

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 210

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 Carrier's discipline (dismissed from all service with Norfolk Southern Railway) of Mr. B. Martin, issued by letter dated August 1, 2012 in connection with his alleged improper performance of duty as a machine operator and violation of Norfolk Southern Safety and Operating Rules on June 28, 2012 when he failed to give his full attention to his duties and the ballast regulator that he was operating collided with a tamper, causing damage to both machines was arbitrary, capricious and an abuse of the Carrier's discretion (Carrier's file MW-ROAN-12-27-SG-249).
2. As a consequence of the violation referred to in Part 1 above, Mr. Martin shall receive the remedy prescribed under 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 Claimant entered service for the Carrier as a Track Laborer on August 29, 2010 and subsequently established Machine Operator seniority on December 14, 2010. At the time of the events which led to this case, the Claimant was a Ballast Regulator Operator on the TS-20 Timber and Surfacing Gang. On June 28, 2012 the Claimant was operating the Ballast Regulator and was instructed along with other Machine Operators to go to a point on the track to refuel the machines. The Claimant arrived at the designated refueling point first, followed by Assistant Gang Supervisor Bedwell who was acting as a Tamper Operator. Assistant Supervisor Bedwell stopped his machine approximately 40

feet behind the Claimant's machine, which he announced via radio. The Machine Operator behind Assistant Supervisor Bedwell's machine also confirmed the Tamper was stopped over the radio. After the Claimant's machine had been refueled, he proceeded to back up the Ballast Regulator without any radio warning. The Claimant testified he did use the machine's horn, but there is a dispute about this in the record. The Claimant collided with Assistant Supervisor Bedwell's machine. The parties dispute the magnitude of the damage – the Carrier characterizes it as significant and the Organization states it was minor. Due to these events, the Carrier removed the Claimant from serving pending a formal investigation including a hearing on July 18, 2012. The Carrier charged the Claimant with failure to properly perform the duties of a Machine Operator. The Carrier found the Claimant guilty and dismissed him from service via a letter dated August 1, 2012.

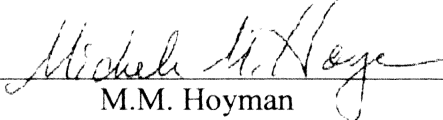
The Carrier argues the case record clearly establishes the Claimant's guilt, including that he was familiar with Operating Rule 815 which requires Machine Operators to be aware of their surroundings to avoid collisions. The Carrier notes the failure of awareness in this case is particularly egregious as the Claimant admitted he reversed his machine without looking back to see the machine 40 feet behind him (see Carrier Brief, page 5). Given that there were no mitigating factors in the collision (such as poor visibility due to weather), the Claimant's negligence is both obvious and serious enough to warrant dismissal. The Carrier dismisses the Claimant's testimony that he sounded the machine's horn as he was backing up. The Carrier considers this to be a fabrication as it was not corroborated by Assistant Supervisor Bedwell, who was operating the other machine (see Carrier Brief, page 6). The Carrier also refutes the Claimant's testimony that the damage was minor by providing pictures and noting Assistant Supervisor Bedwell's statement that a part of the machine was "destroyed." For all these reasons, the Carrier considers dismissal as appropriate and warranted.

The Organization offers a slightly different characterization of events. It contends that the Claimant was unaware of the stopped machine behind him because he received no direct communication about it from Assistant Supervisor Bedwell (see Organization Brief, page 6). It also claims that the damage was very minor as the contact between the machines happened at a slow rate of speed. The Organization contends any appearance of significant damage is because part of the machines that collided were frail to begin with (see Organization Brief, page 2). Although the Organization does not appear to dispute the Claimant's guilt – the Claimant did cause the collision – it contends dismissal is disproportionate to the offense. Instead, it suggests the maximum punishment should be 30 days suspension if any punishment is warranted at all. The Organization notes a long series of arbitral precedent, including cases involving the instant parties (SBA 1049 Awards 200, 214, 215, 216, and 224), where dismissal for minor accidents has been overturned by previous boards (see Organization Brief, page 7).

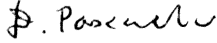
The Board finds sufficient evidence in the case record to support the notion that the Claimant was negligent. Although the Claimant may not have been directly communicated with regarding the location of the machine behind him, the Claimant should be aware enough of his surroundings to look behind him before backing up a

machine. In this case the collision involved a machine only 40 feet behind the Claimant, and there is no evidence that there were any conditions which would have made the other machine more difficult to see. After carefully weighing all the factors in this case, on balance the Board finds the penalty of dismissal was not appropriate. The Claimant shall be reinstated. However, we do not award back pay and the Claimant shall forfeit his Machine Operator seniority due to his lack of awareness playing a role in the collision. The forfeiture of Machine Operator Seniority shall not bar the Claimant from re-qualifying for it in the future.

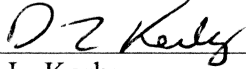
The claim is partially sustained.



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.