

PUBLIC LAW BOARD NO. 6394

Award No. 14

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 T. E. Gasaway 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 December 18, 2001, for violation of Rule N for failure to properly report an alleged on-duty injury and making false statements and conflicting statements in connection with an alleged injury on December 4, 2001.

(Carrier File: MW-DEAR-01-71-BB-475)

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: Claimant claimed that he was injured when, during an altercation with another employee, the other employee struck him on or around his right elbow. The incident occurred during the morning of December 4, 2001. Claimant, however, did not report an alleged injury until 11:54 p.m. that night. Claimant made no effort to report the alleged injury prior to leaving the property. Although the Organization argued that the injury did not manifest itself until later that night, after Claimant drove 136 miles to his home to be with his girlfriend, Claimant testified that, while working that afternoon, his "right arm felt kind of weird," and that he "knew something didn't feel right. . ." Accordingly, we find that Carrier proved Claimant's failure to report his alleged injury in a timely manner by substantial evidence.

We further find that Carrier proved the charge of making false and inconsistent statements by substantial evidence. The record reflects that Claimant did not notify supervision of any alleged injury prior to leaving the property. It further reflects that Claimant continued to perform his duties, including carrying tie plates, operating the gas powered drill and running the hydraulic spiker. The record also indicates that when questioned about the details of how he allegedly was

struck by the other employee, Claimant changed his story concerning his position relative to the other employee and the location of where he was allegedly struck.

Although we find that Carrier proved the charges by substantial evidence, we also find significant evidence which mitigates against the penalty of dismissal. It is apparent that there was ongoing tension between Claimant and the other employee, including an argument earlier that day. The incident in question arose when Claimant was using a crescent wrench to tighten bolts while the other employee was underneath installing bolts. Claimant accidentally grazed the other employee's hard hat with the wrench. Words were exchanged and, Claimant maintains, the other employee struck him with a hammer. The Track Superintendent witnessed the incident and said to both employees, "That's it. We don't have that out here on these projects." Claimant then walked away but the Track Superintendent took no further action to follow up on the incident.

The Assistant Foreman saw Claimant as he was walking away. Claimant advised the Assistant Foreman that he had had another confrontation with the coworker and that the coworker had struck him with a hammer. The Assistant Foreman told Claimant "to take some time out and remove himself from the situation and see if it would clear itself up a little better." The Assistant Foreman took no other follow-up action. He did not ask Claimant if Claimant was injured and did not take any action to investigate whether the coworker had in fact struck Claimant with a hammer.

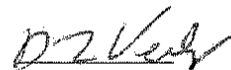
Because of the lack of follow-up, the record is far from precisely clear concerning the events in question. Furthermore, had the Track Superintendent or the Assistant Foreman engaged in further follow-up, the matters which gave rise to the charges might not have occurred. Although these circumstances do not excuse Claimant's failure to report his alleged injury in a timely manner or his inconsistent statements, we believe that they do mitigate the discipline that could appropriately be imposed. We conclude that under the circumstances the penalty of dismissal was excessive and that Claimant should be given one last opportunity to demonstrate that he can be an honest and productive employee who follows all rules. The Claim shall be sustained to the following extent. Claimant shall be reinstated to service with seniority unimpaired, but without compensation for time held out of service.



M. H. Malin
Chairman and Neutral Member



P. K. Geller, Sr.
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois, March 10, 2003.

PUBLIC LAW BOARD NO. 6394

Award No. 15

Parties to Dispute:

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

and

Norfolk Southern Railway Company

Statement of Claim:

Claim on behalf of R. A. Franklin 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 May 1, 2002, for conduct unbecoming an employee for receiving funds for the sale of a 1979 Case Backhoe stolen from Norfolk Southern at Elkhart, Indiana and for being in possession of a Case-580C Extend-A-Hoe-Loader stolen from Reith Riley Constructions Company.

(Carrier File: MW-DEAR-02-21-LM-079)

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.

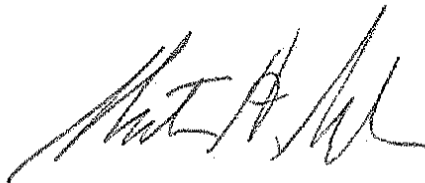
Claim disposed of as follows: There is no dispute that Claimant was in possession of a Case-580C Extend-A-Hoe-Loader stolen from Reith Riley Constructions Company. Claimant maintained that he did not know it was stolen. However, as testified to by Carrier's Special Agent, the Extend-A-Hoe's identification numbers had been defaced and any reasonable person would have known it was stolen. The only explanation that Claimant offered was that he had purchased the Extend-A-Hoe from an unidentified seller, paid the seller \$2,000 down with another \$14,000 to be paid upon Claimant's sale of some of his older equipment. Not only was Claimant unable to identify the seller, but he was also unable to produce any documentation of the sale or of his lawful ownership of the Extend-A-Hoe. Claimant's testimony was not credited on the property and we see no reason to depart from the general practice of deferring to the credibility determinations made on the property. Indeed, the transaction, as described by Claimant, strikes us as inherently incredible. Accordingly, we find that Carrier proved the charge

of being in possession of the stolen Extend-A-Hoe by substantial evidence.

We further find that Carrier proved the charge of receiving the proceeds from a sale of a stolen 1979 Case Backhoe by substantial evidence. The record reflects that the stolen Backhoe was discovered when an individual brought it to a repair facility to repair an oil leak. The facility recognized the Backhoe as possibly being Carrier's property and notified authorities who confirmed from the vehicle identification number that it was property that Carrier had reported stolen. The individual who had brought the Backhoe in for repairs identified an employee of Claimant's tree trimming business as the party from whom he had purchased it. The employee told Carrier's Special Agent that he had sold the Backhoe at Claimant's direction for \$4,000, cashed the check and gave the cash to Claimant. Claimant's employee pled guilty to misdemeanor receipt and concealment of stolen property.

Claimant agreed that he had his employee sell a backhoe for him but maintained that the backhoe that Claimant employee sold on his behalf was a 1974 JCB Backhoe which Claimant had purchased prior to his employment with Carrier. Claimant, however, offered no explanation for the unconventional method by which he received the proceeds of the sale, i.e. having the employee sell the backhoe and receive a check in the employee's name and then having the employee cash the check and give Claimant the cash. Claimant's testimony that he knew nothing of the stolen backhoe was not credited on the property and we see no reason to disturb that credibility determination.

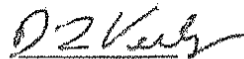
Claimant's misconduct was extremely serious. Such acts of dishonesty deprive Carrier of the trust to which it is entitled. Moreover, Claimant had less than four years of service at the time of his dismissal. We cannot say that the penalty in this case was arbitrary, capricious or excessive. Accordingly the claim is denied.



M. H. Malin
Chairman and Neutral Member



P. K. Geller, Sr.
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois, March 10, 2003.