

PUBLIC LAW BOARD NO. 6394

AWARD NO. 65

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline [ninety (90) day actual suspension] of Mr. D. Perry issued by letter dated April 19, 2013 in connection with his allegedly using an NS company credit card to make food purchases without authorization was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (Carrier's File MW-PITT-13-17-LM-087).
2. As a consequence of the violation referred to in Part 1 above, Mr. Perry shall be immediately reinstated, exonerated of all charges and compensated all lost wages, overtime and credits and benefits denied to him, commencing February 20, 2013, until he is placed back into service or until the matter is resolved."

Upon the whole record and all the evidence, after hearing, the Board finds 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 under Public Law 89-456 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 precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant entered service for the Carrier on August 14, 2006 as a Track Laborer and was working as an Assistant Foreman at the time of the events which led to this case. As an Assistant Foreman, the Claimant was issued a Carrier credit card and was authorized to use it to purchase meals under certain conditions. For example, the Claimant was authorized to make such purchases when he worked through lunch or needed to purchase food for the gang while in preparation for a Carrier safety meeting. Otherwise, the Carrier's card was only to be used for the purchase of tools and materials

needed to conduct work (see Carrier Brief, page 3). In January 2013 the Carrier's Audit and Compliance Department was informed of suspicious activity on the Claimant's purchasing card. The Audit and Compliance Department conducted a review of the Claimant's card activity and discovered a number of transactions that did not appear to be authorized. These questionable transactions were reviewed by Division Engineer Webb who found that some of the purchases seemed unusual and needed additional investigation. On February 2013, Division Engineer Webb and Compliance Investigator Weatherman met with the Claimant to discuss the transactions in question. At that meeting the Claimant explained some of the transactions but later stated he wanted to speak with a lawyer and would not answer further questions (see Carrier Brief, page 5). In response to these events the Carrier charged the Claimant with (1) making unauthorized charges on the Carrier credit card, (2) returning items bought with the card in exchange for store credit to buy tools for his personal use, and (3) making conflicting statements when questioned about the purchases. An investigation was conducted including a hearing on March 29, 2013. After the hearing, the Carrier found the Claimant guilty of the charges and assessed a 90 day actual suspension as discipline.

The Carrier argues that the Claimant is clearly guilty of using the card for unauthorized food purchases. The Carrier acknowledges that, at the hearing, testimony was provided which showed what appeared to be unauthorized tool purchases had actually been previously approved by Track Supervisor Hunsinger. However, numerous authorized meal purchases were made on the card that were followed by the Claimant collecting a separate meal allowance. Essentially, the Claimant had "double dipped." Additionally, in some instances the Claimant used the card to pay for meals that were unauthorized in any form under Carrier rules (see Carrier Brief, pages 7-8). When questioned about why he would both use the card to pay for a meal and then collect a meal allowance, the Claimant stated "I have no clue..." (see Transcript, page 217). The Carrier finds no merit in the Organization's argument that the Claimant had a right to purchase the meals under Rule 45 of the agreement. In refutation of this argument, the Carrier points out the testimony of three supervisors all of whom stated that the Claimant is not authorized to make meal purchases or claim an allowance when working regular hours. The Claimant also testified that he understood he was not allowed to both collect a meal allowance and use the purchasing card to pay for the same meal (see Transcript, page 288). The Carrier also refutes the Organization claim that the purchases were authorized because the Claimant's supervisor was supposed to review the statements each month and did not disapprove of the charges. In response, the Carrier notes that the Claimant's supervisor could not be present with every employee during meal times and that there is an expectation of honesty from employees in this area. For these reasons, the Carrier asserts its discipline was appropriate and proportional to the type of offense committed in this case.

The Carrier asserts that the Organization's procedural objections are without merit. First, the Carrier denies that it failed to start disciplinary proceedings within 30 days of its first knowledge of the event. The Carrier argues that while it was informed by a private citizen of unusual purchasing activity by the Claimant in January 2013, at that time it did not have any information which would provide a "reasonable basis" that a

violation had actually been committed. On the second issue of removing the Claimant from service pending the investigation, the Carrier argues that as the case involves theft and dishonesty, the nature of the alleged violations rise above the level of a minor offense. Third, the Carrier argues the discipline rules do not require it to provide a specific violation in the charging letter, but instead it only requires the Carrier to provide the nature of the alleged violations and the dates on which they occurred.

The Organization's position is that, since this case involves allegations of "moral turpitude," the Carrier is under a heightened "clear and convincing" (and not "substantial evidence") burden of proof. It is the Organization's position that the carrier has failed to meet this increased burden. The Organization notes the Claimant's testimony that he informed a supervisor (Foreman Brubaker) each day that he made a meal purchase and that such purchases were authorized in accordance with the Carrier's rules. The Claimant testified that he never made any purchase that was not previously authorized. The Claimant's meal allowance claims were all verified by Supervisor Hunsinger after being entered into the payroll system by Foreman Brubaker (see Transcript, page 136). Given that two levels of Carrier supervisors had the opportunity to review the Claimant's purchases, the Claimant had cause to believe that such purchases were in line with Carrier policy (see Organization Brief, page 15). The Organization notes that at the hearing Supervisor Hunsinger described the Claimant as being a "good employee" and that unauthorized charges on the Carrier credit card usually result in counseling and do not necessarily rise to a level requiring discipline (see Transcript, pages 28, 31). Additionally, as it is normal for employees to use the purchasing card of other employees, the Carrier would have no way of knowing whether the transactions in question were actually made by the Claimant or by someone else. The Organization notes that at the hearing there was evidence that the practices for employee compensation of meals vary widely across different local level supervisors (see Transcript, page 111). This further suggests the Claimant's actions may have been based on simply being unaware that his purchases were unauthorized.

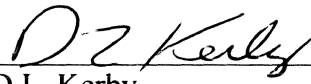
In addition to its substantive arguments, the Organization also brings forth several procedural objections. First, the Organization believes the Carrier failed to hold an investigation within 30 days of its "first knowledge" of an event as required by rule 30(a) of the agreement. It argues that as the last of the alleged unauthorized charges occurred in December 2012, and given that the transactions in question were reviewed monthly by a Carrier supervisor, the Carrier should have started disciplinary action no later than January 2013. Second, the Carrier erred when it refused the Claimant's request for an Organization representative when he was being questioned. The Organization believes this is another violation of 30(a) since it resulted in the Claimant potentially offering testimony against himself, which is a violation of his due process rights. Third, the Organization states the Carrier acted improperly by failing to bring the precise charges against the Claimant. In support of this, the Organization notes that the Carrier entered over 115 potentially unauthorized tool purchases into the record but only included 13 unauthorized purchases in the letter of charge. The Organization also asserts that the Carrier denied the Organization's request for further information about the charges before the hearing.

The Board finds sufficient evidence in the record that the Claimant engaged in at least 9 unauthorized meal transactions. Although there is not enough evidence in the record to determine the claimant's intent on all these transactions, in particular it seems unusual that the Claimant would both purchase a meal on the Carrier credit card and then claim a meal allowance. Even if such transactions were made based on the Claimant's misunderstanding the meal allowance process, the Claimant should have known it would be unusual to claim a meal allowance for food that was paid for on a Carrier credit card. Given these circumstances, the Board finds that the discipline assessed in this case was appropriate for the level of the offense.

The claim is denied.



M.M. Hoyman
Chairperson and Neutral Member

D. Pascarella
Employee Member

D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on May 9, 2014.