

**SPECIAL BOARD OF ADJUSTMENT NO. 1048**

**AWARD NO. 213**

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 service with Norfolk Southern Railway) of Mr. K. Via issued by letter dated October 4, 2012 in connection with alleged improper performance of duty as a Roadway Worker in Charge, on three (3) separate occasions, on September 5, 2012 on Roanoke Terminal was arbitrary, capricious and an abuse of the Carrier's discretion (Carrier's File MW-ROAN-12-38-LM-343).
2. As a consequence of the violation referred to in Part 1 above, Mr. Via shall be immediately reinstated, paid for all time lost, with seniority, vacation and all other rights unimpaired."

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 on July 11, 2005 as a Trackman and was working as an Assistant Foreman during the events which led to this case. On September 5, 2012 the Claimant was working as the Roadway Worker in Charge (RWIC) and assigned to a gang that was replacing ties on two railroad tracks. As the RWIC, the Claimant was to ensure no train or equipment movements occurred on the portions of the track being worked on by properly securing the tracks. On 3 occasions during the work day, the Claimant allegedly failed to properly secure tracks FY9 and FY10 which could have exposed the gang to equipment or train movements. A Federal Railroad

Administration Inspector was at the work site that day and noticed the Claimant's failures to secure the track properly, and as a result the Carrier was cited for safety violations. Due to these events, the Carrier charged the Claimant with improper performance of his duties as Assistant Foreman. The Carrier conducted an investigation including a hearing on September 21, 2012. The Carrier found the Claimant guilty of the charges and as a result dismissed him from service via letter on October 4, 2012.

It is the Carrier's position that Claimant's own statements as well as the violation citation from the Inspector sufficiently demonstrates the facts in this case and thus the claimant is clearly guilty. The Carrier also notes the testimony of the Claimant that he had known he needed to place a lock on track FY8 but did not want to get close to the train, suggesting that the Claimant knew a safety issue was occurring and still let the gang work on the track (see Carrier Brief, page 6). The Claimant's actions constitute a violation of two Carrier operator rules. Operating rule 751(c) concerns the duties of the RWIC and provides in part:

The designated person [RWIC] must be qualified on the rules prescribing protection for each individual in the group. The responsible person may be designated generally, or specifically for a particular work situation.

Additionally, as the designated RWIC in this case the Claimant failed to follow operating Rule 755, the relevant part of which states:

Working limits on non-controlled tack will be established by rending the track...inaccessible to trains, engines, or other railroad equipment....

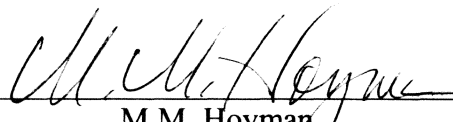
The Carrier finds no merit in the Claimant's defense that a supervisor told him he did not need to protect one of the two tracks that was being worked on, FY10. The Carrier argues there is no evidence for who this supervisor was who gave such an order. Even if such an order were given, the Claimant as RWIC had the responsibility to ensure the gang's safety. The Carrier also finds no merit in the Organization's argument that the Charging Officer stated the Claimant was not guilty of failing to secure the track in the morning hours (which constitutes 1 of the 3 instances of violations in this case). The Carrier points out that it is up to the Hearing Officer to determine guilt and that in any case some of the Charging Officer's testimony suggests the track was not protected during the morning hours as alleged (see Carrier brief, page 9). Given the serious magnitude of the safety violations which occurred in this case, it is the Carrier's position that dismissal is warranted and appropriate.


The Organization disputes the facts in the case, stating that three alleged instances of failing to secure the track were proven false at the hearing. (Instance #1) It points out that the Charging Officer variously stated both (1) the work during the morning hours was correctly protected and (2) any instances of unprotected work was the fault of other employees (and not the Claimant) (see Transcript, page 12). (Instances #2 and #3) Additionally, the Organization contends that the other two allegations are false because the Claimant did in fact protect the west ends of tracks FY9 and FY10 (see Transcript,

pages 19-29). In support of this position the Organization notes the testimony of multiple Carrier officials stating that the west ends of the tracks in question had been “spiked” or “locked and tagged” and as such it was impossible for any movement from the west end of the tracks to occur. Even if the charges were true, the Organization argues that the dismissal of the Claimant is inappropriate because no one in the gang was “in any real danger of getting hurt” and “nor was equipment palpably threatened with imminent damage” (see Organization Brief, page 4). The Organization characterizes the violation noted by the Inspector as “entirely technical.” Additionally, the Organization argues the Claimant had a clear record free of discipline, and any mention by the Carrier of a 45 day actual suspension on the Claimant’s record should be disregarded as it is on appeal and is currently before the members of this Board in another case. Overall, the Organization argues that dismissal in this case is excessive given the Claimant’s service record and given that, if any violations occurred, they were technical in nature.

The Board gives great weight to the findings of the Federal Railroad Administration Inspector. As the RWIC, the issuing of a formal citation by the Inspector suggests the Claimant was at least partially guilty in properly securing railroad track that was being worked on. The record is unclear on whether at least one of the three instances involved – the failure to secure the track during the morning hours – actually happened given the conflicting testimony at the hearing. However, there were at least two other time periods where the record suggests the Claimant did not properly secure the track. The Claimant’s actions are especially egregious given his position as Assistant Foreman and as RWIC. The Board does not concur with the Organization’s position that the Claimant’s actions are somehow mitigated by the fact that there was no resulting accident in this case. The Board considers this case as involving a serious safety issue even if there were no incidents that resulted from the Claimant’s oversight. However, overall the Board finds that dismissal in this case is not appropriate given the level of offense. The Claimant shall be reinstated to service with the Carrier, but without back pay and with the loss of his seniority in the Assistant Foreman position. The Claimant may requalify for the Assistant Foreman position 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 May 9, 2014.