

PUBLIC LAW BOARD NO. 6394

Award No. 2

Parties to Dispute:

Brotherhood of Maintenance of Way Employees
(Consolidated and Pennsylvania Federations)

and

Norfolk Southern Railway Company

Statement of Claim:

Claim on behalf of J. W. Higginbotham for reinstatement with seniority and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on August 17, 2000, for conduct unbecoming an employee in connection with his theft of company property.

(Carrier File: MW-BLUE-00-10-LM-229)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

Claim disposed of as follows: The record reveals that Claimant was involved in two transactions that involved the sale of rail stolen from Carrier. In one transaction, Claimant brokered the sale of 105 pound rail from a scrap dealer to a Florida corporation. A back hoe leased to a construction company in which Claimant had a significant interest was used to remove the rail. In the second transaction, Claimant paid the scrap dealer \$10,000 for rail that was illegally removed from Carrier's property.

Carrier established the above facts by substantial evidence. Theft is an extremely serious offense that generally justifies discharge and can justify criminal prosecution. However, the evidence in

the record failed to establish that Claimant knowingly stole from the Carrier. The scrap dealer did not testify and his written statement did not implicate direct knowledge on Claimant's part. The principal from the Florida corporation did not testify and gave no written statement. A written statement from a CSX Roadmaster implicated only the scrap dealer. The statement asserted that the scrap dealer had conned the Roadmaster into giving him a false CSX document purporting to authorize the scrap dealer to remove the rail.

Our review of the record leads us to conclude that although Carrier did not establish by substantial evidence that Claimant knowingly stole Carrier's property, Carrier did prove by substantial evidence that Claimant knew or should have known that the rail in question belonged to Carrier or to CSX and knew or should have known that the scrap dealer lacked proper authorization for its removal. Accordingly, we find that Carrier proved Claimant guilty of conduct unbecoming an employee.

Considering the nature of the evidence and Claimant's record of thirty-six years of service, we conclude on the peculiar facts presented that dismissal was an excessive penalty. Claimant's misconduct was quite serious and warranted a lengthy suspension. We shall direct Carrier to reinstate Claimant with seniority unimpaired but without compensation for time held out of service.

Claim sustained in accordance with the findings. Carrier is directed to make this award effective within thirty days following the date two members of this Board affix their signatures thereto.



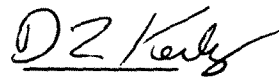
M. H. Malin

Chairman and Neutral Member



P. K. Geller, Sr.

Organization Member



D. L. Kerby

Carrier Member

Dated at Chicago, Illinois, May 30, 2001.