SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 195

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

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

1. The dismissal of Machine Operator C. Bowens for conduct unbecoming an employee between February 23, 2010 and June 28, 2010 in connection with knowingly falsifying his payroll by claiming the weekly Travel Allowance for rest day round trip between work and an address in Nelsonville, Ohio when he was living in Canton, Ohio is unjust, unwarranted, excessive and in violation of the Agreement (Carrier's File MW-PITT-10-32-SG-191)

2. As a consequence of the violation referenced in Part 1 above, Mr. Bowens shall be granted the remedy in accordance with Rule 30(d) of the Agreement."

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 1, 2005 and was in the position of machine operator at the time of the events which led to this case. From February 23, 2010 to May 10, 2010, he was assigned to the R-8 Rail Gang as a traveling service employee. Work performed by certain employees for the Carrier on these gangs is referred to as traveling service, meaning that the work performed can take employees over a large geographic area each week during their work season. Traveling service employees are given a travel allowance which compensates them for the drive to and from the employee's permanent residence to the work site at the start and end of every work week. Employees are compensated for commutes greater than 100 miles, with

compensation increasing at an incremental level for larger (in miles) commutes. During the work week, traveling service employees stay at Carrier provided lodging.

On May 9, 2010 Supervisor Hull observed the Claimant arrived to the work site in a vehicle which was recognized as belonging to another employee, Mr. R.J. Swinehart. Mr. Swinehart had contacted Supervisor Hull the previous day to inform him he would not be reporting to work for the week for "personal reasons." There is a dispute in the over what happened next. According to the Carrier (see Carrier Brief, page 3), in the course of conversing with Supervisor Hull about this the Claimant stated he had been staying at the Swinehart residence since April 14, 2010 because Ms. Swinehart asked Mr. Swinehart to leave the residence and asked the Claimant to help look after her children. According to the Organization, the Claimant never had a conversation about where he was living and never stayed at the Swinehart residence (see Organization Brief, page 12). In any case, Supervisor Hull then contacted Mr. Swinehart who stated that the Claimant had been living at the Swinehart residence for multiple weekends in Canton, Ohio since February 23, 2010 and had been commuting with Mr. Swinehart to work almost every weekend since that date.

Supervisor Hull reviewed the Claimant's payroll since February 23, 2010 and discovered that he had submitted multiple requests for travel allowance reimbursements for commutes from the work site to addresses in Nelsonville, Ohio and Fort Gay, West Virginia. This is the time period that in many cases – according to Mr. Swinehart – the Claimant had been residing with him in Canton, Ohio. The distance from Canton, Ohio residence to the sites the Claimant worked is shorter than the claimed travel allowances from Fort Gay, West Virginia (claimed for rest days February 26-March 1, March 4-7, March 11—14, March 18-22, and March 25-28) and Nelsonville, Ohio (claimed for rest days April 4-6, April 8-12, April 15-19, April 23-26, April 28-May 3, and May 6-9). If he was living in Canton, Ohio the Claimant would not have been entitled to travel allowance reimbursements due to this shorter distance. Due to this finding, Supervisor Hull removed the Claimant from service pending a formal investigation into the matter. The Carrier initiated an investigation including a hearing on June 9, 2010 on charges of conduct unbecoming an employee. The Claimant was notified via letter on June 28, 2010 that he was considered guilty of the charges and dismissed from service.

The Carrier argues that there is overwhelming evidence to support that the Claimant was living in Canton, Ohio while making repeated travel allowance claims of having permanent addresses in other towns. In support of this position the Carrier cites the testimony of Mr. Swinehart, who stated the Claimant had been living in his residence for multiple rest periods since the week February 23, 2010 and that the two often commuted together (Transcript pages 40-41). In addition it also cites the testimony of Supervisor Hull, who testified that the Claimant told him he had been living with Mr. Swinehart for three weeks on May 10, 2010 (Transcript, page 10). Notably, the testimony here between Mr. Hull and Mr. Swinehart is in conflict, but even in the "best case" of the Claimant only living in Canton, Ohio for three weeks it is still multiple violations of dishonesty via claiming otherwise on the travel allowance forms. The Carrier also disputes the testimony of Ms. Swinehart as she was unable to explain how the Claimant

arrived with Mr. Swinehart's car at work on May 10, 2010 if – as she testified – she did not know the Claimant. Finally, the Carrier disputes the Claimant's proof of having an apartment outside of his Fort Gay residence because he failed to produce a signed lease.

