

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 174

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of R. W. Roby requesting that he be paid for all time lost as a result of his dismissal following a May 15, 2008 formal investigation concerning improper performance of the duties of a Machine Operator in that the Ballast Regulator that he was operating collided with the Walking Spiker, which then caused a chain of subsequent collisions involving two additional machines on February 4, 2008.

(Carrier File MW-CN-08-06-SG-075)

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.

AWARD

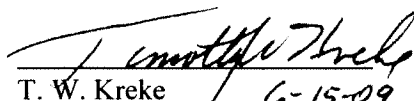
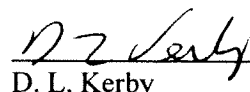
After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

On February 4, 2008, Claimant was operating a ballast regulator when he collided with a walking spiker and triggered a chain reaction with two Nipper Spikers. There is no dispute that the collision occurred. Claimant maintained that the ballast regulator's throttle stuck as he tried to take it out of gear, that when he applied the service brake the machine did not slow and that he finally turned the ignition off to stop the machine. The record, however, contained substantial evidence disputing Claimant's claim that the accident was caused by mechanical defects rather than Claimant's negligence. A manufacturer's representative coincidentally was at the scene investigating problems with a difference machine., He examined the ballast regulator after the accident and again on the following day and found no mechanical defects. Furthermore, Claimant had no trouble moving the directional travel lever out of gear to separate the machines and to drive the ballast regulator from the scene. Furthermore, the ballast regulator was observed to still be moving forward after the collision, thereby indicating that Claimant did not turn the ignition off until after the collision. Finally, the evidence established that had Claimant hit the emergency stop button, the machine would have stopped immediately, but Claimant failed to do so. We conclude that Carrier proved the charge by substantial evidence.

However, under the circumstances, particularly considering Claimant's almost 32 years of service, we find the penalty of dismissal to be excessive. Carrier shall reinstate Claimant to service with seniority unimpaired but without compensation for time out of service. Claimant shall be disqualified as a ballast regulator operator until such time as he may requalify.



M. H. Malin
Chairman and Neutral Member


T. W. Kreke
Organization Member
6-15-09
D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on May 30, 2009