

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 124

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of L. B. Butler for reinstatement to service with payment for all time lost, and seniority and vacation unimpaired, as a result of his dismissal following a formal investigation held on May 22, 2001, in connection with his improper performance of duties as a Roadway Laborer on May 1, 2001, at milepost 579.8, near Red Lane, Georgia, in that he used gasoline to start and/or stimulate a fire while attempting to remove, by burning, a wedge from a hammer; and for persisting in unsafe work practices for negligently subjecting himself to injury on three occasions and habitually violating safety and operating rules as evidenced by the Claimant's prior service record.

(File MW-GNVL-01-07-LM-143)

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

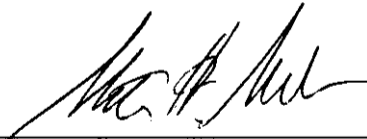
After thoroughly reviewing and considering the transcript and the parties' presentations, the Board finds that the claim should be disposed of as follows:

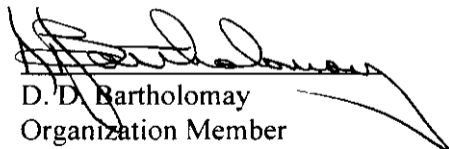
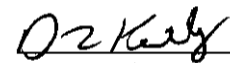
Carrier proved the charges by substantial evidence. The record is clear that Claimant used gasoline to stimulate a fire, an action that not only violated Carrier's Rules but also was extremely dangerous. The remaining issue is whether the penalty of dismissal was arbitrary, capricious or excessive. Claimant was counseled on at least seven occasions concerning his unsafe work practices. Such counseling concerned such dangerous practices as using a cigarette lighter to light a torch and smoking around acetylene and oxygen tanks.

Such counselings were not disciplinary in nature and had Carrier merely gone from counselings to discharge we would be troubled. However, on September 25, 2000, Claimant operated a contractor's front end loader without authorization. Claimant was unable to stop the front end loader. He not only violated Carrier's rules, but he endangered the safety of himself and others. Claimant waived investigation and received a five day suspension.

The incident in the instant case occurred less than eight months later. The Board recognizes Claimant's lengthy service with Carrier. However, Claimant has been counseled numerous times and has been suspended. Moreover, Claimant's actions have involved deliberate conduct over which Claimant had complete control. Despite Carrier's efforts to motivate Claimant to reform his behavior, he again engaged in a deliberate and extremely unsafe act, i.e. using gasoline to stimulate a fire. We cannot say that the Agreement requires Carrier to continue to run the risk of keeping Claimant in its employ.

The claim is denied.



M. H. Malin
Chairman and Neutral Member
D. D. Bartholomay
Organization Member

D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on February 13, 2002