

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
DIVISION – IBT RAIL CONFERENCE	)	Case No. 129
	)	
and	)	
	)	Award No. 129
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER	)	
NORFOLK & WESTERN RAILWAY COMPANY)	)	

Richard K. Hanft, Chairman and Neutral Member  
Scott M. Goodspeed, Carrier Member  
Zachary J. Wood, Organization Member

STATEMENT OF THE CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. J. Battistini, issued by letter dated March 4, 2021, in connection with his alleged failure to properly perform his job duties when he operated a ballast regulator at an unsafe rate of speed that did not permit him to stop within half the range of vision, resulting in his machine striking parked equipment and damage to both machines and for allegedly having a personal electronic device powered on and on his person while operating on-track equipment on October 27, 2020 in the vicinity of Mile Post HP 29.5 was capricious, excessive, harsh and unwarranted (Carrier’s File MW-HARR-20-105-LM-954 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Battistini. shall now be immediately reinstated with all back pay, rights and privileges and that all charges be expunged from his record.”

FINDINGS:

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 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 a precedent in any other case.

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

Claimant in this dispute has approximately thirty-two years’ service with the Carrier and has no machinery accidents on his Career Service Record. On October 27, 2020 Claimant was operating a ballast regulator pursuant to his job assignment of Machiner Operator out of Abrams, PA. when his ballast regulator collided with a stationary tamper parked in the tangent of the track just outside of a right-hand five-degree curve. The Tamper Operator and Claimant both sustained lost time injuries as a result of the collision. Claimant in this matter was charged with failure to properly perform his duties when he operated the ballast regulator at an unsafe speed that did not permit him to stop within half the range of vision and with improperly having

a personal electronic device powered on and, on his person, while operating on-track equipment.

A formal investigation convened on February 23, 2021. Claimant was notified by letter dated March 4, 2021 that as a result of the findings from the investigation, he was dismissed from service.

The Organization filed the instant claim on Claimant's behalf on April 1, 2021 and after the claim being progressed on the property in the usual manner, up to and including being discussed in conference, the claim remains declined and is now properly before the Board for final adjudication.

It is indisputable that the collision occurred and Claimant clearly couldn't stop the ballast regulator within half the range of vision or he would have. The Carrier met its burden of proof concerning this charge.

The Claimant was also charged with having a personal electronic device powered on and, on his person, while operating on-track equipment. There are a couple of issues that stand out to the Board relative to this charge.

First, Claimant testified that he was off the machine and in the clear when he received a call on his cell phone. There were no witnesses produced by the Carrier to dispute the Claimant's testimony and so that charge was not proven by substantial evidence and cannot stand.

Moreover, according to this record it was Claimant's foreman who initiated a cell phone call to the Claimant when radio communication failed.

The Board therefore finds that only one of the two charges against Claimant was proven by substantial evidence. Where, as here, the quantum of discipline is bottomed on a finding of guilt on more than one charge, guilt on each of those charges must be proven because Carrier, it must be assumed, would not have found that level of discipline appropriate but for the guilt found on each of the charges.

For that reason, as well as consideration of Claimant's lengthy, unblemished Career Service Record, the Board directs the Carrier to commute Claimant's discipline to a thirty (30) day suspension with all further time out of service compensated and all commensurate service credit restored.

Award:

Claim sustained in part and denied in part. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.



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Richard K. Hanft, Chairman



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Scott M. Goodspeed, Carrier Member

Dated at Chicago, Illinois, October 20, 2022



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Zachary J. Wood, Employee Member