

Award No. 66

Case No. 66

Carrier File MW-PO-79-23

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement Claim is made that Eugene Parker Foreman rights be restored of and that he be paid the difference between Extra Force Labor's Claim and Extra Gang Force Foreman's pay for all dates he is required to work at the lesser rate of pay, effective with October 23, 1979, and that he be paid for the 33 days' actual suspension which he lost, at his applicable rate of pay. Citing Rule 33 in support of this claim.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 1, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

On Tuesday, September 4, 1979, Claimant Eugene Parker, then an acting foreman, was responsible for the supervision and operation of Backhoe No. 50005 operating at approximately MP 573. During the course of the assignment, the aforesaid backhoe was struck by a N&W train. As a result thereof, under date of September 5, 1979 Claimant received notification which, in pertinent part, read:

"...You are hereby released from the service of the Norfolk & Western Railway Company...."

An investigation at the request of Organization was held on

September 25, 1979 and Claimant Parker was assessed thirty-three (33) days actual suspension and disqualified as extra gang foreman.

The transcript of the investigation discloses that Train No. 2XWP, a westbound coal train, had struck the backhoe. Claimant Parker was new to the area that he was assigned to. On September 4th, at approximately 9:00 AM Backhoe No. 50005 was operating under the supervision of Claimant. There was no injury to the operator; however, there was several hundred dollars worth of damage done to the backhoe.

Collier, the backhoe operator, testified that he was digging in the six foot per the instructions of the foreman and that a portion of his outrigger was approximately two feet from the south rail of the westbound track, near the edge of the ties while he was digging out the six foot. There was fog earlier in the morning, but at the time of the collision there was only approximately 1,000 foot of visibility, due to a right hand curve obstructing the straight ahead vision from the east.

Claimant under examination by Carrier's Officers acknowledged that he did not have a line-up of traffic in both directions in his possession. However, he testified that he did check the line-up for at least one of the directions. Claimant Parker acknowledged to Dennis J. Ahern, Assistant to the Division Engineer - Maintenance, Portsmouth, Ohio, that he had not spoken to the dispatcher prior to putting the backhoe out of the six foot fouling the westbound, that he did not have a line-up in his possession at the time of the incident, that the only thing he had was a line-up of eastbound train movements only.

Claimant was removed from service for violating a Norfolk & Western Operating Rule requiring a foreman to get permission from a dispatcher

prior to putting any piece of equipment on the tracks. Claimant, admitted that he never spoke to the dispatcher to request such permission.

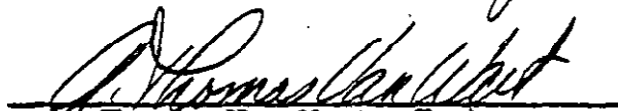
The Board has read the transcript which contains ample evidence to support the conclusion by Carrier of a rule violation by a qualified foreman. The discipline assessed was neither arbitrary nor capricious in view of the circumstances. Fortunately for all involved the damage to the backhoe was not that great, although substantial; the operator was unharmed, although he could have been killed. Claimant's disqualification does not appear on the record to be permanent and the Board can find no circumstances within the record that would warrant intrusion into the results for the well articulated reasons that permit the setting aside of discipline where it appears arbitrary, capricious or excessive.

On the record before us we are impelled to conclude that the claim must be denied.

AWARD Claim denied.


A. D. Arnett, Employee Member


E. N. Jacobs, Jr., Carrier Member


A. Thomas Van Wart, Chairman
and Neutral Member

Issued at Salem, New Jersey, May 6, 1982.