

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 230

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 (dismissed from all services with Norfolk Southern Railway) of Mr. J. Rayder issued by letter dated August 17, 2012 in connection with his alleged improper performance of duties concerning a collision between machines while he was tramming one of them near Mile Post M261.3 at Geneva, Georgia on July 16, 2012 was arbitrary, capricious, unjust, unwarranted, unreasonable and in violation of the Agreement (Carrier's File MW-ATLA-12-33-SG-260).
2. As a consequence of the violation referred to in Part 1 above, Mr. Rayder shall receive the remedy prescribed under Rule 40(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 in this case entered service for the Carrier on April 13, 2004 as a Roadway Laborer and on the dates of the event which lead to this case was working as a Machine Operator. On July 16, 2012 the Claimant was working on a cribber adzer machine on the Carrier's R-11 rail gang. After completing work for the day, the gang was tramming when they approached a road crossing at MP M261.3. A private vehicle entered the road crossing and then, upon noticing the oncoming machines, tried to reverse direction while stopped in the middle of the crossing. A multicrane machine was unable to stop and collided with the private vehicle. The claimant, who was behind the multicrane, was unable to apply brakes on his machine in time to prevent a collision with

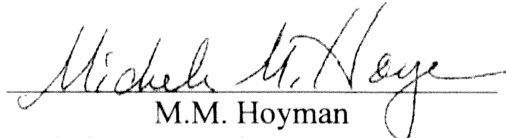
the multicrane. This resulted in an accident that caused a material amount of damage to the multicrane's electrical components. As a result of these events the Carrier removed the Claimant from service on July 20, 2012 on charges of improper performance of duty related to the collision. The Carrier held a formal investigation including a hearing on August 2, 2012. The Carrier concluded the Claimant was guilty and dismissed him from service via letter dated August 17, 2012.

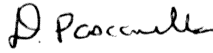
The Carrier's position is that the Claimant is clearly guilty of violating Operating Rule 814, which requires all employees to be able to stop vehicles within half the range of vision. The Carrier notes that the Claimant testified that he was both an experienced operator of his machine and was well aware of Operating Rule 814, as his work team reviewed it every morning. The Carrier also notes that there is no evidence that the machine's brakes were faulty. The Carrier acknowledges there may have been hydraulic oil on the rail, but points out that Operating Rule 814 requires employees to be aware enough to notice such conditions and adjust their speed downward (see Carrier Brief, page 5). The Carrier notes that the safe operation of machines is an essential part of a Machine Operator's duties, and cites numerous awards noting that such conduct constitutes a form of negligence that easily rises to the level of warranting dismissal (see Carrier Brief, pages 8-9).


The Organization's position is that the Carrier has failed to meet its burden of proof regarding the Claimant's alleged negligence. In support of its position the Organization notes: (1) the Claimant was travelling at 5MPH during the incident, (2) the Claimant applied brakes immediately when the multicrane stopped, (3) the structure of the machine the Claimant operates makes it difficult to have an unobstructed view of what is in front of it, and (4) the rail was slick with oil and sloping downward, which made it difficult to stop (see Organization Brief, pages 6-7). The Organization also points out that the mere occurrence of an accident does not mean a rule violation has occurred, and cites numerous awards (for example NRAB 3rd Division Awards 16166 and 30849) in support of this position. The Organization finally contends that even if Claimant has committed some sort of violation, the penalty of dismissal is unwarranted given the circumstances of the case (see Organization Brief, page 11).

In reviewing the record the Board finds that there is sufficient evidence to suggest that the Claimant violated portions of Rule 814. However, we find that there are substantial mitigating factors in this case. First, there is no dispute in the record that the Claimant applied his brakes immediately upon seeing that the multicrane had stopped. Second, there is no dispute in the record that there was oil on the tracks which made it more difficult to stop. Third, the view from the Claimant's machine was obstructed. These mitigating factors do not excuse the Claimant's actions, but they do demonstrate that the level of negligence herein does not rise to a point which warrants dismissal. The Claimant is to be reinstated. We award partial back pay, starting from six months after the Claimant was dismissed and ending on the date he is reinstated by the Carrier.

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.