

**NATIONAL MEDIATION BOARD**

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
DIVISION – IBT RAIL CONFERENCE	)	
	)	Case No. 273
	)	
	)	Award No. 273
NORFOLK SOUTHERN RAILWAY COMPANY	)	
<u>(FORMER SOUTHERN RAILWAY COMPANY)</u>	)	

Richard K. Hanft, Chairman and Neutral Member  
D. M. Pascarella, Employee Member  
D. L. Kerby, Carrier Member

**STATEMENT OF THE CLAIM:** “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. N. Lee, issued by letter dated May 23, 2016, in connection with his alleged conduct unbecoming of an employee, in that on April 12, 2016 it was discovered that he plead guilty to felony theft in the Fulton County District Court on March 4, 2016 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (Carrier’s File MW-ATLA-16-21-LM-401 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant N. Lee shall have his dismissal set aside with all notations thereof removed from all Carrier records and he shall be reinstated to service with all seniority rights restored and entitlements to and credits for benefits, including vacation and health insurance benefits restored as well and he shall be made whole for all financial losses occasioned as a result of the violation, including: (1) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of removal from service (this amount is not reduced by earnings from alternative employment obtained by Claimant while wrongfully suspended); (2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on and performed had Claimant not been removed from service; and (4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service.”

**FINDINGS:**

Special Board of Adjustment No. 1049, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction

over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedence in any other cases.

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

There can be no dispute that Claimant in this matter entered a plea of guilty to a felony Theft by Taking charge in the Fulton County District Court on March 4, 2016. It is a matter of public record. This plea resulted from an investigation by the United States Office of Labor-Management Standards Atlanta-Nashville District Office.

Carrier learned of the situation on April 12, 2016. An investigation was scheduled and, after one postponement, held on May 12, 2016. Claimant did not appear at the investigation and it was held in absentia. Claimant was notified by letter dated May 23, 2016 that he was found responsible for conduct unbecoming an employee and was accordingly dismissed. The Organization filed a claim on Claimant's behalf.

In its Claim, the Organization asserts that with respect to Claimant's due process rights, Carrier failed to comply with Rule 40 and provide a "fair and impartial" investigation because the Claimant was not present at the investigation held in absentia.

The record evidence shows that on April 27, 2016 Claimant was notified that the investigation would be postponed until May 12, 2016 and that if Claimant required an additional postponement then he "...must provide medical documentation to the Carrier's Medical Director that would substantiate..." his "...inability to attend and participate in the hearing."

The record reveals that some medical information was received by the Medical Director on May 10, 2016. The Medical Director determined, based on the information received, that there was insufficient medical reason to justify a good cause for Claimant's absence or participation in the investigation. Claimant did not appear at the investigation and it was therefore held in absentia. Claimant was represented by the Organization at the investigation.

The System Discipline Rule expressly provides that: "If the charged employee fails to attend the duly scheduled investigation without having provided evidence of

good cause for such failure to attend, the Carrier may proceed with the investigation in absentia and such proceeding in absentia shall not constitute the basis for any claim with respect to such employee's right to contractual due process."

Hence, the Organization's assertion cannot form the basis for the claim that Claimant's due process rights were violated.

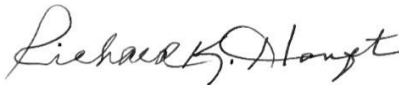
Moreover, the Organization avers that the Carrier has failed its burden of proof With respect to any valid grounds for disciplining Claimant in this manner.

Numerous prior Awards throughout the industry bear out that dishonesty in any form is a very serious offense and that theft or embezzlement has long been considered a dismissal offense. A prior Award on this property addressing the same issue herein resulted in dismissal. See 2 NRAB, Award 11622, G. L. Troy v. SOU (Carter).

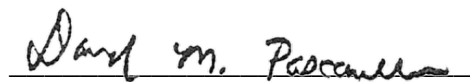
The record before us contains substantial evidence to support Carrier's disciplinary action. Claimant was not denied his right to contractual due process and the discipline assessed was neither arbitrary, capricious, nor excessive. The Board can find no cause to disturb the discipline assessed on the property.

**AWARD:**

Claim denied.



Richard K. Hanft, Chairman

  
D. M. Pascarella, Labor Member  
D. L. Kerby, Carrier Member

Dated at Chicago, Illinois, November 21, 2018