

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 197

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 dismissal of Machine Operator T.A. Doss, Jr. for violation of Norfolk Southern Corporation's Operating Rule 814 in that he was operating Ballast Regulator BR-070113BX and failed to stop short of backup Tamper ET-89538SC resulting in a machine collision at Mile Post N451.7 in Vulcan, WV on September 8, 2010 is unjust, unwarranted, excessive and in violation of the Agreement (Carrier's File MW-BLUE-10-21-SG-350).
2. As a consequence of the violation referenced in Part 1 above, Mr. Doss shall be granted the remedy in accordance with 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 seniority date of the Claimant as a Trackman was February 14, 1995. The Claimant had an accident while working as a Machine Operator on Ballast Regulator BR-070113BX on September 8, 2010. His machine collided with the rear end of Backup Tamper ET89538SC. This led to him being written up for a violation of Rule 814 and removed from service. On the day of the incident the Claimant was on the S-6 Gang near Vulcan, West Virginia operating a Ballast Regulator which is a very large machine on the track with hydraulic arms that have plows on the end. This machine is often used in close proximity with a Tamper which compresses the ballast and gets it ready for the Regulator to come next. The morning of the incident the two gangs were "leapfrogging" which is

the practice of a smaller surfacing gang working ahead of the Claimant's rear gang. The Claimant was at the tail end of the second gang, staying behind to clean up a switch. After he finished that, he proceeded down the track at MP 451.6.

While moving the machine the Claimant lost control and quickly radioed the Tamper man ahead of him that he could not stop, after putting on the brake and other emergency measures. The Claimant's machine pushed the cart about 20 feet. Supervisors Harriston and General Supervisor Work Equipment J. Bailey inspected the Claimant's Ballast Regulator after the accident and everything was found to be in good working order. Operating Rule No. 814 is clear about the obligations of the equipment operator. The Claimant was aware of the rule. In addition, the Claimant had been qualified as a regular operator of this machine for more than four months before the accident.

The provisions of Rule 814 "Speed of On-Track equipment" are as follows:

- A. On-track equipment must at all times be prepared to stop within half the range of vision.
- B. Passenger type Hi-Rail inspection vehicles must not exceed 35 mph. Other on-track equipment must not exceed 30 mph.
- C. Speed must be adjusted when stopping distance is affected by conditions, such as grade, load or rain, frost or grease on the rail.
- D. Care must be taken to avoid striking anything lying on or across the rail.

Supervisor Harriston sent the Claimant a letter dated September 10, 2010 that the Claimant was removed from service pending an investigation. The formal investigation occurred on October 6, 2010, after which the Hearing Officer concluded that the Claimant was guilty of violating Rule 814. The Organization filed a grievance on behalf of the Claimant and it was denied.

The Carrier's position is that the evidence is clear that the Claimant was not paying sufficient attention which is why he could not stop. The Carrier refutes several defenses of the Claimant's accident: (1) the presence of grease on the rail, (2) the inadequate briefing by the supervisor before the assignment, (3) the condition of the brakes, and (4) the differential treatment of this Claimant compared to other first accident offenders who get only a suspension. The grease on the rail is immaterial according to the Carrier as a careful operator should be able to handle that situation. The evidence was clear that the brakes were checked out before the outset of the assignment according to the Carrier. Finally, the Carrier asserts that every case is handled on a case by case basis and thus it is the employer's discretion whether to grant waivers. In addition the Carrier cites the following cases in support of the notion that safety is of paramount importance: 3 NRAB Award 14066 BMWED v. ATSF (Rohman), 3 NRAB Award 10880 BRS v. FEC (Boyd), 3 NRAB Award 30016 BMWED V. CSXT (Mason), and finally 3 NRAB Award 9444 BRS v. KCS (Bernstein).

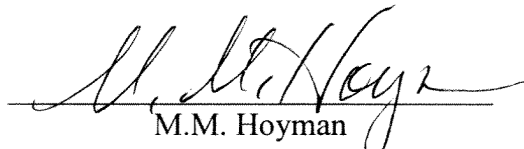
The Organization points out that prior to the accident the Claimant had been an employee of the company for 15 years (Transcript page 7). The Organization admits that there was no real doubt about what happened, as the Claimant's in his testimony even admitted responsibility:

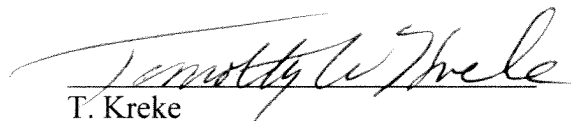
"Most definitely the accident should have been prevented on my part. I done everything I know how to do. Didn't want an injury to happen was my biggest thing in notifying Dave so he could at least try to get out of the way and brace for an impact. That was my biggest concern. You know other than that I really don't have much." (Transcript pages 46-47)


Concurrently, the Organization points out that the Claimant took every measure to prevent the accident (Transcript page 34). In addition, the Organization argues that it does not think that the violation of the rule merits dismissal. The union cites NRAB Second Division Award 6234 and Third Division Award 19037, the first of which held that discharge is the industrial equivalent of capital punishment and the second of which argues that the purpose of discipline is rehabilitation, not punishment. The Organization further points to a recent on-property award, Award 214 of SBA 1049, involving similar factual circumstances to the instant case, where it was ruled that dismissal was too severe for the infraction.

The Board is cognizant of the importance of adhering to safety rules and understands that – in many cases – violations of safety rules rise to a level so egregious that they warrant dismissal from service. However, we do not find that the circumstances in this case support dismissal. The Claimant took responsibility for his actions and the record shows he was highly concerned about the safety of his fellow employees. Except for this incident, the Claimant otherwise has a good work record and notable amount of seniority with the Carrier. In this case, dismissal is not appropriate for the offense and not in accordance with progressive discipline. As such, the Board reinstates the Claimant with all seniority restored, but without back pay.

The claim is sustained in part.


M.M. Hoyman
Chairperson and Neutral Member


T. Kreke
Employee Member


D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on February 10, 2012.