

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION - IBT RAIL CONFERENCE)	Case No. 42
and)	
)	Award No. 42
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)	
NORFOLK & WESTERN RAILWAY COMPANY))	
)	

Richard K. Hanft, Chairman & Neutral Member
J. Dodd, Employee Member
D. L. Kerby, Carrier Member

Hearing Date: February 25, 2010

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

1. The discipline (47 day suspension and permanent machine operator disqualification) imposed by letter dated September 15, 2008 upon Mr. C. Harris for alleged violation of Company rules and policies in connection with an incident involving a machine collision on August 6, 2008 was disparate and unwarranted and in violation of the Agreement (Carrier's File MW-DEAR-08-98-SG-450).
2. As a consequence of the disparate and unwarranted discipline referred to in Part 1 above, the Carrier shall rescind said discipline and pay the Claimant for all lost time and restore his seniority unimpaired, make him whole, which would include any overtime that he would have had and could have earned if he were working."

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 that this Board is duly constituted by agreement 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

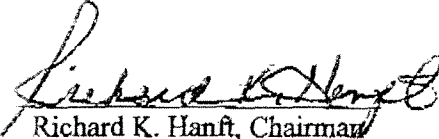
AWARD:


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


At approximately 9:00 A.M. on August 6, 2008 Claimant was tramming a Plasser Dyna-CAT Tamper on a controlled siding to clear onto the Main Line. Claimant's machine was one of 11 on-track machines in a line tramming in a westerly direction up the siding. The gang was to tram west to CP 329 which would put them in position to access the Main Line and come to a complete stop until track authority to enter onto the Main Line was obtained. The record reflects that the gang's supervisor proceeded to CP 329 where some of the on-track machines had arrived and were awaiting authority to enter the Main Line. Upon receiving Form D, Line 5 authority to enter onto the Main Line, the supervisor radioed the machine operators the information for the Form D, Line 5 track authority. Claimant testified that his attention was momentarily diverted while trying to copy the track authority as he was tramming and did not hear that the C-Series Tamper directly in front of Claimant's machine was going to stop. Claimant stated that by the time he had copied the limit information and looked up he wasn't able to stop before colliding with the C-Series tamper ahead. There is no dispute that the collision occurred. The impact of the collision caused substantial damage to both machines.

Claimant forthrightly admitted during the investigation on the property that a momentary lapse of concentration while copying the limit information caused him not to hear or acknowledge that the machine in front of him had come to a stop and that when he looked up from writing he was unable to stop his machine before colliding with the machine stopped in front of him. Operating Rule 814(a) requires on-track equipment to be prepared to stop within half the range of vision which Claimant here was unable to do. Hence, given Claimant's admission of responsibility, we must conclude that the Carrier proved the charges against Claimant by substantial evidence. However, under the particular circumstances of the case before us, we find that while the suspension imposed was reasonable, the penalty of permanent disqualification as a machine operator is excessive. Carrier shall reinstate Claimant's machinery operator's seniority unimpaired but without compensation for time out of service.

Claim sustained in accordance with the findings. Carrier is directed to make this Award effective within thirty days following the date two members of this Board affix their signatures thereto.


Richard K. Hanft, Chairman


D. L. Kerby
Carrier Member

 5/18/10
J. Dodd
Employee Member

Dated at Chicago, Illinois, April 6, 2010