

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	
)	Case No. 86
)	
)	Award No. 86
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)	
NORFOLK & WESTERN RAILWAY COMPANY)	

Richard K. Hanft, Chairman and Neutral Member
Jed Dodd, Labor Member
D. L Kerby, Carrier Member

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

1. The Carrier’s discipline (dismissal) of Mr. M. Brown, issued by letter dated October 28, 2016, in connection with his alleged improper performance of duty, in that he failed to properly follow lockout/tag-out procedures prior to working on ballast regulator (BR98301KK) in order to make repairs to the ballast regulator machine located at Mile Post PC 144.7 in Shreve, Ohio at approximately 1:40 P.M. on September 19, 2016 was undeserved, inequitable, unbalanced, disproportionate, unjust, arbitrary and capricious (Carrier’s File MW-CHAR-16-07-ME-903 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant M. Brown shall receive the remedy allowed under Rule 30(d) of the Agreement.”

FINDINGS:

Public Law Board 6394, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedence in any other cases.

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 matter, a Roadway Equipment Repairman and his co-worker, a Ballast Regulator Operator, were approached on Monday, September 19, 2016 by the Division Engineer and Track Supervisor for the Pittsburgh District as they were beginning to perform work on the ballast regulator.

The Smoothing Gang consisted of the Foreman, who was providing watchman/lookout protection, the Tamper Operator, who was in the gang truck when the Division Engineer and Track Supervisor arrived and the Ballast Regulator Operator who was working with Claimant. Claimant had been sent to the gang to perform work on both the Tamper and Ballast Regulator.

When the Division Engineer and Track Supervisor approached the gang on the siding they approached the Foreman first, briefed with him and asked how the gang was protected. They then approached Claimant and his co-worker and asked the same question. The two workers knew that the Ballast Regulator had not operated since the previous Thursday and was de-energized. They informed the management officials that it was and had been de-energized over the weekend and that there was a lock on the battery box. The officials walked around to the battery box and found it locked with a general lock rather than with a group lockout device and each employee's personal safety lock.

The Carrier's Maintenance of Way and Structures Standard Procedure No. 195 concerns Lock-out/Tag-out Protection and provides in relevant sections:

2.01 MW&S Standard Procedures – LOCKOUT/TAG-OUT PROCEDURES

Lockout/Tag-out is required any time when:

- a) A machine which contains stored pneumatic, hydraulic, electrical, mechanical, chemical or thermal energy sources is serviced and/or maintained;
AND,
- b) There is the potential for energization or startup of machines or equipment or the release of stored energy which could cause injury to employees;
AND,
- c) An employee is required to by-pass a guard or other safety device; or
- d) An employee is required to put any part of his or her body into an area on a machine or other piece of equipment where work is actually performed upon the material being processed (point of operation) or

where an associated danger zone exists during a machine operation cycle.

“2.02 ...because the locks must be durable, standardized, substantial and identify the employee who uses them, they are red in color for repairmen and blue for operators, but all are keyed different for security. Tags must always be used whenever a lock is applied.”

“5.03 When service and maintenance are performed by groups of employees, primary responsibility must be vested in one authorized employee for a set number of employees under the protection of a group lockout device. The device must allow each authorized employee to affix his or her own personal lock-out/tag-out device to the group lock box when he or she begins work.”

The record reveals that no such personal locks nor group lock-out devices were being utilized in violation of Standard Procedure No. 195 when the Division Engineer and Track Supervisor checked the battery box, but rather, a common lock was securing it. Both men were later summoned to Division Headquarters and after revisiting and discussing what was witnessed, both employees were taken out of service.

Both employees were subsequently summoned to separate investigations. Both employees were found responsible for violating Standard Procedure No. 195. The Ballast Regulator Operator was given a thirty (30) day suspension, Claimant was dismissed. The Organization appeals the decision reached on the property.

The Organization first argues that Claimant did not receive a fair and impartial hearing in accord with System Discipline Rule No. 30 because he had an investigation that was two weeks later than his co-worker's and that the Carrier also called an “expert witness” that did not testify at the other employee's investigation.

The Board's review of Rule 30 – DISCIPLINE AND GRIEVANCES finds that Rule 30 provides neither a requirement that similarly charged employees must be investigated together nor any prohibition on who the Carrier may call as a witness.

Next, the Organization contends that the Carrier failed to meet its burden of proof because the Claimant and his co-worker had not actually commenced work, but were merely briefing on how they were going to proceed.

The transcript of the investigation provided the testimony of both supervisors who stated on the record that the men were working on the machine. The testimony of ADE Seatter is particularly telling when he testifies:

Transcript, Page 6, Line 26 – “They were working on the live side of the machine and they were in between the side box and the broom box, the wing, the side wing and the broom box, kind of tucked inside there. We pulled up and they stepped up and out.”

Compare that to Claimant’s testimony:

Transcript Page 49, Line 412 – “We were standing on the side of the machine on the rail side. I’m talking about the live rail side.”

Transcript Page 49, Line 417 – “Okay, so you’re standing, in your words, in the center of the machine? Mm-hmm.”

Transcript Page 49, Line 418 – “Near the turntable area? Mm-hmm.”

Transcript Page 52, Line 447 – “Okay, and the bottle jacks were in place at the time? I put one in place, yes sir.

Transcript Page 55, Line 473 – “And you had placed a jack there beneath the machine, in the gauge of the track, in the vicinity of the wings, just kind of central to the, to the machine mass? Mm-hmm.

Thus, it appears to the Board that the Carrier Officer’s testimony coincides with Claimant’s own recollection that he and his co-worker were working on the live side track near the center of the machine and that Claimant had placed a bottle jack in place in the gauge of the track central to the machine mass. We find no failure of Carrier to meet its burden of showing the employees were working on the machine and that it was required to be locked out in accord with Standard Procedure No. 195. When Claimant placed the bottle jack under machine in the gauge of the track he both placed a body part at the point of operation and subjected himself to the release of hydraulic and mechanical stored energy. The machine needed to be locked out.

Finally, the Organization insists that the discipline imposed is arbitrary and unwarranted. It submits that Claimant was no more culpable than his co-worker who was assessed a thirty (30) day suspension for the same incident and opines that stout arbitral principles prohibit the giving of decidedly unequal disciplines for what are substantially if not exactly equal offenses.

While the Organization objects to inequitable treatment in that both employees involved did not receive equal disciplinary penalties, nothing can be more inequitable than to ignore an employee's length of service, past record with the Carrier or prior record. Indeed, while an employee's past work record may not be considered in determining guilt of the charges brought against him, the Carrier may, and should consider mitigating and aggravating factors from an employee's past record in determining the appropriate discipline to assess.

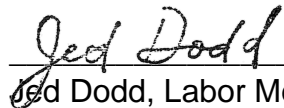
In this matter, Claimant had been back to work less than a year after this Board reinstated him after being dismissed for a similar safety-related rule violation. The Board strongly cautioned Claimant to comply with all safety rules in the future. Claimant failed to heed the Board's warning. The Board can find no basis to disturb the decision made on the property.

AWARD:

Claim denied.



Richard K. Hanft, Neutral Chairman



Jed Dodd, Labor Member



D. L. Kerby, Carrier Member

Dated at Chicago, Illinois November 21, 2018