In its statement of facts, the Organization includes several key details not mentioned by the Carrier. The Organization states that on March 15, 2010 the Claimant initiated a lease for an apartment located in Nelsonville, Ohio but did not reside in the apartment until April 4, 2010. The Claimant travelled to the apartment between March 15, 2010 and April 4, 2010 from Fort Gay, West Virginia on his rest days to perform basic maintenance in preparation for moving in which occurred on April 4, 2010. This would mean the Claimant was residing in Fort Gay, West Virginia until April 4 and thereafter resided in Nelsonville, Ohio and thus made proper and truthful travel allowance claims. In support of this version of the facts the Organization notes that the Claimant never testified to residing in Canton, Ohio at any time during the period in question and that the evidence for him residing there is based solely on the testimony of Mr. Swinehart.

The case before the Board is difficult because nearly everything appears to be in dispute. In coming to its conclusion, the board has had to weigh the support in the case record for the Organization's and Carrier's materially different version of the facts. In our review of the case record, we find one aspect in particular of the case that throws the Organization's statements into question. If the Claimant permanently resided in Nelsonville, Ohio after April 4, 2010 how could he arrived at the work site on May 10, 2010 with a vehicle that belonged to Mr. Swinehart who resides in Canton, Ohio? According to the Board's review of a map of Ohio, the shortest distance via road between the city limits of Nelsonville, Ohio and Canton, Ohio is approximately 138 miles – a distance large enough that does not support the Claimant and Mr. Swinehart carpooling if they lived in different cities.

In addition, we find it unusual the Claimant would arrive in Mr. Swinehart's vehicle on May 10, 2010 if Mr. Swinehart was not reporting to work that week. In reviewing testimony, the Board does find cause to re-consider the testimony of both the Claimant and Mr. Swinehart in regards to this aspect of the case because it appears as though there is some level of animosity between them related to family personal problems (Transcript, pages 53-54, 63). However, we do not find enough evidence in the record to doubt the testimony of Supervisor Hull, who both clearly testified that the Claimant arrived to work on May 10 in a vehicle owned by the Swineharts. The Claimant's explanation for this is that the car in question (a 2005 Dodge Magnum) was legally in the name of Ms. Swinehart (which the record disputes – Ms. Swinehart testified to the car being in both her and her husband's name on page 90 of the transcript) and that the Claimant had an agreement to buy the car from her. However, when he drove the car to Canton, Ohio the transmission malfunctioned and Ms. Swinehart let him use her jeep (a second vehicle) while the 2005 Dodge Magnum was going to be repaired. This is again disputed in the record, as Ms. Swinehart says he was loaned the second jeep vehicle by Ms. Swinehart's aunt (Transcript, page 90). When considering Ms. Swinehart's testimony, all of this seems rather unusual because according to her (Transcript, page 89):

"I don't know him <the Claimant> other than what Randy <Mr. Swinehart> talks about." It seems improbable that Ms. Swinehart could not have known the Claimant yet somehow made an agreement with him to sell him one car and loan him a second one when the first broke down, especially if Mr. Swinehart had been asked to leave the home due to personal problems.

In absence of sufficient evidence to explain the curious use of Mr. Swinehart's vehicle when he lived over 138 miles from the Claimant and was not present at the work site, the evidence strongly suggests that the Claimant must have been present at or near the Swinehart residence during the rest days of May 6-9, 2010 and his commute to the work site was not from Nelsonville, Ohio at that time. Even if one case of dishonesty is all the case record clearly supports because nearly everything else appears to be in dispute, the conduct is extremely serious. Dishonesty in this case is equivalent to theft, as if the Claimant was really staying in Canton, Ohio he would not have been paid the travel allowance for commuting from Nelsonville, Ohio. The Board notes the claimant had multiple avenues to easily document his legal residence in Nelsonville, Ohio – such as a signed and dated apartment lease. That the Claimant failed to produce such documents, combined with the conflicting testimony of his witnesses, throws his version of events into serious doubt.

Ordinarily, one rule infraction by an employee with an otherwise clear work record would not rise to a level that is serious enough to warrant dismissal instead of some other action in accordance with progressive discipline. However, as the Carrier cites in their brief, dishonesty is one of the few singular infractions that are so egregious and so damaging to the employment relationship that dismissal is an appropriate action. Although we do not consider them as precedent, we agree with the findings cited in similar cases like PLB 1837, Award 133 that "It is a well-established principle that theft is an offense for which an employee may be immediately dismissed."

The claim is denied.

M.M. Hoyman
Chairperson and Neutral Member

T. Kreke
Employee Member

D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on February 10, 2012.