

**SPECIAL BOARD OF ADJUSTMENT NO. 1048**

**AWARD NO. 146**

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-CHAR-04-03)

Statement of Claim:

Claim on behalf of R. C. Allen for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on December 16, 2004, in connection with his improper performance of duties concerning a collision between Company Vehicle #300504 which he was driving, and a private vehicle on November 7, 2004, at Route 24, Moberly, Missouri, as well as his waiting to report this incident on the following day, not using the Company radio to advise of the accident and not obtaining the necessary information regarding the other vehicle and driver, in accordance with the Highway Vehicle Operator's Manual.

Upon the whole record and all the evidence, after hearing, the Board finds that 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 a precedent in any other case.

**AWARD**

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

## **BACKGROUND**

R.C. Allen, the Claimant herein, entered the Carriers' service on May 19, 1980, and was working as a Roadway Equipment Repairman on Sunday, November 7, 2004<sup>1</sup>, the date of the incident giving rise to his ultimate termination. The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

The record evidence shows that on November 7<sup>th</sup>, the Claimant was operating a Company Vehicle on a two-lane road located in Moberly, Missouri. Upon approaching a private vehicle, the Claimant chose to pass this vehicle on the right side by driving onto the shoulder of the highway. As the Claimant did so, the driver of the private vehicle attempted to make a right hand turn onto a side road. Claimant's vehicle struck the passenger side of her vehicle. Claimant then veered further to the right causing the Company Vehicle to strike an embankment. No serious injuries occurred, and total damage to the Company Vehicle amounted to \$13,464. The Missouri State Police reported to the scene of the accident and completed a post-accident report assessing the Claimant's actions as the proximate cause of the mishap. The Carrier was first made aware of the accident on Monday November 8<sup>th</sup> between 7:00 and 7:15 a.m. In this regard, the Claimant did not acquire sufficient information about the incident, the other vehicle and its driver on the date of its occurrence, but admittedly awaited completion of the State Police Report from which he gathered this information on November 8<sup>th</sup>.

Subsequent to the Carrier's discovery, the Claimant was directed to attend a formal investigation, which was held on December 16<sup>th</sup> in connection with his improper performance of duties concerning the foregoing collision that occurred on November 7<sup>th</sup>. By letter dated December 30<sup>th</sup> the Hearing Officer, following his review of the transcript together with evidence admitted at the formal investigation, determined that the Claimant was guilty of the charge, and advised the Claimant that he was dismissed from the Carrier's service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

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<sup>1</sup> All dates noted herein occurred in calendar year 2004 unless otherwise noted.

DISCUSSION

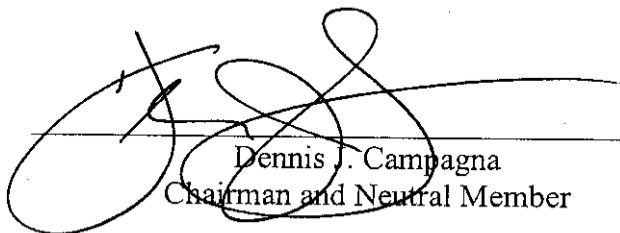
Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

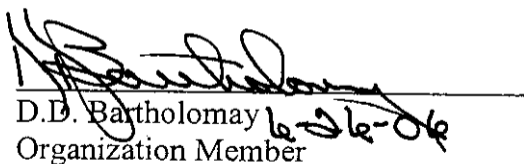
Facts gathered from the investigation, as well as the Claimant's own admission, established that the Claimant, while operating his Company Vehicle improperly performed his duties as a Repairman when he attempted to improperly pass a private vehicle on the right shoulder of the highway, and in the process, struck the vehicle as it attempted to make a proper right hand turn onto a side road. The Hearing Officer also determined that the Claimant failed to take the necessary and required action to report the accident to his supervisor until the following day, and at that time, demonstrated that he could not provide sufficient details regarding the other vehicle or its driver, thereby failing to "immediately" report the accident to his supervisor as required by HV-1. The Hearing Officer also rejected the Claimant's claim that he attempted to contact two supervisors on their cell phones since there was no record that the Claimant made either of these two calls.

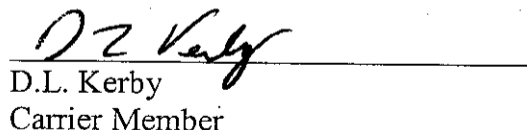
Turning now to the discipline sought to be imposed, it is well established arbitration precedent that the penalty sought to be imposed by an Employer will not be disturbed so long as it is not arbitrary, capricious or discriminatory. In the instant matter, while the record evidence reveals that the Claimant had amassed a disciplinary record over his tenure with the Carrier that included four letters of warning for various infractions, discipline of 10-days deferred, 15-days actual, 30-days actual, and 90-days actual suspension periods, as well as one previous dismissal followed by reinstatement without back pay, the record also shows that the Claimant had given the Carrier approximately 24 years of dedicated service at the time of the incident.

**CONCLUSION**

While the Investigation revealed that the Claimant engaged in an action that could very well warrant his termination from service, it is also clear that when fashioning an appropriate penalty, absent an egregious incident, not present here, the Claimant's length of service as well as his past disciplinary record must be considered. And when so considered, the Board finds, with particular emphasis on his length of service and the lack of egregious conduct, that the penalty of dismissal from service is excessive. Accordingly, the Carrier is ordered to reinstate the Claimant to service, with seniority and benefits unimpaired, but without compensation for the time held out of service. However, let this decision serve as formal notice to the Claimant that he is on "thin ice", and accordingly, if he has any hopes of continuing his employment with this Carrier, he is duty bound to follow all Rules, Regulations and Procedures promulgated by the Carrier for the efficient and safe operation of its business as well as the general welfare of all its employees.

  
Dennis J. Campagna  
Chairman and Neutral Member

  
D.D. Bartholomay  
Organization Member

  
D.L. Kerby  
Carrier Member

**Dated June 11, 2006, Buffalo, New York**