

SPECIAL BOARD OF ADJUSTMENT 1049

CASE NO. 158

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier's File: MW-BHAM-06-07-LM-019)

Statement of Claim:

Claim on behalf of R. Lilly 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 April 27, 2006, concerning conduct unbecoming an employee for unauthorized use of the Company credit card to purchase gasoline for his personal auto on March 14 and 22, 2006.

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. Lilly, the Claimant herein, entered the Carrier's service on January 26, 1970 as a Laborer. In March 2006, the Claimant was assigned as a Foreman/Operator and was working with a Gradall Gang. The instant matter concerns the propriety of the Claimant's conduct in using the Company credit card to purchase gasoline for his personal auto on March 14 and 22, 2006, and the Carrier's determination to dismiss him for these unauthorized personal charges to the Company.

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 Carrier sustained its burden of proof by establishing, through substantive credible evidence that the Claimant improperly used a Company issued credit card to make personal gasoline purchases. In this regard, the record reveals that on the dates in question, the Company Dump Truck, normally used by the Claimant, was in the shop for repair. As a result, in order to continue his responsibilities as a Foreman/Operator, the Claimant elected to use his own vehicle between work points and to haul diesel fuel in a barrel for the Gradall's use. The record further reveals that on March 14 and 22, 2006, the Claimant used his Company issued credit card to purchase gasoline for his personal vehicle. When the matter was discovered by the Carrier, the Claimant was approached by the Track Supervisor to whom he acknowledged that he had made these gasoline purchases. The Claimant then telephoned the Assistant Division Engineer and advised him that he had made these gasoline purchases for his personal vehicle, and that he was short of cash. The Grievant's two purchases totaled \$65.58. An investigation by the Carrier revealed that in addition to these personal gasoline purchases, the Claimant sought reimbursement for personal mileage during March 2006. Following the investigation, the Hearing Officer advised the Claimant by letter dated May 12, 2006 that he was dismissed from the Carrier's service. The Organization took exception to the dismissal assessed and initiated an appeal dated May 16, 2006.

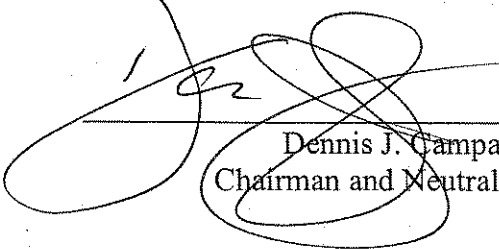
Turning now to the discipline sought to be imposed, the Board finds that while the Claimant's action was inappropriate, it is significant that he quickly admitted his error, acknowledged his violation of the Carrier's Rules, and was contrite in his approach to the situation. In addition, the Board also takes notice of the fact that the Claimant is a long term employee with service of over 36 years, and except for two instances of a suspension, one in 1978 and the second in 2001, both involving a vehicle mishap, the Claimant has not been a disciplinary problem to the Carrier. Taking these facts into account, the Board finds that while it would have been a prudent move by the Claimant to reimburse the Carrier for these improper purchases, the sum of the Claimant's actions were more in

the nature of negligence than fraud. That is, while there is no dispute that the Claimant's actions were improper, there has been no showing in the record that the Claimant intended to defraud the Company. Notwithstanding this conclusion, the Board must stress the fact that the Claimant cannot be exonerated from liability that resulted from his actions. The Board so concludes due to the fact that the Carrier has every reasonable expectation that those entrusted with Company issued credit cards will use them properly and honestly.

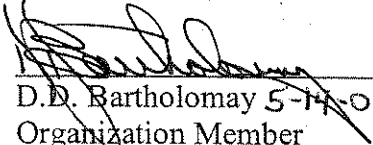
Given the foregoing unique facts and circumstances in this matter, and without setting a precedent for future cases which must be decided on their own merits, the Board finds that the Claimant's actions, while clearly improper, were not conducted with the intent to deceive or defraud the Carrier. Accordingly, when taking into account with the Claimant's long and dedicated history of employment with this Carrier, we conclude that a more fitting and appropriate discipline is the Claimant's reinstatement to service without back pay. The time served without pay shall be deemed a disciplinary suspension.

CONCLUSION

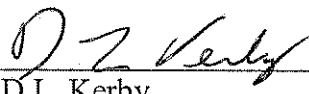
The Claim is sustained in accordance with the findings and conclusions noted and discussed above.



Dennis J. Campagna
Chairman and Neutral Member



D.D. Bartholomay 5-14-07
Organization Member



D.L. Kerby
Carrier Member

Dated April 27, 2007, Buffalo, New York