

AWARD NO. 329
Case No. 329

File No. Thomas-P-G-12-21-INV/MW-ATLA-21-49-BB-953 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) DIVISION – IBT RAIL CONFERENCE
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY
) (FORMER SOUTHERN RAILWAY COMPANY)

STATEMENT OF CLAIM:

Claim on behalf of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. P. Thomas, issued by letter dated December 22, 2021, in connection with his alleged conduct unbecoming an employee in that on November 10, 2021, supervision discovered that on or about March 20 and September 13, 2018 and continuing, he used the Company account to rent gas cylinders for personal use and/or without proper authorization was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Thomas-P-G-12-21-INV/MW-ATLA-21-49-BB-953 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant P. Thomas shall now have his dismissal set aside with all notations thereof removed from all Carrier records and he shall also be restored to the Carrier's service with all seniority and restored to all financial and benefit losses, such as vacation and health insurance benefits occasioned as a result of the violation, including: (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 dismissed); (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 dismissed."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

This is the second of two cases on our current docket involving Claimant P. G. Thomas, Jr., both of which involve dismissal assessments. We address the first dismissal, which was assessed on August 10, 2021, in Case No. 328.

By notice dated November 29, 2021, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with “conduct unbecoming an employee in that on November 10, 2021 Supervision discovered that on or about March 20 and September 13, 2018, and continuing, you used a Company account to rent gas cylinders for personal use and/or without proper authorization.”

The hearing was held *in absentia* on December 9, 2021, at which Claimant’s manager presented testimony and documentation regarding Claimant’s use of a company credit card to rent gas cylinders from a local welding supply shop. He also presented evidence establishing that the type of gas was not used in Carrier operations. After the hearing, Claimant was found to be guilty as charged, and by notice dated December 22, 2021, he again was dismissed from service.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that the Carrier did not initiate the charges in compliance with the agreement. It states that the Carrier had notice of the alleged violations for approximately three years, but that it did not issue the notice of investigation and hold the hearing within 30 days thereof. The Organization states that this defect alone requires the discipline to be overturned.

With respect to the merits, the Organization submits that the Carrier failed to meet its burden of proof in connection with the charges. It contends that, because the case involves charges of “moral

turpitude,” the Carrier’s burden of proof on such charges is elevated, and that the proof must be at least clear and convincing. The Organization posits that the Carrier failed in this instance to establish that Claimant intended to mislead the Carrier or that he willfully disregarded the Carrier’s interests.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. It states that the purpose of discipline is to correct and guide employees, not to punish them without affording them an opportunity for redemption or rehabilitation. The Organization points out that Claimant has 16 years of service with only minor discipline on his record, and it contends that the Carrier failed to show that he was an employee of ill repute who could not be a productive member of the Carrier’s operations. The Organization concludes that dismissal was not warranted, and that Claimant should be returned to service.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment. With respect to the time limit arguments raised by the Organization, the Carrier cites arbitral precedent as holding that time limits do not begin running until a Carrier officer with authority to administer discipline has knowledge of potential wrongdoing. It states that Claimant’s manager did not discover that Claimant was using the company card to rent the cylinders until November 10, 2021, so that the charges were then initiated within the timelines set forth in the agreement.

The Carrier also asserts that the evidence adduced at the hearing fulfilled its burden of producing substantial evidence to establish Claimant’s guilt. It states that the testimony and invoices presented during the hearing conclusively proved that Claimant was guilty of using company credit for his own gain, which cost the Carrier more than \$1,400 over the period in question.

With respect to the level of discipline imposed, the Carrier states that employee conduct is of utmost importance, including an employee’s responsibility to refrain from using Carrier assets for personal use. It states that Claimant’s use of the company credit card to rent and purchase materials for his personal use without authorization is dishonest, and it points to prior awards which have

upheld dismissal for similar conduct. It states that it is well within its rights to treat the violation as it did, and that it has no obligation to retain in its employ an individual who commits dishonest misconduct. The Carrier states that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that dismissal is appropriate in light of the seriousness of the offense.


We have carefully reviewed the record in this case and the parties' arguments, and we find no procedural barrier to our consideration of the merits. With respect to the timing of the notice of investigation and hearing, we concur with the holdings of the cases cited by the Carrier that time limits for such matters do not commence until a manager with authority to initiate disciplinary proceedings has knowledge of the alleged misconduct, and here there is nothing in the record to contradict the manager's testimony that he did not discover the Claimant had been using the company credit card to rent cylinders for his personal use until November 10, 2021, when he was discussing gas purchases with the vendor.

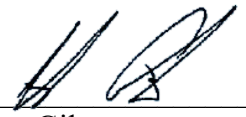
Turning to the merits, we find that the Carrier has provided sufficient evidence to establish that Claimant was guilty as charged. Whether we apply the standard of substantial evidence, or an elevated standard of proof as suggested by the Organization, we believe that the record adequately establishes that Claimant improperly used Carrier credit to benefit himself. We note that it was established that Claimant was aware of the hearing, but that he chose not to attend, so there is nothing in the record which would contradict the conclusion that Claimant's actions were intentional.

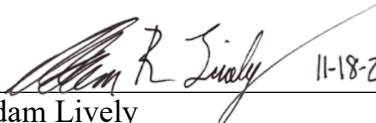
Having found that the charges were proven, we turn to the level of discipline. To overturn the Carrier's assessment would require the Board to find that the Carrier acted arbitrarily or capriciously so as to constitute an abuse of discretion. As the Carrier notes, many prior awards have upheld dismissal for offenses such as these, as those actions break the bonds of trust necessary in the employment relationship. On this record, we cannot find that the Carrier's actions were an

abuse of discretion, so we will not substitute our judgment for the Carrier's now.

AWARD: Claim denied.


Michael D. Phillips
Chairman and Neutral Member


Adam Gilmour
Employee Member

 11-18-2024
Adam Lively
Carrier Member

Dated: November 18, 2024