

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 221

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed from the services of Norfolk Southern Corporation and its affiliates) of Mr. D. Encalade, issued by letter dated August 18, 2011 in connection with alleged failure to timely notify the proper authority of theft or unauthorized removal and sale of steel ties and metal pilings, allegedly providing false and/or conflicting statements to Norfolk Southern Police Officer R. Bible regarding a matter under investigation and allegedly receipt of payment in connection with the unauthorized sale of Norfolk Southern property to Southern Scrap on March 17 and June 3, 2011 was arbitrary, capricious, unjust, unwarranted, unreasonable and harsh or excessive (Carrier's File MW-BHAM-11-19-LM-234).
2. As a consequence of the violation referred to in Part 1 above, Mr. Encalade shall be made whole by exonerating him of all charges placed against him, restoring him to service, paying him for all time lost, with seniority, qualifications, vacation and all other 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 February 14, 2005 in the position of Track Laborer. At the time of the events that led to this case, the Claimant was working in the role of Material Handling Truck Operator in New Orleans, Louisiana. On June 22, 2011 the Carrier was contacted by Mr. K. Wilson, the owner of KASH

Contracting, a contracting firm that the Carrier regularly uses to perform work. Mr. Wilson informed the Carrier that one of his employees was been fired after admitting to stealing materials from the Carrier and selling them to a scrapyard.

Mr. Kash communicated his concerns to the Carrier that its own employees may have been involved in these actions – specifically Track Supervisor J. Jones and the Claimant. The Carrier, through Special Agent Bible, conducted a series of interviews with Supervisor Jones and the Claimant. Special Agent Bible determined that Supervisor Jones and the Claimant had: (1) been involved in multiple discussions centered around taking ties and selling them to a scrap yard, (2) gained knowledge that a KASH Consulting employee, Mr. Husband, had on June 3, 2011 stolen steel crossties and sold them to Southern Scrap, (3) had convinced Mr. Husband to give them a portion of the proceeds (\$500.00 and \$400.00, respectively) in exchange for their silence and agreement not to report the theft, and (4) on March 17, 2011 illegally acquired metal pilings from a contractor by stating they would be used for Carrier work and then sold the items to Southern Scrap and split the cash proceeds.

The involvement of the Claimant in these events included telling Special Agent Bible the following: in relation to (2), the Claimant stated he was aware of the removal of the crossties but was not involved in the actual removal or sale; in relation to (3) the Claimant first stated he did not know why he was given \$400 and then stated the money was for repayment of loans owed to him by Supervisor Jones; in relation to (4) the Claimant stated he helped load the pilings and received \$250 cash from Supervisor Jones, but he did not realize the pilings were Carrier property.

Due to these events the Claimant was removed from service on June 27, 2011 pending a formal investigation which was held, including a hearing on August 2, 2011. The Carrier charged the Claimant with conduct unbecoming an employee due to failing to notify the proper authority of the theft and sale of Carrier property, providing false and conflicting statements to Special Agent Bible regarding a matter under investigation, and finally receipt of payment in connection with the sale of Carrier owned property on March 17, 2011 and June 3, 2011. The Carrier found the Claimant guilty of these charges and dismissed him via a letter dated August 18, 2011.

The Carrier argues that the evidence of the Claimant's actions is clear and that they constitute a violation of the Carrier's rules. Rule L specifically requires employees to report any theft of Carrier property immediately and prohibits unauthorized removal and sale of railroad property. The Carrier also has a General Notice which states employees must have a willingness to obey the rules regardless of past practices and that employment with the Carrier requires honest discharge of duties (see Carrier Brief, page 6). The Carrier argues the Claimant violated both these provisions by being aware of potentially illegal theft and choosing not to report it, and not showing any personal responsibility by inquiring how he could be receiving cash payments for scrap items (see Carrier Brief, pages 6-7). The Carrier further notes the testimony of Special Agent Bible, wherein the Claimant first stated he did not know why he received cash payments in relation to the events of June 3, 2011 and then later stated they were payment for personal

