

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5332

Parties to Dispute:)	
)	
INTERNATIONAL BROTHERHOOD OF)	<u>AWARD</u>
ELECTRICAL WORKERS)	
)	Case No. 172
-and-)	
)	Claimant D. E. Phillips
NORFOLK SOUTHERN RAILWAY)	
COMPANY)	

STATEMENT OF CLAIM:

“Claim on behalf of Electrician D. E. Phillips in Roanoke, Virginia, for reinstatement with seniority rights unimpaired and made whole for all losses sustained. These begin the date removed from service, continue to the present date and include, but are not limited to, lost wages, vacation rights, health and welfare and insurance benefits, pension benefits such as Railroad Retirement and Unemployment Insurance, and any other benefits that would have been earned during the time Electrician Phillips is unjustly withheld from Carrier’s service. We also request his personal record be cleared of the matter.”

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

This dispute and companion Case No. 173 (Kendrick), decided concurrently by the Board, center on a curious, complicated pattern of facts implicating both men and triggering both their dismissals. Although the records developed in both disputes are marked by substantial detail and several unsettled questions, in the interest of efficiency we make no attempt to serve up here either the totality of the underlying facts in highly granulated form or the multiple arguments offered by both sides in support of their respective positions. For the reasons that follow, the Board concludes it must deny the claims.

On June 15, 2017, Claimant Phillips was charged with multiple incidents of Conduct Unbecoming an Employee and a separate charge of being away from his assigned work area spending time in the powerhouse at Carrier's Roanoke facilities. Included in the conduct unbecoming charges was an assertion that Claimant had threatened Electrician Gary Chapman's vehicle on May 16, 2017. Additional charges alleged recklessly endangering his own safety and that of others by hanging or witnessing a bucket hanging above a doorway in the powerhouse. Lastly, he was charged with making five specific false statements to supervision regarding matters under investigation. At the close of formal investigation conducted on June 29, 2017, and following review of the testimony and evidence adduced, by letter of July 18, 2017 Hearing Officer Watkins notified the Claimant that based upon his findings of guilt on a number of the charges proffered Claimant was being dismissed from service.¹ The Organization's claim challenging that action was not resolved in claim handling and is now properly before the Board for final determination.

The run-up to the dismissal was long and untidy. When rumors began to circulate at the Roanoke Locomotive Shop in early May 2017 that employees were using the shop's old powerhouse as a secret hideaway for unauthorized breaks from work, an area where there is no need for employees to go during working hours, on May 11 Electrician Gary Chapman, also serving as the Organization's Assistant Safety Chairman, states that he became curious about the matter. Upon investigating, found an area at the top of several flights of stairs with four extension cords camouflaged with black paint leading to an area that appeared to be a hideout assembled with plywood and black plastic. Upon returning to the site the following day, however, he discovered that the area had been dismantled. It was, however, now booby-trapped with a bucket overhanging the doorway designed to dump grease and oil on whoever tripped the trap. He also observed a camera high on the wall facing the entry door, possibly observing him through a video feed. Chapman, however, apparently took no action to address the issues.

On May 16, 2017, several third shift employees at the location received a text message depicting a laptop computer located in a locker shared by Claimant and fellow Electrician

¹ Carrier's notice of dismissal omitted the earlier asserted charges of threatening damage to another Electrician's vehicle and recklessly endangering safety by either hanging or witnessing the hanging of a bucket of coal dust and grease over a powerhouse doorway.

Garry Kendrick displaying videos of the employee break room. One employee shared the message with supervision. That night, Gary Chapman requested and received permission to park inside the shop out of concern for the safety of his vehicle. Upon learning of the text message, supervision interviewed Chapman and took his written statement on May 17 addressing the parking issue.

On May 17, General Foreman Robbins interviewed Claimant and Kendrick on third shift. Claimant admitted the computer belonged to him and complained that Chapman had been spreading rumors about him. Toward the end of the discussion, he then reported that both his computer and camera had gone missing, but acknowledged that he had assisted Kendrick in setting up the camera in the governor room, indicating that it was installed for the purpose of attempting to determine who had been stealing personal property from him and other employees. Kendrick admitted that he had set up the camera and hidden the computer in the locker, expressing his belief that Chapman had taken the picture of the computer in the locker and circulated it to employees and management.

At some point, Assistant Shop Manager Keister interviewed Chapman again. Chapman admitted that he had discovered the hideout and believed Claimant and Kendrick were responsible for creating it and that Electrician, M. W. Nester may have known about it. On May 24, Keister went to the powerhouse to check out the hideout stories. He found no evidence of a hideout, but did discover a bucket suspended above the doorway full of grease/oil and oil covering the top rungs of the ladder leading up the stairs. After taking pictures, he dismantled the traps.

That same morning Keister interviewed Electrician M. Nester, who acknowledged that he had heard scuttlebutt that two employees were involved with the hideout but declined to identify anyone by name. Keister then interviewed Claimant and Kendrick again, both of whom disclaimed any knowledge of or role in creating or using the hiding spot.

