

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1048

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION - IBT RAIL CONFERENCE)	Case No. 184
and)	
)	Award No. 184
NORFOLK SOUTHERN RAILWAY COMPANY)	
)	

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. L. Kerby, Carrier Member

Hearing Date: February 25, 2010

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The discipline imposed upon Mr. Andrew M. Tuggle [seventy-nine (79) calendar days suspension] and Mr. Zachary Winkler [sixty-four (64) calendar days suspension] in connection with improper performance of duty resulting in personal injury to employee Scott Howell on May 5, 2009 is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement (Carrier's File MW-FTW-09-20-LM-246 and MW-FTW-09-21-LM-247).
2. As a consequence of the violations referred to in Part 1 above, Messrs. Tuggle and Winkler shall have their record cleared of all charges and discipline and be made whole and paid for all lost time resulting from the improper suspensions."

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 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.

AWARD:

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

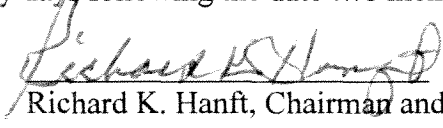
Both Claimants involved in this dispute were involved in performing the same task:


manually rolling a 50 foot section of rail off of the tie plates on a section of track. Claimant Winkler was actually rolling the rail with a rail fork, while Claimant Tuggle, the gang's assistant foreman, was acting as the safety lookout. Neither of the Claimants noticed a third member of the gang enter the danger zone just as the rail was being turned, resulting in the rail being rolled onto that employee's foot. Both Claimants were immediately taken out of service and notified ten days later on May 15, 2009, to report for a formal investigation on June 2, 2009. That investigation was postponed and not finally held until June 24, 2009, fully 50 days after the Claimants had been removed from service. The Organization strongly argues that Rule 30(a) requires an investigation to be held within 30 days of the first knowledge of the offense unless mutually agreed otherwise and that as a result of the delayed investigation Claimants here were unjustly withheld from service.


The hearing officer's decision was rendered two weeks after the investigation on July 8, 2009. Claimant Winkler was returned to work the next day on July 9, 2009 and Claimant Tuggle was returned to work 15 days later on July 24, 2009. Ultimately, Claimant Winkler was withheld from service for a period of 64 days and Claimant Tuggle for 79 days. The Organization contends that the time held out of service was excessive and the result of delay in handling the matter on the property.

We agree. While the technical violation of the Agreement is not sufficient to overturn the findings of the investigation, the failure to follow contractual time limits needs to be addressed. While the record is clear that the first proposed date for hearing needed to be postponed due to scheduling conflicts on the part of the Organization, alternative dates were offered and rejected. The record evidence further indicates that the Carrier had no intention of going forward with an investigation until the injured employee was returned to work and able to participate, causing the charged employees to remain on indefinite suspension. That, under Rule 30(a), is unacceptable without mutual consent of the parties. Further, it is evident that the delay in investigating this incident contributed to the length of the actual time each Claimant spent out of service. The Carrier is therefore directed to reduce the discipline assessed Claimant Tuggle to a 45-day actual suspension and to reduce the discipline assessed Claimant Winkler to a 30-day deferred suspension.

Claim sustained in accordance with the findings. Carrier is directed to make this Award effective within thirty days following the date two members of this Board affix their signatures thereto.


Richard K. Hanft, Chairman and Neutral Member
Dated at Chicago, Illinois, May 2, 2010


D. L. Kerby
Carrier Member
Dated: 6/18/10


T. W. Kreke
Employee Member
Dated: June 18, 2010