

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1049

BROTHERHOOD OF MAINTENANCE OF WAY)	
EMPLOYEES DIVISION – IBT RAIL CONFERENCE)	Case No. 285
)	
and)	
)	Award No. 285
NORFOLK SOUTHERN RAILWAY COMPANY)	
(FORMER SOUTHERN RAILWAY COMPANY))	

Richard K. Hanft, Chairman & Neutral Member
D. M. Pascarella, Employee Member
S. M. Goodspeed, Carrier Member

Hearing Date: July 24, 2019

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

1. The Carrier's discipline (dismissal) of Mr. B. Brown, issued by letter dated January 19, 2018, in connection with his alleged conduct unbecoming as an employee on December 13, 2017 the Carrier discovered that he had been taking Carrier's material, including various heavy equipment filters without permission and selling and/or exchanging Carrier's material for personal gain to NAPA Auto Shops at various locations, including Southaven, Mississippi, Parson, Knoxville and Jackson, Tennessee was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (System File Brown-B-12-17-INV/MW-BHAM-17-26-SG-929 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant B. Brown shall be reinstated to service with all seniority rights restored and all entitlements to and credit for benefits restored including vacation and health insurance benefits, being made whole for all financial losses as a result of the violation including compensation for: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully removed); (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 overtime paid to any junior employee for work Claimant could have bid 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 with, finally, all notations of the dismissal removed from all Carrier records."

FINDINGS:

Upon the whole record and all of 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.

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

Claimant in this matter entered the Carrier's service on March 10, 2003 and was assigned as a Machine Operator on the Timber and Surfacing Gang No. 1.

Claimant was charged on December 13, 2017 with conduct unbecoming an employee in that he was taking various machine filters from railroad property, some new and some used, to various NAPA auto parts stores and cashing them in for store credit which he used to purchase various items for his own use.

Claimant does not deny that that is just what he did, and the transactions totaled more than \$700.00 and were converted to Claimant's own use.

While the Claimant avers that he talked to "some lawyer" who allegedly told him that anything that has been placed in a dumpster and is discarded is no one's property and apparently free for the taking, the Carrier, however has Safety and General Conduct Rule No. 911 that provides in Paragraph 2:

2. Unauthorized possession, removal or disposal of any material from Railroad property or property served by the Railroad is prohibited.

Claimant, when asked at the Investigation whether he was "authorized" replied: "No".

There was, therefore, substantial evidence on the record before the Board to conclude that the charges against Claimant were supported by substantial proof.

While there were complaints from the Organization concerning alleged procedural due process matters that it carps denies the Claimant of all he is due under the System Agreement, none were found to hold water.

The Organization initially argues that the charges issued by the Carrier were not precise, however, the charge letter fully apprised the Claimant and the Organization of the nature of the violations under investigation and referred to the time period when that conduct allegedly took place.

The Organization further complains that the Carrier did not comply with the Parties' Agreement when it brought charges more than thirty (30) days after "first knowledge" of the conduct or event for which Claimant is being investigated.

While the Norfolk Southern Police Department began investigating the conduct for which Claimant was eventually charged with on November 17, 2017 based on a call from a NAPA auto parts store employee, there was no evidence reported to a Carrier Officer with authority to discipline Claimant until December 13, 2017, when Claimant made a statement and authorized NSPD to search his car. A formal investigation was convened on January 4, 2018, well within the thirty (30) day period demanded by the Parties' Agreement. The Organization's complaint is, therefore, without merit.

The Organization also objects to the entry of "hearsay" evidence into the record as the declarant wasn't made available to testify at the hearing. Again, arbitral precedent takes the wind out of those sails. There is no contractual prohibition concerning admission of statements made by declarants not present at the investigation.

Hence, Claimant was found guilty of conduct unbecoming an employee, the findings on the property were supported by substantial evidence, there were no procedural deficiencies that denied Claimant any of his rights under the Parties' Agreement and, in consideration of the severity of the Rule violation proven, the discipline assessed was neither arbitrary, capricious nor excessive. The Board can find no cause to disturb the discipline assessed on the property. The Claim is denied.

AWARD:

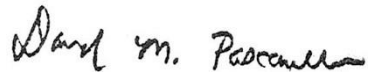
Claim denied.



Richard K. Hanft, Chairman



S. M. Goodspeed, Carrier Member



D. M. Pascarella, Labor Member

Dated at Chicago, Illinois, August 26, 2019