

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 131

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of C. L. Faddis for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for time lost as a result of his dismissal from service following a formal investigation held on July 2, 2002, in connection with his conduct unbecoming an employee for unauthorized use of a Company phone card for personal business.

(File MW-BHAM-02-06-LM-124)

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

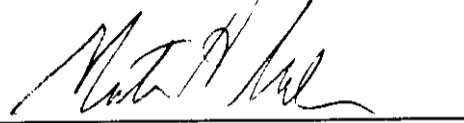
After thoroughly reviewing and considering the transcript and the parties' presentations, the Board finds that the claim should be disposed of as follows:

Carrier clearly proved the charge by substantial evidence. There is no dispute that over a period from July 31, 2001 through May 9, 2002, Claimant made 309 unauthorized personal telephone calls on his Carrier-issued telephone calling card. The critical question is whether the penalty of dismissal was arbitrary, capricious or excessive.

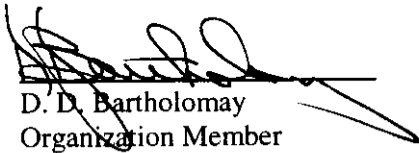
After considering all of the facts and circumstances, we conclude that dismissal was an excessive penalty in the instant case. Claimant had more than thirteen years of service at the time of the investigation and there is no record of any prior discipline. Moreover, when confronted by the Assistant Division Engineer with a list of the telephone calls, Claimant did not deny making the calls but rather forthrightly admitted them and stated that he must have made an honest mistake. Claimant testified, without contradiction, that he offered to pay for the calls. At the hearing, Claimant elaborated that the 1-800 number used to access the calling card account was very similar to the 1-800 access number of Claimant's personal calling card. Both numbers were entered into evidence and it is apparent that they are very close. Claimant further explained that he used the calling card numbers from memory and mistakenly confused the Carrier card number with his personal number. He further explained that his wife handled all of the bills and that he never saw the company calling card bill until confronted by the Assistant Division

Engineer. The record contains no evidence contradicting Claimant's explanation and his explanation is corroborated by the closeness of the two access telephone numbers.

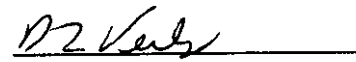
In light of Claimant's years of service, his immediate acceptance of responsibility when confronted and the absence of any direct evidence of willful, deliberate dishonesty, we find award that Claimant be returned to service with seniority unimpaired but without compensation for time held out of service.



M. H. Malin
Chairman and Neutral Member



D. D. Bartholomay
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on December 29, 2003