

**BEFORE PUBLIC LAW BOARD NO. 1837**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**And**

**NORFOLK & WESTERN RAILWAY COMPANY**

**Case No. 133**

**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The dismissal of S. J. Esposito for conduct unbecoming an employee in connection with personal long distance calls made on a Carrier telephone on December 10, 11, and 12, 1999, and allegedly providing housing for a non-employee on December 10, 11, and 12, 1999, was unjust, unwarranted, excessive, and in violation of the Agreement. (Carrier's File No. MW-HARR-99-31-LM-536.)
2. Claimant S. J. Esposito shall be returned to service with all seniority and benefits intact and compensated for any and all monetary loss suffered by him commencing on February 17, 2000, and continuing until he has been reinstated.

**FINDINGS:**

Claimant S. J. Esposito was employed by the Carrier as an extra gang foreman at the time of this claim.

On February 18, 2000, the Carrier notified the Claimant to appear for a formal investigation to determine his responsibility, if any, in connection with his conduct unbecoming an employee in that he: 1) made and/or allowed to be made personal long distance telephone calls on December 10, 11, and 12, 1999, on a Carrier telephone under his control at Angola, New York, incurring charges of \$5 18.57 which were billed to the

Carrier; and 2) provided unauthorized housing for a non-employee female foreign national in a Carrier provided camp trailer under his control on December 10, 11, and 12, 1999, at Angola, New York

After several postponements, the hearing took place on April 4, 2000. On April 20, 2000, the Carrier notified the Claimant that he had been found guilty of making the personal long distance telephone calls on a Carrier telephone on the dates in question and was being assessed discipline of dismissal from all service with the Carrier.

The Organization tiled a claim on behalf of the Claimant, arguing that the Claimant withdrew a February 11, 2000, statement made to the Carrier and amended it with a statement made at the investigation whereby the Claimant denied he had a foreign female national on the Carrier's property on the dates of the alleged incident. The Organization maintains that the Claimant even went so far as to take a polygraph test to prove that he was telling the truth. The Organization also contends that there was an implied arrangement between the Carrier and the Claimant that if the Claimant admitted using the telephone on the dates in question and made restitution to the Carrier in the amount of \$518.57, the Carrier would take no disciplinary action against him. The Organization maintains that the Claimant complied and, yet, the Carrier held an investigation and assessed discipline in violation of the implied arrangement. The Organization argues that the assessment of discipline cannot be sustained under these unjust and misleading terms. The Organization **also** claims that the Claimant was being treated by a doctor for emotional and addictive problems which were contributory to the

Claimant's actions on December 10, 11, and 12, 1999, which can be resolved by treatment. The Organization maintains that the Claimant has identified his problems and is currently addressing same by getting the treatment and help he needs to continue his career with the Carrier. Therefore, the Organization contends that the assessment of dismissal is excessive, unjust, and a gross abuse of the Carrier's discretion. In addition, the Organization asserts that the hearing officer reviewed testimony from a witness prior to the investigation that was not made available to the Claimant or the Organization. The Organization claims that the Carrier did not afford the Claimant with a fair and impartial investigation and would have better served the Claimant if it had attempted to counsel and help him since he provided the Carrier with years of loyal service.

The Carrier denied the claim, contending that the Claimant was properly notified and afforded a fair and impartial investigation as provided for in the schedule agreement. The Carrier maintains that the evidence adduced at the investigation, including the Claimant's own admissions, clearly established that the Claimant made unauthorized personal phone calls to some type of entertainment line on the Carrier's phone, incurring \$5 18.57 of charges billed to the Carrier. The Carrier argues that the phone was located in the gang trailer at Angola and that the Claimant was the only person using the trailer for lodging at the time of the incident. The Carrier alleges that the Claimant, on February 11, 2000, lied and said that he had picked up a female companion during the time of the incident and that she had made the phone calls in question. The Carrier argues that at the investigation, the Claimant recanted his previous statement and admitted that he alone

had made the personal phone calls and that there never was a female companion. The Carrier maintains that at no time did it imply or make statements to the Claimant that no charges would be tiled if he made restitution, which the Claimant was obligated to do anyway. In fact, the Claimant did not offer to make restitution immediately after he made the phone calls, but rather two months later only after he had been caught. The Carrier also argues that the polygraph test that the **Claimant** took cannot be considered since the information was not entered at the investigation and also because it is not considered to be probative. In addition, the fact that the hearing officer conducted a short discussion with a witness in advance of the hearing in no way prejudiced the Claimant's right to a fair and impartial investigation. The Carrier also maintains that although the Claimant is seeking help for his addiction and emotional problems, the seriousness of the offense warranted the discipline assessed because the Claimant was dishonest and committed theft. The Carrier contends that the discipline of dismissal assessed in this case was wholly appropriate when considering the serious nature of the offense and the Claimant's past discipline record, which includes a previous dismissal for dishonesty.

The parties being unable to resolve the issues, this matter comes before this **Board.**

This Board has reviewed the procedural arguments raised by the Organization, and we **find** them to be without merit.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was


guilty of making unauthorized personal telephone calls on a Carrier telephone and having those calls billed to the Carrier. In addition, the Claimant lied when he denied making any of those personal calls.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its action to have been unreasonable, arbitrary, or capricious.

The Claimant engaged in a very dishonest act toward the Carrier which amounted to theft. There have been numerous awards upholding discharges by Carriers when employees have been dishonest and engaged in theft. Given the seriousness of the wrongdoing in this case, plus the fact that the Claimant attempted to cover it up, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the claim must be denied.

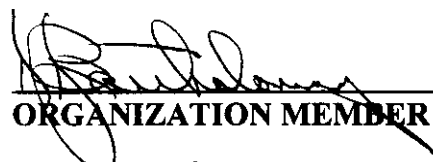
**AWARD:**

The claim is denied.

  
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**PETER R MEYERS**  
Neutral Member

  
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CARRIER MEMBER

DATED: 5/18/01

  
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ORGANIZATION MEMBER

DATED: 5-18-01