

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 231

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. C. Floyd issued by letter dated August 17, 2012 in connection with his alleged improper performance of duty when, while tramming a machine, he failed to be prepared to stop short of the road crossing at Mile Post M261.3 in Geneva, Georgia and collided with a private motorist, resulting in damage to the motorist's vehicle was arbitrary, capricious, unjust, unwarranted, unreasonable and in violation of the Agreement (Carrier's File MW-ATLA-12-34-SG-261).
2. As a consequence of the violation referred to in Part 1 above, Mr. Floyd 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 October 1, 2007 as a Railroad Laborer and was working as Machine Operator on the date of the events which led to this case. On July 16, 2012 the Claimant was operating a multicrane machine on the R-11 rail gang. After completing work, the R-11 gang was tramming near road crossing MP M261.3. A private vehicle stopped at the railroad crossing and attempted to reverse course when it saw the oncoming machines. The Claimant applied his breaks but the machine did not stop in time, resulting in a collision with the private vehicle. There was no damage to the Claimant's machine, but there was moderate damage to the private

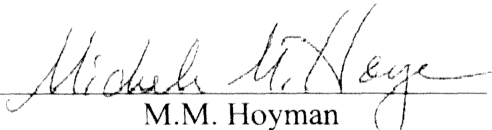
vehicle. As a result of this event the Carrier charged the Claimant with improper performance of duty. The Claimant was removed from service pending investigation via letter on July 20, 2012. The Carrier conducted a formal investigation including a hearing on August 2, 2012. The Carrier found the Claimant was guilty of the charges and dismissed him from service via letter on August 17, 2012.

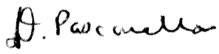
The Carrier's position is that the Claimant is clearly guilty of improper performance of duty in that he violated Carrier rules 814 (requiring all operators to be prepared to stop within half the range of vision) and 815 (requiring all operators to be prepared to stop and not enter a crossing until it is known to be clear). In support of this position the Carrier notes the Claimant was aware of these rules and they had been reviewed before work on the morning of the collision, as supported by the testimony of the Claimant and his supervisor (see Transcript, pages 11 and 42). Given that the Claimant was a qualified machine operator and that there was no evidence of the brakes on the machine being faulty, the Claimant should have stopped in time to avoid a collision (see Carrier Brief, page 5). The Claimant himself admits he violated rules 814 and 815 (see transcript, page 44), although he also testified that he thought he would be able to stop in time. The Carrier refutes the Claimant's justification by noting his testimony that his decision to stop was based on an assumption that the vehicle would continue through the crossing (see Transcript, page 40).

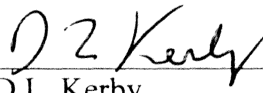
The Organization's position is that the Carrier failed to meet its burden of proof in demonstrating that the Claimant's conduct rose to a level that was appropriate for dismissal. Instead, the Organization argues that the Claimant's actions demonstrate that he was performing his duties in accordance with Carrier rules. The Organization's argument is based on the contentions that: (1) the Claimant's machine was going approximately 5MPH at the time leading up to the collision, (2) the Claimant applied his brakes within half the range of vision as required by Carrier policy, (3) the Claimant's focus was directed elsewhere as he had to continuously check the mirrors on the machine and the front camera, and (4) the Claimant applied the brakes as soon as the car stopped in the middle of the crossing. For all these reasons, the Organization argues there was no realistic way to avoid a collision due to the circumstances in the case. Additionally, the Organization notes that the occurrence of an accident in and of itself is not enough to establish misconduct on the part of the Claimant.

In reviewing the record the Board finds that there is sufficient evidence to suggest that the Claimant violated portions of Rule 814 and 815. However, we find that there are substantial mitigating factors in this case. First, there is sufficient evidence in the record to support that the Claimant applied his brakes immediately upon seeing that the private vehicle had stopped in the middle of the crossing. Second, there does not appear to be any intentional disregard for the Carrier's rules. The Claimant admitted he was in violation of Rules 814 and 815 but testified that he thought he would be able to stop in time. These mitigating factors do not excuse the Claimant's actions, but they do demonstrate that the level of misconduct 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.