

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 212

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

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

1. The Carrier's discipline [forty-five (45) days actual suspension] of Mr. K. Via issued by letter dated August 12, 2012 in connection with alleged violation of Norfolk Southern Safety and General Conduct Rules and improper performance of duty in that he pitched a rail spike into the air without ensuring that the surrounding area was clear on July 18, 2012 was arbitrary, capricious and an abuse of the Carrier's discretion (Carrier's File MW-ROAN-12-28-LM-263).
2. As a consequence of the violation referred to in Part 1 above, Mr. Via shall be immediately paid for all time lost with seniority, vacation and all other rights unimpaired."

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 July 11, 2005 as a Trackman and was working as an Assistant Foreman during the events which led to this case. On July 18, 2012 the Claimant was repairing a track after a derailment at the Roanoke Material Yard in Roanoke, Virginia. The Claimant was putting rail spikes in place so that a different employee could use a hydraulic spiker to drive the spikes into new rail ties. While placing a rail spike the Claimant noticed it was bent and threw it behind him towards a spike bucket without looking around to make sure the area was clear.

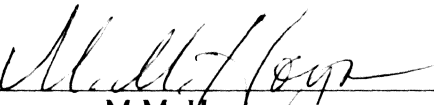
Trackman Bowles was behind the Claimant and was hit in the face by the rail spike. The impact caused a laceration which required eight stitches. Due to these events, the Carrier charged the Claimant with improper performance of duty in his position as Assistant Foreman and held an investigation including a hearing on August 8, 2012. The Carrier found the Claimant guilty of the charges and assessed a discipline of 45 days actual suspension via letter on August 22, 2012.

It is the Carrier's position that the Claimant is clearly guilty of the charges because he admitted to blindly throwing the spike at the hearing (see Transcript, page 24) and in his written statement of the incident. The facts were additionally confirmed by the testimony of multiple employees. The Claimant's conduct is a violation of the Carrier's General Conduct Rule J, which provides in part that "Employees must not do any work in a manner that will jeopardize...the safety of others...." (see Carrier Brief, page 4). As the testimony of the witnesses at the investigation showed that the Claimant's actions were obviously unsafe and were directly responsible for the injury sustained by Trackman Bowles, the discipline assessed was appropriate and proportional to the offense.


The Organization notes that the basic facts in this case are not in dispute, but it argues that the Carrier's assessed discipline is disproportionate to the infraction. Before this incident the Claimant had no previous disciplinary action in his 7 years of service with the Carrier. Additionally, the Claimant did not intend to harm Trackman Bowles and did not believe at the time that his actions would hurt anyone. The Organization argues these facts along with the Claimant's forthrightness about the incident should be considered as mitigating circumstances. The Organization contends that what it characterizes as mitigating circumstances demonstrate the Carrier did not have sufficient just cause to assess the 45 day actual suspension as discipline. Instead, the Organization characterizes the instant case as being used by the Carrier as a pretext to another case before this Board involving the same Claimant which resulted in dismissal.

In considering this case, the Board takes note that the discipline of a 45 day actual suspension was reduced from a dismissal when it was handled on property. The facts are not in dispute – the Claimant threw a spike without looking behind him and caused a safety hazard in the process that caused significant harm to another employee. Regardless of the Claimant's intent and forthrightness about the incident, the events in this case represent a serious breach of the Carrier's safety rules. As an Assistant Foreman there is an expectation that the Claimant should understand the importance of adhering to the Carrier's safety policies and govern himself accordingly while working. However, the Board finds while some discipline in this case was appropriate a 45 day actual suspension was excessive. The discipline shall be reduced to a 30 day actual suspension.

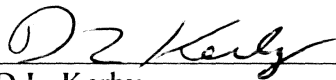
The claim is partially sustained.



M.M. Hoyman
Chairperson and Neutral Member



D. Pascarella
Employee Member



D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on May 9, 2014.