

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1048

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	
)	Case No. 226
)	
)	Award No. 226
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)	
<u>NORFOLK & WESTERN RAILWAY COMPANY)</u>)	

Richard K. Hanft, Chairman and Neutral Member
D. M. Pascarella, Employee Member
D. L. Kerby, Carrier Member

STATEMENT OF THE CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline {dismissal from all services with the Norfolk Southern Railway, later commuted to a one hundred three (103) day suspension} of Mr. M. Carter, issued by letter dated January 20, 2017, in connection with his alleged improper performance of duty, when he failed to utilize fall protection while working outside the gauge of the rail on the ballast deck bridge at MP R-10.1 at approximately 1:10 P.M. on Tuesday, December 6, 2016 was unjust (Carrier’s File MW-BLUE-16-123-BB-1080 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant M. Carter shall be immediately reinstated with all rights and privileges unimpaired, paid for any and all loss earnings sustained as a result of the Carrier’s action, receive a written apology from Charging Officer Holloway for unjustly removing him from service and have all charges expunged from his record.”

FINDINGS:

Special Board of Adjustment 1048, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedence in any other cases.

After thoroughly reviewing and considering the record and the parties’ presentations, the Board finds that the claim should be disposed of as follows:

Claimant in this matter was regularly assigned and working as a Machine Operator on December 6, 2016. Claimant had ten (10) years' service with the Carrier at that time. Claimant and two (2) co-workers were working with the R-9 Dual Rail Gang knocking clips on a ballast deck bridge at MP-R10.1. That afternoon around 1:00 PM, the Charging Officer alleged, Claimant was observed working outside the gauge of the track at an elevation greater than twelve (12) feet from the ground and less than six (6) feet from the unprotected leading edge of the bridge without proper fall protection.

Claimant was removed from service and summoned to appear at an investigation held January 4, 2017. As a result of the findings on the property, Claimant was informed by letter dated January 20, 2017 that he was dismissed from service. Claimant was eventually re-instated to service on April 18, 2017 and his discipline was commuted to a one hundred three (103) day suspension.

The Organization asserts in its submission to the Board in support of its Claim that the Organization requested that the investigation be recessed to allow all parties to travel to the bridge that was only 10 miles away for the purpose of verifying Claimant's actual distance above the ground. Because the Organization's request was denied by the hearing officer, the Organization maintains that Claimant was denied a "fair and impartial" hearing and therefore, the Claim for relief must be sustained.

However, the charging officer at the investigation provided photographic evidence that he testified he took at the spot that the Claimant told him he was standing at showing the bridge deck to be at eighteen (18) feet above the ground.

The Organization further contends that the evidence produced by the charging officer was inconclusive and therefore, the Carrier failed to meet its burden of proof.

The Board does not agree with the Organization's argument that the evidence produced at the investigation was inconclusive and suggests that if the Organization intended to dispute the evidence put forth by the charging officer, it should have come to the investigation with evidence to refute the Carrier's evidence.

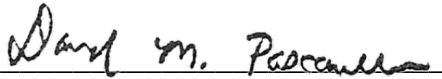
The Board does feel, however, that this matter could have been handled better on the property. While violation of the personal protective equipment rules are a very serious matter, the infraction here was not so serious as to demand that the Claimant be taken out of service. The Board, therefore, upon consideration of the facts of this particular matter determines that the discipline imposed shall be reduced to a thirty (30) day suspension.

AWARD:

Claim sustained in accordance with the findings. Carrier is directed to make this Award effective within thirty (30) days following the date that two members of this Board affix their signatures thereto.



Richard K. Hanft, Neutral Chairman



D. M. Pascarella, Labor Member



D. L. Kerby Carrier Member

Dated at Chicago, Illinois, November 21, 2018.