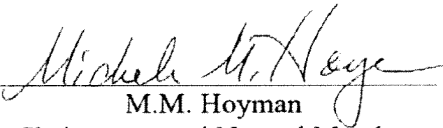
loans. In addition, later testimony by Mr. Husband, which revealed that the Claimant made suggestions for how to disguise the ownership of the stolen materials, showed that the Claimant clearly knew what was going on (see Carrier Brief, page 9). The Carrier points to the corroborating testimony of multiple witnesses as proof that the Claimant received cash payments for the sales on March 17, 2011 and June 3, 2011. Finally, the Carrier argues that dismissal was warranted in this case because there is substantial evidence for the Claimant's dishonesty, and dishonesty constitutes the "ultimate breach in the employer-employee relationship" (see Carrier Brief, page 17).

The Organization argues that the hearing was not fair and impartial (see Organization Brief, page 10), and even if it was the Carrier failed to meet its heightened burden of proof due charges of moral turpitude (see Organization Brief, page 7). The Organization contends that in relation to the March 17, 2011 incident that the Claimant clearly believed he was accepting cash to do work on a "quasi-personal" basis for his Supervisor in order to clean up contractor-owned materials that "the supervisor's superiors would have taken a dim view of yet littering the property" (see Organization Brief, pages 7-8). The Organization also argues that the Carrier mischaracterizes the events surrounding June 3, 2011. It states that the Claimant did advise the contractor employee not to steal Carrier property and that, upon being aware that property was stolen, properly reported the theft to his supervisor (Supervisor J. Jones was also involved in the theft, but the Claimant was not aware of this fact at that time). In this context, the Claimant thought his later receipt of \$400.00 cash was in relation to personal loans owed to him by his Supervisor. Finally, the Organization raises multiple arguments related to the proceedings in claiming that the hearing was not fair because the hearing officer was biased (see Organization Brief, pages 11-20).

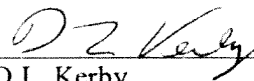
The Board finds there is substantial dispute over some of the critical events that occurred in this case, especially whether the Claimant knew that the materials were company materials. There appears to be no dispute that the Claimant in some way assisted in the prohibited selling of Carrier owned merchandise on March 17, 2011 and June 2, 2011. In attempting to determine the Claimant's level of knowledge the Board will utilize the testimony of Mr. Zack Husband. As Mr. Husband had been fired from his contracting position at the time of the hearing and was working in another position (see Transcript, page 180) it is unlikely he had motive to implicate the Claimant to get his job back. Mr. Husband testified that he had been involved in conversations with the Claimant, specifically about taking metal crossties and selling them for money (see Transcript, pages 184-185), and that the Claimant directly inquired about his portion of the funds from the sale of the stolen materials in connection with the March 17, 2011 incident (see Transcript, page 188). In relation to the June 3, 2011 incident, Mr. Husband also testified that the Claimant called him and already knew how much the stolen property had fetched because he demanded \$500 (1/3 of the total of approximately \$1500) (see Transcript, page 197). Further, in the Board's reading of the record the Claimant's defense that he told Mr. Husband not to engage in stealing material (see Transcript, page 281) is denied by Mr. Husband (see Transcript, page 219).

In coming to its conclusion the Board has carefully considered the record, the Claimant's seniority, and the testimony at the hearing. We find it extremely improbable that the events of March 17, 2011 and June 3, 2011 could transpire without the Claimant ever thinking that he was engaged in a prohibited activity in some way. Even if the Claimant's version of events is true, at some point the unusual and rare nature of these events (such as receiving cash payment from a Supervisor to clear up ties believed to be owned by a contractor) reached the level that the Claimant had some personal responsibility to inquire further. We find there was insufficient evidence that the Claimant's supervisor owed him money in the amount of \$400. If all these procedures and events had been routine, the Claimant's defense that he was "just following orders" may have been given more weight, but given the record we do not find that defense to be convincing. For these reasons, the Board finds that the Claimant engaged in dishonest behavior. The Board holds that, when dishonesty of this level occurs, it is a particularly egregious offense which permanently damages the relationship between the employee and the employer. Therefore, the penalty of dismissal is appropriate.

The claim is denied.


M.M. Hoyman
Chairperson and Neutral Member

 10/15/12
D. Pascarella
Employee Member

 10/15/12
D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on September 14, 2012.