

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 137

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of W. N. Barnwell for reinstatement to service 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 March 4, 2003, for conduct unbecoming an employee in that he falsified the following documents:

1. Job Application BNE-02-72 that included a copy of an invalid Virginia Commercial Driver's License.
2. Norfolk Southern Corporation Form 11512-8 FHWA (Motor Vehicle Driver's Certification of Violation) in that you failed to list the offense of Driving While Intoxicated in 2002 and subsequent loss of Commercial Driver's License.

(Carrier File MW-GNVL-03—1-BB-01)

FINDINGS

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.

OPINION

Claimant W. N. Barnwell began his service for the Carrier as a B&B Apprentice on May 23, 1977. On November 25, 2002, Claimant bid for an open position as a B&B Mechanic, which required a valid Commercial Driver's License (CDL). Claimant completed a bid form for the position, and presented a copy of his CDL and Medical Examiner's Certificate to Carrier's officers. He was awarded the position and began working the following day.

A few weeks later, on December 19, 2002, Claimant completed and signed a Motor Vehicle Driver's Certification of Violation, certifying that he had not been convicted of any violation required to be listed during the past twelve months. The certification form also served as a consent form authorizing the Carrier to receive Claimant's driving record information. Subsequently, a routine check of Claimant's driving record revealed a conviction in July 2002 for driving while intoxicated (DWI). Obviously, that was within the twelve months prior to the date he certified he had no convictions in the past twelve months. When confronted about the conviction by his supervisor on January 14, 2003, Claimant admitted his CDL had been revoked in July 2002 due to the DWI conviction.

By letter dated January 15, 2003, Claimant was notified to attend a formal investigation on January 28, 2003. He was charged as indicated in the Statement of Claim. After several postponements the investigation was held on March 4, 2003, at which time Claimant freely admitted his guilt, explaining how his actions and poor judgment were the result of alcoholism. After the investigation, Claimant was found guilty of conduct unbecoming an employee and was dismissed from service.

The Organization seeks reinstatement based upon Claimant's years of service and age. The Organization has submitted several arbitration awards involving cases in which the claimants were dismissed for using alcohol while subject to duty, and were reinstated on a leniency basis, in part because it was recognized that they suffered from alcoholism, in part due to their length of service, and in part due to their relatively good disciplinary records.

The awards submitted by the Organization are not on point with this case because Claimant was not dismissed for abusing alcohol while at work; he was dismissed for conduct unbecoming an employee. Specifically, Claimant was dismissed for dishonesty, so this is not a case about alcohol abuse in the workplace. Perhaps an argument could be made that his dishonest acts were a result of alcoholism, but that is not a determination this Board is qualified or willing to make.

The Carrier's position is that Claimant violated the employer-employee relationship by being dishonest, dishonesty is a dismissible offense, and permanent dismissal is appropriate because Claimant's record is less than exemplary. In support of its position, the Carrier has submitted three awards denying claims of dishonest employees, but those awards are not on point. Two of the awards involve employees who stole from their employer, and the other involves an employee who was arrested for burglary. While Claimant's falsification of a bid form and a driver certification form was certainly dishonest, it was not theft. Further, although Claimant bid on a position requiring a CDL because it was the highest paying job available, he did not actually drive a vehicle requiring a CDL at any time relevant to this case, and did not at any time expose the Carrier to liability. It is unnecessary and inappropriate to speculate whether he would have driven such a vehicle had the opportunity presented itself.

The Carrier is right on point regarding Claimant's prior record, however. In addition to some minor discipline early in his career and a thirty day deferred suspension in 1996, Claimant was dismissed in 2001 for a serious lack of judgment when he failed to properly provide on-track protection for a contractor, resulting in a collision between a train and the contractor's equipment. Claimant was reinstated to service by Award No. 129 of this Board in November

2002. It is significant that Claimant's reinstatement was based upon the Board's determination that permanent dismissal was excessive for an employee with twenty-five years of service.

Standing alone, dismissal for Claimant's actions in this matter would be considered excessive discipline. Indeed, Special Board of Adjustment No. 1048, Award No. 139, with these same Parties and Neutral Member, found permanent dismissal excessive in a case involving very similar circumstances. Unfortunately, that finding is not warranted in this case due to the fact that the Claimant has recently been reinstated to service after dismissal for a very serious offense. Claimant has twice been found guilty of very poor judgment in a period of eighteen months, and it would be irresponsible for the Board to disregard Claimant's prior record and reinstate him once again. Therefore, the claim will be denied.

AWARD

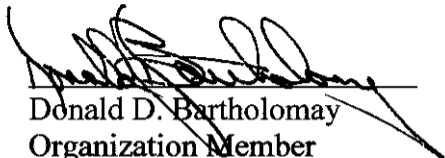
After thoroughly reviewing and considering the transcript and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The claim is denied.



Mark D. Selbert

Chairman and Neutral Member



Donald D. Bartholomay
Organization Member



Dennis L. Kerby
Carrier Member

Issued at Saint Augustine, Florida on December 23, 2004