

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 145

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-BLUE-04-10-BB-199)

Statement of Claim:

Claim on behalf of R. D. Law for reinstatement with seniority, vacation 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 26, 2004, for unauthorized use of the Norfolk Southern E-Z Pass from January through August 2004.

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 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 a precedent in any other case.

AWARD

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

BACKGROUND

R.D. Law, the Claimant herein, entered the Carriers' service on May 3, 1982 as a Trackman, and was working as a Machine Operator on August 6, 2004¹, at the Carrier's Pocahontas Operating Division. The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

¹ All dates noted herein occurred in calendar year 2004 unless otherwise noted.

The record evidence shows that on August 6th, Division Engineer Merilli was notified by the West Virginia Turnpike Commission that a vehicle containing E-Z Pass Transponder #35848 had violated West Virginia traffic laws by proceeding through a tollbooth at a speed of 45 mph. An investigation revealed that this E-Z Pass was detailed to a Company Truck assigned to Glue Gang 4, to which the Claimant was a member. The investigation disclosed that the license plate on the vehicle associated with the violation was assigned to the Claimant's personal vehicle. The E-Z Pass had been given to the Claimant in January 2004. Upon further investigation, it was discovered that the Claimant's personal vehicle had proceeded through the tollbooth using the foregoing E-Z Pass on numerous dates from May 9th through August 2004, resulting in costs of approximately \$340 assessed to the Carrier.

Subsequent to the Carrier's discovery, the Claimant was directed to attend a formal investigation, which was ultimately held on August 26th. By letter dated September 7th, the Hearing Officer, following his review of the transcript together with evidence admitted at the formal investigation, determined that the Claimant was guilty of the charge of conduct unbecoming an employee, and advised the Claimant that he was dismissed from the Carrier's service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

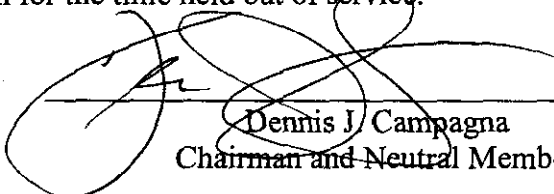
At the investigation, the Organization proffered the defense that the E-Z Pass was in possession of P.M. Bennett, a co-worker during the entire period encompassed by the violations. In rendering his determination, it is clear that the Hearing Officer rejected this claim. A review of the record evidence revealed that the Claimant and Mr. Bennett, his co-worker, commuted to work together, alternating use of their personal vehicles, and that the Claimant gave the E-Z Pass to Mr. Bennett, a junior employee, to carry. During the investigation, the Claimant admitted to using the Pass for his own benefit. Accordingly, it is apparent that it was the Claimant's decision to have Mr. Bennett pull out the E-Z Pass and use it to charge the toll rather than properly assuming this liability himself.


The record also revealed that the Claimant's supervisor, who gave the Claimant this E-Z Pass, verbally advised the Claimant that the Pass was for use with the Glue Gang's truck. Given this review of the relevant facts as contained in the record, we find that the Hearing Officer's conclusion bears a rational relationship to the record evidence.

Turning now to the discipline sought to be imposed, it is well established arbitration precedent that the penalty sought to be imposed by an Employer will not be disturbed so long as it is not arbitrary, capricious or discriminatory. In the instant matter, the record evidence reveals that the Claimant provided dedicated service to the Carrier for over 23 years. The record also reveals that until the instant matter, the Claimant enjoyed an unblemished work record. Finally, and also bearing on the question of an appropriate penalty, the record reveals that Mr. Bennett, who, at the time of the Charge, had only worked for the Carrier for a very short time, was reinstated to his employment, with the imposition of a 6 month suspension, while, at or about the same time, the Carrier chose to terminate the Claimant's employment.

CONCLUSION

While it is clear, and the Investigation revealed, that the Claimant engaged in an action tantamount to theft, a *terminable offense*, the fact that the Carrier chose to treat Mr. Bennett in a substantially different fashion must be considered by this Board as it reviews the penalty sought to be imposed. And when so considered, together with the Claimant's length of service, and his unblemished record, the Board finds that the penalty of dismissal from service is excessive. Accordingly, the Carrier is ordered to reinstate the Claimant to service, with seniority and benefits unimpaired, but without compensation for the time held out of service.


Dennis J. Campagna
Chairman and Neutral Member


D.D. Bartholomay 6-15-05
Organization Member


D.L. Kerby 6-20-05
Carrier Member

Dated May 31, 2005, Buffalo, New York