Several weeks later, however, Keister received a package at work containing a laptop, power cord and USB camera. There was no indication of ownership or source, but the package was accompanied by the following note:

this laptop was discovered in the “governor room break area, presumably by the electricians who eat lunch in there on 2nd shift.

i heard about it and went to take a look (morbid curiosity) Well. the situation upset me greatly Nobody should be surveilling their coworkers. It is a violation of several VA and federal laws, as well as against union bylaws and surely violates several company rules.

then I learned about the “nest” that Dannie Phillips and Gary Kendrick had built in the power house and I learned about the grease on the ladder. Wow, was I pissed? I am not even an electrician!

we do not need these guys around sleeping 6 hours a night (and bragging about it to many), stealing time and material from the company and making the shop look bad.

i wish to remain anonymous, I hope the company finds more on this than I did. Surely the deleted files from them recording people encroaching on their nest are still on there and can be forensically found pretty cheaply.

a lot of good people work at RLS, please don't punish all of us for the actions of 2 or 3.

Examination of the unprotected computer revealed videos of employees in the governor break room and one file shot from an elevated area in the powerhouse. Having already admitted setting up the camera, Claimant and Kendrick were interviewed again by Keister and Senior General Foreman Hershel on June 7. Claimant admitted the computer appeared to be his but that it had been stolen, although the theft was never reported, and persisted in denying any role in creating a hideaway. He denied that the computer had ever been in the powerhouse. Kendrick agreed with respect to the computer ownership and repeatedly denied ever being in the powerhouse. Informed by Keister that the Company had proof regarding the computer and Claimant having been in the powerhouse, Claimant again denied that he had been at the site or set up the camera and computer. Upon being informed that he was being removed from service, according to Hershel, Claimant “then apologized for lying to Pat [Keister] the first time about being out in the power house.” According to Claimant’s admission, he had been going to the powerhouse to rest after completing his work and apologized for not being honest about that issue in prior interviews.

At the conclusion of the formal investigation on June 29, 2017, as noted above several of the charges initially asserted were dropped. Claimant was, however, found guilty of “Conduct Unbecoming an Employee” in making false statement with respect to matters under investigation in (i) answering “no” in response to the question asked by Pat Keister

on May 24, 2017, “Do you have any involvement with the happening in the powerhouse;” (ii) answering “no” in response to the following questions asked by Pat Keister and Bill Hershel on June 7, 2017: “Were you in the powerhouse?” “Was the camera ever set up in the powerhouse?” and, “Has the laptop ever been in the powerhouse?” Additionally, Claimant was determined to have provided false information in replying to the question asked by Pat Keister and Bill Hershel on June 7, 2017, “Has anyone else ever gone out there with you?” Lastly, Claimant was determined to have been responsible for being away from his assigned work area without proper authority in violation of General Safety Rule 919 of the Norfolk Southern Book of Safety and General Conduct Rules, although no date(s) was specified.

Among the several arguments advanced by the Organization is the contention that as a procedural matter, the charges against Claimant were vague and unspecific, resulting in a flawed investigation, and that several of the most serious charges were ultimately dropped. Substantial resources, it contends, were expended in discussions of “reckless endangerment” and the “nesting” issue, the former subsequently dismissed and the latter never expressly charged. With respect to the merits, the Organization argues on Claimant’s behalf that his statements to management never rose to the level of “false and conflicting,” and that the record may be read to suggest Claimant’s computer may have been stolen by a disgruntled co-worker, possibly altered and sent to management.

Although effectively argued, upon careful consideration of the record as a whole we find neither point persuasive. There is, as suggested, both some slackness here in discussion of “happenings” in the powerhouse and imprecision in other matters falling short of ideal, including the lack of a date on which charge 4 was based. But it is simply impossible to read this record and conclude that Claimant did not know precisely what conduct they were suspected of engaging in, nor any evidence whatsoever suggesting anyone was in doubt about the facts under investigation. There is not a hint that the defense was in any way hobbled by any question of vagueness in the charges. Lastly, after long dissembling, Claimant admitted to having been in the powerhouse with computer, camera and others.

The hard reality is that although Claimant was a relatively junior employee, there is nothing to suggest Claimant did not know of Company policy with respect to absenting

himself from his assigned work area. That policy was not unreasonable. The Company investigated the suspected violations thoroughly and objectively, generating substantial evidence of Claimant's violation, including his own clear admissions. And perhaps of even greater significance, this record paints a picture of an employee who lied repeatedly to supervision in the course of their investigation, fatally undercutting the possibility of any continuing employer-employee relationship built on trust. Those factors, in the opinion of the Board, must reasonably be seen easily powering past any procedural shortcomings in case handling. Just cause has been established for dismissal.

A W A R D

The Claim is denied.

Tom Owens
Tom Owens *Dissent*
Employee Member

James E. Conway
James E. Conway
Chairman and Neutral Member

Christopher Carr
Christopher Carr
Carrier Member

Dated: January 10, 2019