

SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 215

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

CONSOLIDATED RAIL CORPORATION

(Conrail System Docket MW-0091D)

Statement of Claim:

Appeal of the discipline of dismissal assessed Trackman M. Piegaro in connection with the following:

“Failure to properly perform the duties of a Trackman/Casual Driver and violation of Conrail Safety Rules 2.2; 9.8, Paragraph 5, in that at approximately 12:17 PM. Wednesday, February 14, 2007, you failed to properly line and lock the hand operated switch ast MP 6.95 at the Whitaker-Clark and Daniels Siding on the Port Reading Secondary in the normal position for train movement after Brush Cutter No. WC 2060 was operated and tied down in 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:

M. Piegaro, the Claimant herein, entered the Carrier's service on June 19, 2006 as a trackman. On February 14, 2007, the Claimant was assigned as a Trackman 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 Trackman assigned to work with the brush cutter in conjunction with Foreman J. C. Armstrong and Machine Operator A. J. DeVivo. 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 Machine Operator DeVivo and the Claimant 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 Machine Operator DeVivo 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. Mr. DeVivo advised the Foreman

Armstrong of these instructions and proceeded to operate the brush cutter west toward the siding. Mr. DeVivo then instructed the Claimant to line and lock the switch. The Claimant 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, the Claimant locked the switch lined for the siding. 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 14th, 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 and that the Claimant's dismissal from employment should not be disturbed. In reaching this conclusion, the Board found the following facts significant:

First, at the hearing held on March 8, 2007, Mr. Mingolla, who completed the investigation of the mishap on the Carrier's behalf, testified that it was the Claimant's responsibility in the first instance to lock, line and spike the switch.

Second, it is undisputed that the Claimant had operated switches in the past. Accordingly, the Claimant knew or should have known that the switch should not have been locked while it continued to permit movement into the siding. In this regard, it was obvious to any reasonable Trackman in the Claimant's shoes that with the switch left open for the siding, any subsequent movement would be directed into the siding.

Next, Mr. Mingolla, whose testimony the Board credits, noted that the Claimant was trained in the safety rules and therefore knew or should have known to spike the switch and that spikes were indeed available for that purpose.

Finally and most importantly, the Claimant made no attempt to ask questions of either Foreman Armstrong or Machine Operator DeVivo nor did he communicate with Foreman Armstrong as to the position of the switch after he locked it.

FINDINGS: The Agreement was not violated.

AWARD

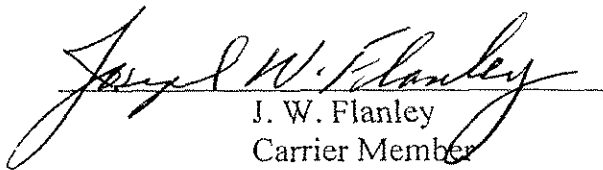
Claim denied.

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