

SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 214

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

CONSOLIDATED RAIL CORPORATION

(Conrail System Docket MW-0090D)

Statement of Claim:

Appeal of the discipline of dismissal assessed Machine Operator A. J. DeVivo in connection with the following:

“Failure to properly perform the duties of a Machine Operator and violation of Conrail Safety Rules 2.2; 9.8, Paragraph 5, 10.3.2; NORAC Operating Rules 104, Paragraph B, 104, Paragraph F; 800; 997 and Conrail Timetable No. 6, Special Instruction 405-1, in that at approximately 12:17 PM. Wednesday, February 14, 2007, you failed to ensure the hand operated switch at MP 6.95 at the Whitaker-Clark and Daniels Siding on the Port Reading Secondary had been properly lined and locked in the normal position for train movement after you operated and tied down Brush Cutter No. WC 2060 on the siding. This resulted in NS train 68Q operating into the siding and colliding with Brush Cutter No. WC 2060 and pushing the brush cutter into a building, causing extensive damage to equipment and property.”

Upon the whole record and all 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 transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

On June 23, 2008, the Board issued an Interim Award ordering the immediate reinstatement of the Claimant to his position as Foreman and employee. This Full Award outlines the basis of the Board's decision.

## **BACKGROUND**

A.J. DeVivo, the Claimant herein, entered the Carrier's service on November 22, 1974 as a trackman. On February 14, 2007, the Claimant was assigned as a Machine Operator in the North Jersey Shared Assets area. This matter concerns the propriety of the Claimant's responsibility following a collision between a freight train and a brush cutter which occurred on February 14, 2007, and the Carrier's action in dismissing the Claimant as a result of this event.

On the date in question, the Claimant was working as Machine Operator assigned to work with the brush cutter in conjunction with Foreman J. C. Armstrong and Trackman M. Piegaro. The brush cutter was tied down at the Whitaker-Clark and Daniels siding on the Port Reading Secondary. This territory is a Dispatcher Controlled System ("DCS") territory with no fixed signals. Movement on the track is controlled by a train dispatcher and movement on this territory must be made under Form D authority issued by the Train Dispatcher.

At approximately 8:58 a.m., Foreman Armstrong received Form D authority from the Train Dispatcher to allow the brush cutter to operate on the single track between CP Boundbrook and Center Street on the Port Reading Secondary. The brush cutter was tied down at MP 6.95 on the Whitaker-Clark and Daniels Siding, and was protected by a hand thrown switch which is required to be in the normal position – i.e. lined for track

movement on the main track when not in use. Foreman Armstrong advised the Claimant and Mr. Piegario of the Form D authority and threw the switch in order to allow the brush cutter onto the main track upon which Foreman Armstrong then threw the switch back to the normal position in order to allow the brush cutter to operate in an easterly direction and perform brush cutting in the area.

At approximately 12:00 Noon, the Track Supervisor called the Claimant and advised him to cease brush cutting, tie up the brush cutter on the siding and go to another location to sweep snow from the switches. The Claimant advised the Foreman Armstrong of these instructions and proceeded to operate the brush cutter west toward the siding. The Claimant then instructed Trackman Piegario to line and lock the switch. Trackman Piegario then lined the switch for the siding. Once the brush cutter had entered the siding, rather than returning the switch to its normal position in order to allow for safe train movement on the Port Reading Secondary, Trackman Piegario locked the switch lined for the siding. It is undisputed that neither Foreman Armstrong nor the Claimant personally observed the switch to insure that it was locked in the normal position. Foreman Armstrong thereupon cancelled the Form D with the Train Dispatcher at approximately 12:17 p.m., and reported that all switches were lined and locked normal.

At approximately 6:04 p.m. on February 14<sup>th</sup>, Norfolk Southern freight train 68Q received permission from the Train Dispatcher and was traveling east on the Port Reading Secondary. When the train approached MP 6.95, the Engineer noticed that the switch had been lined for the siding and not the secondary track thereupon placing the train in emergency in an attempt to stop the train. To no avail – the train struck the brush cutter and continued to push the brush cutter into a building owned by a local business. The head of the train continued into the building for 360 feet and derailed inside the building causing extensive damage to the equipment and to the building itself. There were no injuries or fatalities.

