

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 238

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 (dismissed from all service with Norfolk Southern Railway) of Mr. L. Brown issued by letter dated November 21, 2012 in connection with his alleged: (1) non-company use of a NS Hy-Rail Dump Truck home and back over five (5) off-duty weekends in 2012, without permission; (2) claiming of a Travel Allowance through the pay report system thereof; and (3) falsification of NS Vehicle Mileage Record reports was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File BROWN-L-11-12/MW-ATLA-12-54-LM-411).
2. As a consequence of the violation referred to in Part 1 above, Mr. Brown shall be immediately made whole, exonerated of all charges, restored to the service of the Carrier and paid for all time lost with seniority, qualifications, vacation and all rights unimpaired."

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 November 26, 1985 as a Laborer and was working as a Hy-Rail Dump Truck Driver during the events which led to this case. As a hy-rail dump truck operator the claimant is required to complete a mileage report that details how many miles the vehicle is driven, and the Claimant also has access to a Carrier credit card that allows him to purchase fuel for the vehicle. Due to

inconsistencies on the Claimant's July 2012 mileage report, a Carrier supervisor was prompted to review the Claimant's mileage and fuel transaction reports that were filed between January and July, 2012. A review of these reports showed at least 13 instances where the Claimant had driven the hy-rail dump truck and purchased fuel for it on rest days. During the same time period, the Claimant was also found to have submitted nine travel allowance requests totaling \$240.00 while using the Carrier's vehicle to commute. Traveling gang employees are allowed a travel allowance on a weekly basis to reimburse their mileage when working more than 50 miles away from home. In response to these events the Carrier charged the Claimant with conduct unbecoming an employee and held an investigation including a hearing on November 8, 2012. The Claimant was found guilty of the charges and notified that he was dismissed from service via a letter on November 21, 2012.

It is the Carrier's position that the Claimant has clearly violated the rules outlined in the Highway Vehicle Operator's Manual, which prohibits use of company vehicles for non-business trips (see Carrier Exhibit C, page 2). At the hearing the Carrier official who reviewed the Claimant's fuel transaction reports, Supervisor Hayes, introduced into the record the specific fuel transactions showing purchases on holidays or other time periods when the Claimant was not working. The total dollar amount of unauthorized fuel transactions for the period in question was \$1,698.17. Supervisor Haynes also testified that an employee may only use a Carrier vehicle for their commute with supervisor approval, and the Claimant had no such authorization in this case (see Transcript, pages 28-29). The Carrier further notes that the Claimant admitted that he did not have permission to use the vehicle on his commute home (see Transcript, page 61). The Claimant justified his actions by stating he believed Foreman Clements knew what was going on, but the Carrier notes at the hearing Foreman Clements testified that he had not given permission for the Claimant to drive home with the Carrier's vehicle (see Transcript, page 55). In support of the Carrier's position that employees should not claim a travel allowance if they commute with a company vehicle, it cites a 2008 Letter of Understanding stating the travel allowance will be paid to employees commuting through means "other than Company provided transportation" (see Carrier Brief, page 11).

The Organization argues 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. On the allegation that the Claimant used the Carrier's vehicle to commute home without authorization, the Organization characterizes the Claimant's actions as being the result of not understanding the mileage reporting process and having received no training. The Organization argues the Claimant's behaviors were made on the sincere belief that his actions were standard practice (see Organization Brief, page 5). Concerning the allegation that the Claimant dishonestly received a travel allowance, the Organization argues that Carrier rules in this area are unclear and ambiguous. In support of this argument, the Organization notes the testimony of Supervisor Haynes (see Transcript, page 32) and Assistant Division Engineer Taylor (see Transcript, page 35) who both declined to definitively state whether employees are entitled to a travel allowance while commuting in a Carrier vehicle. The Organization also points out as

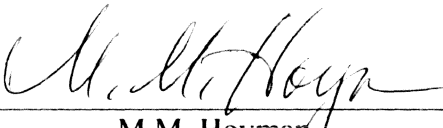
mitigating circumstances that the Claimant has an extensive record of service (27 years) with the Carrier and has had a minimal prior discipline record.

In addition to its substantive arguments, the Organization also brings forth several procedural objections. First, the Organization argues that 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. Second, the Organization asserts that the Carrier erred when it refused the Claimant's request for an Organization representative when he was being questioned on October 18, 2012. The Organization states that this is a 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 and finally, the Organization claims that the Carrier was incorrect in its use of discretion to formally charge the Claimant in this case instead of choosing to provide a letter of counseling.

The Carrier believes the Organization's procedural objections are without merit. First, the Carrier's position is that it had no "first knowledge" of actual violations until the Claimant admitted to Supervisor Hayes on October 18, 2012 that he drove the Carrier's vehicle home. Second, the Carrier claims that the October 18, 2012 interview was for the purpose of fact-finding and was not part of a formal disciplinary investigation at the time. The Carrier notes there is no language in the agreement which requires employees have representation during the fact-finding process. Third, the Carrier alleges there is nothing in the system discipline rules which require it to offer a letter of counseling when the Carrier believes an employee may have committed a major offense. As such, the disciplinary proceedings were not an abuse of discretion.

In reviewing the case record, the Board finds there is substantial evidence the Claimant was dishonest, resulting in economic losses to the Carrier. The allegations in this case are extremely serious because engaging in theft breaks the relationship of trust between the employee and employer. Given the overwhelming evidence, the Board finds that the Claimant engaged in multiple dishonest actions including but not limited to (1) unauthorized use of a Carrier vehicle for personal travel, (2) collecting mileage allowance while utilizing a Carrier vehicle, and (3) making unauthorized fuel purchases using the Carrier's credit card. In addition, these actions were not one time events. They happened multiple times over a six month period. In coming to its decision, the Board has carefully weighed the circumstances in this case against the Claimant's extensive record of service with the Carrier. Overall, the Board concludes that the actions of the Claimant are severe enough that dismissal was warranted.

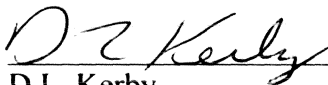
The claim is denied.



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.