

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 211

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline [sixty (60) days actual suspension] of Mr. J. Duke issued by letter dated August 31, 2012 in connection with his alleged improper performance of duty as a foreman and violation of Norfolk Southern Safety and General Conduct rules in that on July 26, 2012 he failed to properly supervise and instruct his tie patch gang in Norfolk, Virginia resulting in a co-worker/member of his gang being placed in an unsafe situation, was arbitrary, capricious, unreasonable and in violation of the Agreement (Carrier's File MW-ROAN-12-32-LM-281).
2. As a consequence of the violation referred to in Part 1 above, Mr. Duke shall receive the remedy prescribed under Rule 30(d) of the Agreement."

Upon the whole record and all the evidence, after hearing, the Board finds 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 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:

The Claimant entered service for the Carrier on June 11, 1981 as a Painter Helper and was working as a Gang Foreman during the events which led to this case. On July 26, 2012, the Claimant was working as a Foreman for a Tie Patch Gang in Norfolk, Virginia. The Gang was installing rail track lines in the Lambert Point Yard. The Claimant was operating the breaks on a gauger-spiker machine and J.R. Carpenter was on the other side feeding spikes into the machine. Mr. Carpenter encountered some sort of trouble with his side of the machine, and as a result the Claimant applied the brakes and went over to the other side to help. In the process of troubleshooting the feeder mechanism several spikes

ended up underneath the live machine. There is a dispute about what happened next. The Carrier claims the Claimant then instructed Mr. Carpenter to pick up the spikes around and under the machine. As Mr. Carpenter was retrieving the spikes under the machine the Claimant stepped on to it and accidentally activated a switch that caused the machine to move. The Organization's version of events states that the Claimant was unaware Mr. Carpenter was picking up the spikes when the switch was accidentally triggered, and had in fact instructed Mr. Carpenter to only pick up the spikes later. Whatever the case, Mr. Carpenter – who was still near the machine at this time and was not expecting the movement – ended up with one of his fingers being rolled over by a wheel. The end result was that Mr. Carpenter's left finger was amputated up to the first joint.

In the course of its initial investigation into these events, the Carrier's officials received what it alleges were conflicting statements from the Claimant. At first the Claimant stated he would never instruct an employee to retrieve spikes under a live machine as it was unsafe. Later, the Claimant stated he had instructed the employee to pick up the spikes while knowing the machine was live. As a result of the later statement the Carrier removed the Claimant from service and conducted a formal investigation including a hearing on August 25, 2012. The Carrier charged the Claimant with conduct unbecoming an employee due to his actions as Foreman. The Carrier found the Claimant guilty on August 31, 2012 and disciplined him with a 60 day suspension.

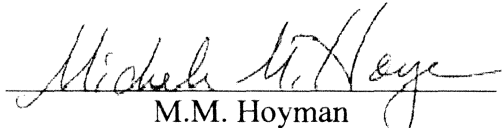
The Carrier's view is that the Claimant clearly acted improperly in his role as Foreman. It dismisses the Organization's argument that the Claimant did not give an unsafe order by noting the Claimant's direct testimony to the contrary which is corroborated by what Supervisor Taylor testified the Claimant told him in his initial investigation (see Carrier Brief, page 5). The Carrier notes the Claimant's conduct is a clear violation of General Conduct Rule J, which prohibits employees from performing actions that will "jeopardize their own safety or the safety of others." The Carrier also argues that in asking the Claimant to pick up the discarded spikes he was effectively changing Mr. Carpenter's job, and a job safety briefing is required whenever a job changes. Mr. Carpenter clearly did not receive a job safety briefing as required. Additionally, the Carrier notes there is clear evidence that the Claimant made different statements about his role in this incident and whether or not he instructed Mr. Carpenter to pick up the discarded spikes (see Carrier Brief, page 9). For these reasons, the Carrier argues the 60 day actual suspension was both appropriate and warranted.


The Organization objects to the discipline on both procedural and substantial grounds. In terms of procedure, it argues that the Carrier (1) did not provide the "precise charges" against the Claimant, (2) denied the Organization advance access to materials it used against the Claimant in the investigation, and (3) assigned a Hearing Officer who was biased because he failed to answer questions regarding his qualifications to serve in that role (see Organization Brief, pages 7-10). On substantive grounds, the Organization argues that the Carrier failed to meet its burden of proof. It notes the Carrier's argument is that the Claimant ordered Mr. Carpenter to pick up the spikes immediately, but the Claimant testified that he did not instruct Mr. Carpenter to pick up the spikes while the machine was live (see Organization Brief, page 13). As Mr. Carpenter's testimony

reflects that he could not remember with any specificity what he was actually told by the Claimant (see Transcript, pages 38-40), there is no evidence to support the Carrier's version of events. The Organization further argues there is insufficient evidence to establish that any conflicting statements were made, as all evidence for that claim was made by a single supervisor (see Organization Brief, page 15). The Organization concludes that the Carrier failed to meet its heightened burden of proof (a standard required because the allegations involve dishonesty). As such, and particularly in light of the Claimant's extensive record of service, the suspension was not appropriate.

The Board finds that the case record is unclear as to exactly what version of events is correct. Ultimately, however, it does not matter whether the Claimant's order to Mr. Carpenter to pick up spikes was given with immediate effect or was given but with the qualifier to wait until the machine was not live. In either case, we find that the Claimant did not appear to take action to prevent the accident. For example, the Claimant did not appear to be watching closely enough to do something like asking Mr. Carpenter to back away from the machine. We have carefully weighed the Claimant's actions in this case against his long record of service with the Carrier. Overall, we find that the sixty day suspension was too severe, and should be reduced to a 30-day suspension.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member


D. Pascarella
Employee Member


D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on June 20, 2013.