

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 240

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 services of Norfolk Southern Corporation and its affiliates) of Mr. M. Hand issued by letter dated February 4, 2013 in connection with alleged conduct unbecoming in that he used an NS company credit card to make a gasoline purchase for non-company related use on December 12, 2012 and fraudulently used the employee identification number of another NS employee to make this purchase was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (Carrier's File MW-BHAM-12-23-LM-484).
2. As a consequence of the violation referred to in part 1 above, Mr. Hand 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 27, 2006 as a Laborer/Truck Driver and was working as a Gang Foreman during the events which led to this case. The Carrier has a fuel card purchasing program that allows employees to purchase fuel for its vehicles. When purchasing fuel, employees use the card and then enter the last six digits of their employee number as well as the odometer reading of the

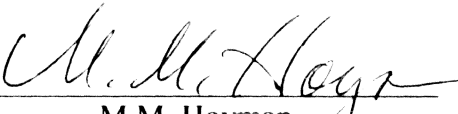
vehicle. An outside vendor for the Carrier tracks the fuel purchases and sends exception reports when fuel amounts exceed the capacity of the vehicle. On December 18, 2012 the Carrier received an exception report for two purchases made on December 12, 2012 – one at 12:59pm with an odometer reading of 36,970 miles for \$75.00 and another at 6:46pm with an odometer reading of 36,036 for \$65.18. After receiving this report Supervisor Brooks contacted employee Perry, whose employee number was entered for both purchases. Employee Perry acknowledged the 12:59pm transaction but stated he had not made the 6:46pm purchase. Supervisor Brooks obtained video of the 6:46pm purchase from the manager of the Chevron gas station in Sylacauga, Alabama. Upon reviewing the footage, Supervisor Brooks recognized the person making the 6:46pm purchase as the Claimant. When the Claimant was interviewed on December 18, 2012 he admitted to using the card to purchase gas for his own personal vehicle and using Employee Perry's identification number. In his position as Foreman the Claimant kept a log book of employee numbers to enter payroll information, which is how the Claimant obtained Employee Perry's number. Due to these events, the Carrier charged the claimant with conduct unbecoming an employee and conducted an investigation including a hearing on January 17, 2013. The Carrier determined the Claimant was guilty of the charge and dismissed him from service via letter on February 4, 2013.

The Carrier notes the basic facts in this case are not in dispute – it is clearly against Carrier policy to use the fuel card for a personal vehicle. The Claimant admitted to using the card and entering another employee's identification number to buy gas for his personal vehicle during the fact-finding interview, his written statement, and at the hearing. All employees who can use fuel cards sign a form indicating it may not be used for personal purchases and any unauthorized use can result in discipline up to and including termination (see Carrier Brief, pages 5-6). At the hearing the Claimant offered several personal explanations for his actions including the need to get his child home quickly and wanting to avoid an altercation with his ex-wife (see Transcript, pages 39-40). The Carrier also notes that the Claimant testified that it was 35 miles to get home (see Transcript, page 44) but he did fill up his personal vehicle with over 24 gallons of gas. This suggests the Claimant bought far more gas than was needed, even given his explanations. While the Claimant offered to pay for the gas he purchased, the Carrier notes that offer only came after he became aware of the preliminary investigation. Additionally, the Carrier characterizes the intentional use of another employee's identification number as dishonest and an attempt to conceal the gas purchase (see Carrier Brief, pages 9-10). The Claimant testified that he believed it was company practice to use the employee number associated with the vehicle when buying fuel, but the Carrier alleges this is not company policy which was confirmed by the testimony of Track Supervisor Brooks at the hearing (see Transcript, page 47). Given that the Claimant's actions suggest dishonest behavior, the Carrier believes dismissal is appropriate in this case. The Carrier believes the Organization's procedural objection is without merit. It argues that no representation is required when it is engaging in the fact finding process and an employee is asked to provide written statement. The system discipline rules only require Organization representation "after being cited to a discipline investigation."

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. The Organization does not dispute the basic facts of the case, but instead draws attention to the Claimant's personal circumstances which caused the fuel purchase. At the time, the Claimant was visiting with his son and was concerned about possible physical abuse by his ex-wife's husband (see Transcript, page 36). The Claimant was running low on gas as he was driving his son home and had accidentally left his wallet at home. The Claimant's decision to use the card only occurred after he called multiple people for help but could not reach anyone. Thus, the Claimant's actions are characterized by the Organization as "a last bit of desperation" (see Organization Brief, page 2). The Organization believes the claimant's actions fall under the legal doctrine of "private necessity," wherein the alleged tort (the unauthorized fuel purchase) was committed in order to prevent a worse consequence (the Claimant being stranded with his child). The Organization as such sees these circumstances as being major mitigating factors that demonstrate the Claimant was not intending to be dishonest or commit fraud. The Claimant fully intended to reimburse the Carrier for the purchase, but was waiting until his regular supervisor returned from being out of the office before bringing up the issue. Overall, the Organization thus concludes that the Carrier has failed to prove that the Claimant had fraudulent intent and as such dismissal is not appropriate. In addition to its substantial arguments, the Organization also raises a procedural objection. The Organization believes the Carrier erred in not allowing the Claimant access to an Organization representative when he was asked to provide a written statement about the events. The Organization interprets rule 40(a) as requiring that Organization members have access to a representative upon request when making "a written statement on any matter" that could result in discipline, and as such concludes the Carrier is in violation of the agreement.

The Board finds the basic facts in this case are not in dispute. The Claimant admits to using a Carrier fuel credit card to buy gas for his personal vehicle and using another employee's identification number to complete the transaction. The Board's review of the case suggests that the Claimant was intending to hide the fuel purchase by using another employee's identification number. The Board points to the testimony at the hearing from Track Supervisor Brooks (see Transcript, page 47) that it is not normal practice for employees to use other employee's identification numbers. We also did consider the Claimant's personal circumstances in this case and his honesty about his actions as mitigating circumstances. However, when weighing the Claimant's relatively short length of service and considering that this type of violation involves dishonesty, the Board concludes that dismissal was appropriate.

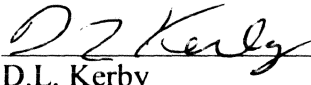
The claim is denied.



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.