

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 224**

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) of Mr. M. Robinson issued by letter dated November 10, 2011 in connection with his alleged improper performance of duty as a machine operator, in that while operating stabilizer PST 88304 he collided with track broom TB930 12 in the vicinity of Mile Post CD317 .2 near Wauseon, Ohio on September 29, 2011 was arbitrary, capricious, unjust, unwarranted, unreasonable and harsh or excessive (Carrier's File MW -DEAR-11-56-SG-380).
2. As a consequence of the violation referred to in Part 1 above, Mr. Robinson shall be restored to service, exonerated of all charges placed against him and paid for all time lost, with seniority, qualifications, vacation and all other rights unimpaired."

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 entered service for the Carrier on March 2, 2009 as a Roadway Laborer. On September 29, 2009 the Claimant was working as a Machine Operator when his machine collided with a Track Broom machine in front of him. After going past a road crossing, the Track Broom machine in front of the Claimant began to speed up as normal but experienced a mechanical problem which required the machine to be stopped. The Track Broom machine operator properly notified the Claimant via radio that the

machine had been stopped. However, the Claimant failed to bring his machine to a full stop before colliding with the Track Broom which resulted in substantial damage.

As a result of this incident the Carrier removed the Claimant from service on October 5, 2011 and held a formal investigation including a hearing on October 27, 2011. The Carrier found the Claimant was guilty of improper performance of duty due to his role in the collision and dismissed him from service via letter on November 10, 2011.

The Carrier argues at the time of the incident the Claimant had been operating as a Machine Operator for over a year and as such was well aware of proper procedures and the importance of keeping a safe distance from other machines (see Carrier Brief, pages 4-5). Additionally, Supervisor J.W. Broce testified that there were no mitigating factors in terms of weather or track structure. The Carrier refutes the Claimant's submitted pictures that show a distorted view from the Machine by stating they are factually inaccurate and in conflict with the testimony of other employees and the testimony of F.G. Little, who is a repairman for the Carrier (see Carrier Brief, page 6).

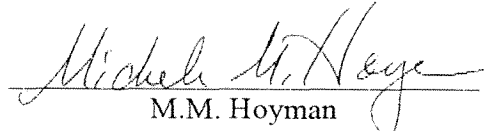
The Carrier states that the Organization's procedural arguments are without merit. The Carrier points out that its records show the Claimant did receive a copy of the dismissal letter within 20 days of the hearing. Additionally, the Carrier claims that the mailing of the dismissal letter under the Charging Officer's name was an administrative error and this error did not prejudice the investigation or discipline process (see Carrier Brief, page 8).

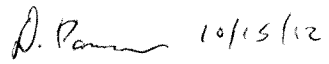
The Organization makes a procedural argument that the Carrier failed in providing a fair investigation because the same employee withheld the Claimant from service, formally charged the Claimant, testified at the hearing, and dismissed the Claimant via letter (see Organization Brief, pages 7-12). The Organization also argues that the Carrier failed to uphold its burden of proof because it did not provide enough substantial evidence to support its allegations, but nevertheless imposed the "ultimate discipline" of dismissal (see Organization Brief, page 19). Finally the Organization argues that there were several factors which impeded the ability of the Claimant to stop on time, including broken brake lights and a tinted window which impaired depth perception (see Organization Brief, pages 20-23).

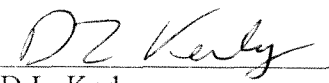
The Board finds no dispute in the record that the Claimant did actually cause the collision that led to this case. At issue here is whether dismissal was appropriate in light of the Claimant's actions. We do not find that the Claimant's submitted photos (see Carrier Brief, Exhibit A, pages 63-65) regarding his view from his Machine as substantial enough to be considered a mitigating factor. The Carrier offered testimony from multiple sources that suggests that the condition of the window was not deteriorated enough to impact the operator's view in any way. Even if the view was an issue, the Claimant has some level of responsibility to report that he cannot operate the machine in the prescribed manner in accordance with the Carrier's safety rules - which he did not until after the collision occurred. Concurrently, we do find other mitigating circumstances. The Claimant does not dispute he caused the accident and admits some level of guilt, and he

otherwise appears to have a clear discipline record. As such, we reinstate the claimant with overall seniority intact but he will forfeit his seniority in the Machine Operator position. We do not find cause to award back pay.

The claim is partially sustained.

  
M.M. Hoyman  
Chairperson and Neutral Member

 10/15/12  
D. Pascarella  
Employee Member  
Dissent to follow

 10/15/12  
D.L. Kerby  
Carrier Member

Issued at Chapel Hill, North Carolina on September 14, 2012.