspection line and observed him on his personal cell phone. According to Mr. Hunt, “Mr. Symosky was paying so much attention in what he was doing on his cell phone, I was able to enter his work area and get approximately two feet from him. I walked up and said, really?” Claimant makes no attempt to deny that assertion. Asked if he had his cell phone in hand when Hunt approached, Claimant responded, “I believe I did have my cell phone.” He insists, however, that his use of the personal device did not offend the applicable Rule because although not on an “assigned or scheduled break...I took it upon myself to take a break at about 1:40 after I returned from a meeting and did probably two motors.” Claimant concedes, however, that he had no permission to take an irregular break nor had he notified anyone he would be doing so.

At the end of the analysis, the dispute distills down to a question of appropriate discipline. Was dismissal in this instance proportionate to the offense? The consequences of distractions caused by personal electronic devices improperly used in the rail industry and in workplaces generally need no elaboration here. Indeed, Carrier cites a catastrophic accident in 2008 involving an engineer on his cell phone involved in a head-on collision with a freight train that took the lives of 25 passengers. That disaster prompted the FRA to issue orders putting employees on clear notice that inappropriate cell phone use would no longer be tolerated. In consequence, dismissals of employees found to be using cell phones while on duty have commonly been upheld. Given that background, and in the face of Claimant’s admission of guilt, those factors would normally dispose of the matter.


In this dispute however, the Board is persuaded that several mitigating circumstances distinguish it from other cases cited in support of termination. First, Claimant enjoyed a spotless service record over his 11 years of employment. Secondly, in light of both the Carrier’s partial reliance on a rule no longer in effect and questions attending Claimant’s request for a short recess of hearing to allow for attendance of what he considered a critical Organization representative, the dispute appears to present with several procedural

defects. When taken together with the total absences of any premeditation or ensuing harm, those mitigating factors force the conclusion that the penalty imposed was excessive.

The Claimant's dismissal will be converted to a disciplinary suspension. Carrier is directed to reinstate him to his prior position without back pay or benefits but with seniority intact and with time out of service considered as time spent on disciplinary suspension.

A W A R D

The Claim is partially sustained in accordance with the Findings.



James E. Conway
Chairman and Neutral Member

Tom Owens
Employee Member

Christopher Decker
Carrier Member

Dated: November 21, 2017