

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 227

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 all services with Norfolk Southern Railway Company) of Mr. N. Lee, issued by letter dated March 16, 2012 in connection with his alleged conduct unbecoming an employee in that he used a Carrier credit card to make gasoline purchases for non-company related use on November 12 and 17, 2011 and January 6, 7 and 8, 2012 and also allegedly made false and conflicting statements to a track supervisor when questioned about the nature of the gasoline purchases made with his company credit card on the January 6, 7 and 8, 2012 dates was arbitrary, capricious, unjust, unwarranted, unreasonable and against the Agreement (Carrier's File MW-ATLA-12-06-LM-033).
2. As a consequence of the violations referred to in Part 1 above, Mr. Lee shall receive the remedy prescribed under Rule 30(d) of the Agreement."

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 in this case entered service for the Carrier on April 1, 2004 as a Track Laborer and was working in that capacity during the date of the events which led to this case. On February 10, 2012 the Claimant's Supervisor Mr. Irvin was completing a

routine review of the Claimant's credit card statements. Mr. Irwin noted charges for gas on January 6, 7, and 8, 2012. These charges caught Mr. Irwin's attention because they indicated the work gang would be using an unusually large amount of gas during this time period. Mr. Irwin contacted the Claimant's Foreman, Mr. Brown, to inquire why the work gang was using so much gas during this period. Mr. Brown stated that he had no knowledge about why such a large amount of gas would have been needed. Mr. Irwin then contacted the Claimant to ask about this issue. The Claimant stated the January 6 purchase was for one can of gas, the January 7 purchase was for two cans of gas, and the January 8 purchase was for another can of gas that had accidentally fallen over and been wasted after being filled on January 6.

Mr. Irwin subsequently examined the Claimant's payroll statements and observed that the Claimant was not working on January 6, January 7, and January 8, 2012. Due to this information he began examining the Claimant's previous credit card charges and noticed gasoline was purchased on November 12 and 17, 2011. The Claimant was not working on November 12, 2011 and while he did work on November 17, 2011 the gasoline purchase occurred (4:07PM) after his shift had ended (3:30PM). The Claimant was again contacted by Mr. Irwin and asked to explain the charges for January and November. The Claimant initially explained the January charges as he had previously until being shown his January payroll report which indicated he was not working. Then the Claimant explained that he must have accidentally given the company credit card to his brother on these dates, who then used the card for gas to fuel a generator in connection with his personal business.

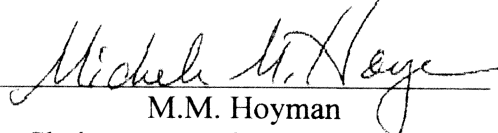
Due to these events, the Claimant was removed from service pending a formal investigation by the Carrier. The Carrier conducted an investigation including a hearing on March 9, 2012. The Carrier found the Claimant was guilty of conduct unbecoming an employee and dismissed him from service via letter on March 16, 2012.

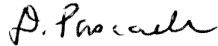
The Carrier's position is the Claimant is clearly guilty of using a company credit card for personal use. All employees upon receiving the credit card sign a form stating (1) the card can only be used for purchases related to company business and (2) use of the card for any other reason can result in disciplinary action up to termination of employment (see Carrier Brief, page 5). The Carrier notes that the Claimant's testimony was that the purchase was a "mistake" even though he could not provide any reason how the mistake could have occurred (see Carrier Brief, pages 6-8). The Carrier notes its interpretation of the implausibility of the Claimant's justifications is based on his unusual explanations. In particular, it notes the Claimant's testimony that he did work overtime on November 17, 2011, which is why he purchased gas. Payroll records, though, show he did not record and was not paid for any overtime worked on that date. The Carrier does not find the Claimant's justification convincing as the Claimant clearly made conflicting statements about the January purchases and only changed the story after realizing Mr. Irwin knew he was not working on those days (see Carrier Brief, page 10). For all these reasons the Carrier argues the Claimant is guilty for conduct unbecoming an employee and dismissal was warranted and appropriate.


The Organization's position is that the Carrier has failed to meet its burden of proof and has not demonstrated that the Claimant's actions were due to intentional dishonesty. As the alleged misconduct involves moral turpitude, the Carrier has a heightened burden of proof which goes beyond the normal "substantial evidence" standard. The Organization contends the Carrier's evidence fails completely to demonstrate the Claimant was intentionally lying (see Organization Brief, page 16). Instead, the Organization argues that at most the Claimant is guilty of an unintentional mistake regarding the use of his credit card. Given the Claimant's eight year service record, the Organization argues dismissal was not due for what it characterizes as unintentional conduct (see Organization Brief, page 18).

The Board finds that although the claimant may have been negligent in how he managed his Carrier credit card, the case record does not support the claim that the actions taken were intentional. The Board cautions that the Claimant should take more care not to make this mistake again. Given that the Claimant otherwise has a good record of service with the Carrier, he should be reinstated. We do not award back pay.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member


D. Pascarella
Employee Member


D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on June 20, 2013.