By Form G-250 dated February 27, 2007, the Claimant was notified to attend a hearing in connection with the charge as outlined in the Statement of Claim. The hearing was held on March 8, 2007 as scheduled after which the Claimant was advised on March 16, 2007 by Form G-32, Notice of Discipline that he was dismissed from the Carrier's service. The Organization took exception and the instant claim followed.

The Organization takes exception with the Carrier's action. In this regard, the Organization first asserts that the Claimant was not afforded his due process rights. In this regard, the Organization maintains that it was improper under Rule 27 (c) to take a statement from the Claimant prior to the hearing without his local representative being present. Following a careful review of the record, the Board finds that the Claimant gave a statement of his own free will and there is no indication that the Claimant ever requested Union Representation at the time he made his statement. Our reading of the Rule leads to the conclusion that it is the Claimant's responsibility to request Union representation. The fact that he failed to do so must result in our conclusion that the Claimant was afforded his due process rights.

Next, in addressing the merits of the Charges, we find that such Charges are supported by the record. However, the Board finds that while the Claimant must bear some responsibility for the mishap, he is not entirely culpable. In this regard, it is undisputed that while the Carrier knew that Trackman Piegara had only eight months of service and never obtained clearance nor was he NORAC Operating Rules tested, these relevant and important facts were never shared with either the Claimant or Foreman Armstrong by their Supervisor during the job briefing that preceded their assignment. The fact that the Claimant was never so informed lends credibility to his claim that had he known of Mr. DeVivo's deficiencies, he would surely have checked the switch to insure that it was in the normal position before reporting same to the Train Dispatcher. In addition, unlike the responsibilities held by Foreman Armstrong, the Claimant would have no responsibility in completing the SPAF Form. Moreover, at the hearing, Mr. Mingolla, who completed

the investigation of the mishap on the Carrier's behalf, testified that it was not the Claimant's responsibility in the first instance to lock, line and spike the switch – it was Mr. Piegaro's responsibility.

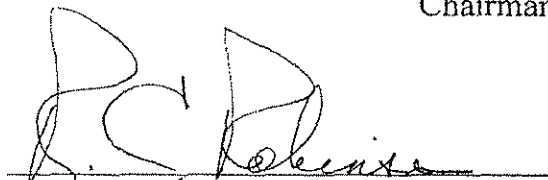
As to the penalty, the Board finds under the facts at hand that while the Claimant is deserving of some form of disciplinary action, his dismissal from service is not warranted. In reaching this conclusion, in addition to those reasons noted and discussed above, the record reflects the fact that the Claimant's over thirty-year record of service with this Carrier is devoid of any disciplinary action, and reflects that the Claimant has been a good-dedicated employee. Accordingly, as noted in the June 23, 2008 Interim Decision, the Claimant was to be reinstated to his position a Machine Operator. However, that period of time between his dismissal on March 16, 2007 and March 16, 2008 shall be considered as an unpaid disciplinary suspension. Accordingly, the Carrier shall pay the Claimant for all time lost between March 17, 2008 and the date of his reinstatement at his straight-time.

AWARD

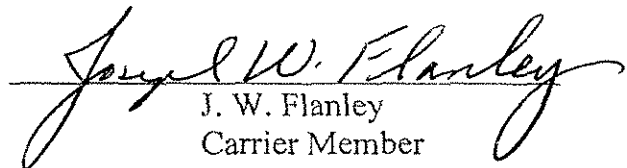
Claim sustained in accordance with the findings and conclusions noted above.

*Dennis J. Campagna*

Dennis J. Campagna  
Chairman and Neutral Member



R. C. Robinson  
Organization Member



J. W. Flanley  
Carrier Member

Dated July 31, 2008, Buffalo, New York