

SPECIAL BOARD OF ADJUSTMENT 1048

CASE NO. 152

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier's File: MW-GNVL-05-08-SG-242)

Statement of Claim:

Claim on behalf of R. Yorker, Jr. for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for time lost as a result of the dismissal assessed, following a formal investigation held August 17, 2005, concerning his improper performance of duties as a Machine Operator in that the SLM 88129 he was operating collided with the rear of SP8606F at approximately 3:15 p.m. on July 12, 2005, near Delphi, Indiana, at milepost D-236.7.

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. Yorker, Jr., the Claimant herein, entered the Carrier's service on February 17, 2004 as a Laborer on the T&S Gang. On July 12m 2005, the Claimant was regularly assigned as a Spike Loading Machine Operator when his machine collided with the rear of a Spike Puller Machine operated by another employee. The instant matter concerns the propriety of the Claimant's performance in the

operation of the Spike Loading Machine and the Carrier's decision to terminate the Claimant's service as a result of his negligence as the proximate cause of the collision.

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.

At the investigation, the Carrier sustained its burden of proof by establishing, through substantive credible evidence, including the Claimant's own admission, that the Claimant improperly performed his duties as a Machine Operator in that he rear-ended the Spike Puller being operated directly in front of him. The record establishes that while moving forward, the Claimant was looking down watching the travel pedal as he pumped it and not paying attention to the distance between his machine and the Spike Puller being operated directly in front of him. As a direct result of this collision, the operator of the Spike Puller was thrown from his seat onto the ground and required medical attention. It was further established that the Claimant failed to maintain a twenty-five (25) foot distance between machines as he operated his Spike Loading Machine as he was instructed, at that he failed to comply with Operating Rules 814 and 815.

Turning now to the discipline sought to be imposed, the Board finds that while the Claimant was negligent, he quickly admitted his error, acknowledged his violation of the Carrier's Rules, and was contrite in his approach to the situation. While the Board recognizes that safety is paramount in the railroad industry, and that the Carrier has every right to have a "zero tolerance" policy for careless and negligent acts, we find that while the Claimant was negligent, he was not grossly negligent. In this regard, Arbitrators generally consider "negligence" to be the failure to do what a reasonably prudent employee would have done, or not done, under the same or similar circumstances.

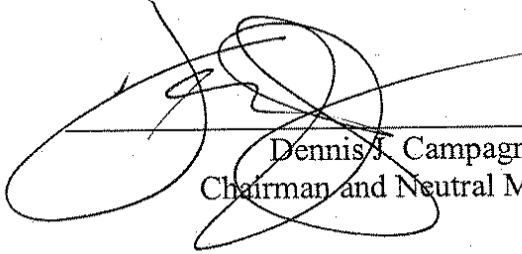
"Carelessness" is the absence of ordinary care and is often used to describe poor or substandard work performance that did not result from errors in judgment. These cases are normally analyzed as unsatisfactory performance and subject to the ordinary steps of progressive discipline. By contrast, "gross negligence" denotes intentional or willful acts or omissions, in flagrant or reckless disregard

of the consequences to persons or property. In cases of gross negligence, the act or omission by the employee often justifies termination, even for a first offense.

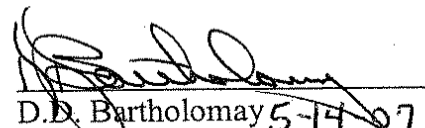
Given the foregoing unique facts and circumstances in this matter, and without setting a precedent for future cases which must be decided on their own merits, the Board finds that the Claimant's actions, while clearly improper, were more in the nature of ordinary negligence and/or carelessness, and accordingly, that a more fitting and appropriate discipline is the Claimant's reinstatement to service without back pay. The Claimant's time off without pay shall be regarded as an unpaid disciplinary suspension. In addition, and as a condition to his reinstatement, the Board finds that the Claimant must forfeit his Machine Operator's Seniority, and that there shall be a six (6) month ban from the Claimant's date of reinstatement before his eligibility to bid in order to reinstate his Machine Operator's Seniority.

CONCLUSION

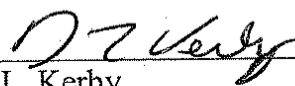
The Claim is sustained in accordance with the findings and conclusions noted and discussed above.



Dennis J. Campagna
Chairman and Neutral Member



D.D. Bartholomay 5-14-07
Organization Member



D.L. Kerby
Carrier Member

Dated April 27, 2007, Buffalo, New York