

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1048

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	
)	Case No. 227
)	
)	Award No. 227
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 Norfolk Southern Railway later commuted to an approximate ninety (90) day suspension} of Mr. W. Marston, issued by letter dated March 17, 2017 in connection with his alleged improper performance of duty, in that: (a) on Thursday, February 2, 2017 at approximately 10:45 A.M., he was observed fouling the 92 Ladder and Main Yard Track 70 at Lamberts Point Terminal in Norfolk, VA, while preparing to grind joints without proper track protection; and (b) while assigned as an electric welder helper on the Norfolk Terminal Welding Gang in Norfolk, VA, he set his welding truck in the foul at Main Yard Track 70 on Thursday, February 2, 2017 without proper track protection was unjust, corrupt, on the basis of unproven charges and not fair and impartial(Carrier’s File MW-BLUE-17-13-LM-101 NWR).
2. The Carrier’s discipline {dismissal from all services with Norfolk Southern Railway later commuted to an approximate ninety (90) day suspension} of Mr. T. Harmon, issued by letter dated March 17, 2017 in connection with his alleged improper performance of duty, in that: (a) on Thursday, February 2, 2017 at approximately 10:45 A.M., he was observed fouling the 92 Ladder and Main Yard Track 70 at Lamberts Point Terminal in Norfolk, VA, while preparing to grind joints without proper track protection; and (b) while assigned as an electric welder helper on the Norfolk Terminal Welding Gang in Norfolk, VA, he set his welding truck in the foul at Main Yard Track 70 on Thursday, February 2, 2017 without proper track protection was unjust, corrupt, on the basis of unproven charges and not fair and impartial(Carrier’s File MW-BLUE-17-14-LM-102).
3. As a consequence of the violation referred to in Part 1 above, Claimant M. Marston shall be immediately reinstated with all back pay, rights and privileges, have all charges expunged from his record and that Mr. Marston and his family be given an apology in writing from the charging officer.
4. As a consequence of the violation referred to in Part 1 above, Claimant T. Harmon shall be immediately reinstated with all back pay, rights and privileges, have all charges

expunged from his record and that Mr. Marston and his family be given an apology in writing from the charging officer.”

FINDINGS:

Public Law Board 6394, 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:

Claimants were, at all times relevant to this dispute Welder and Welder Helper on the Norfolk Terminal Welding Gang working at Lambert's Point Yard. Claimant Harmon was the Welder and Claimant Marston was his helper. Both Claimants had approximately nine (9) years' service with the Carrier.

On Thursday, February 2, 2017 at approximately 10:45 AM. Claimants were observed on the ground near the switch between Tracks 70 & 72 on the 92 ladder preparing to grind joints.

Claimants and their welding truck were parked on Track 72 close to the switch between Tracks 70 and 72 subject, the Carrier alleges, to being struck by any movement on Track 70.

Rolling stock and loaded coal cars occupied Track 70 and no derail on was on Track 70 between the clearance point and the switch. Claimants and their truck, the Carrier avers, were in the foul of Track 70.

The Assistant Division Engineer, the Charging Officer in this matter, observed this situation, instructed the Track Supervisor to have Claimants move the truck to Track 72 and remove the Claimants from service for placing themselves and the truck in the foul of the track.

An investigation into this matter was held on February 28, 2017, Claimants were both found guilty of improper performance of duty and notified by letter dated March 17, 2017 that they were dismissed from service. On April 27, 2017 Claimants' disciplines were commuted to approximate ninety (90) day suspensions.

The Organization complains that Claimants did not receive a fair and impartial hearing in accord with Rule 30 of the Parties' Agreement. The Organization opines that Claimants were denied a fair hearing because the Hearing Officer overruled the Organization's objections at the investigation; because the Carrier failed to compel the attendance of the Division Engineer as a witness pursuant to its request; and, that the hearing was tainted because the Hearing Officer refused to answer a set of some twenty-six (26) questions that were mailed to him prior to the investigation in order to "qualify" him as an acceptable Hearing Officer.

The Board's review of the record of the investigation finds no impropriety or bias in the fact that some of the Organization's objections were overruled. A prime example is the Organization's objection to the Hearing Officer's refusal to answer questions that were mailed to him prior to the investigation in order for the Organization to "qualify" him as an acceptable hearing officer.

First, it is solely within the discretion of the Carrier to appoint a hearing officer and there is no requirement in the Parties' agreement that requires the Carrier to provide documents or other evidentiary material to the Organization prior to the investigation. Thus, the Organization's objections to the hearing officer refusing to answer its questions relative to his competency to serve showed no bias but instead served to keep the investigation on track relative to the matters to be considered.

In regard to the Carrier failing to produce requested witnesses, as was discussed on the record at length, the witness requested was aware that the Organization requested his attendance but chose not to participate. Moreover, the Organization made no attempt to contact the witness and ask him directly to attend. We find no evasion of Claimants' due process rights because the witness, who had no first-hand knowledge of the alleged violation nor any hand in the charging of the Claimants chose not to attend as a witness.

Turning to the question of whether the Carrier met its burden of proof that Claimants violated the rules by fouling the track without adequate protection, we find there was substantial evidence to prove the charges made.

While there were a number of rules alleged to have been violated, calculations made of where the welding truck and Claimants were situated in reference to clearing points and argumentation as to whether "work" had actually commenced, the testimony of the Track Supervisor, who was the Charging Officer's corroborating witness, makes one fact abundantly clear: "They had a piece of on-track equipment in the foul of Track 70 with no derail down and no YP form on Track 70. They only had an YP form from 92 Ladder to switch 72." It is never permissible to foul a track without protection whether engaged in work or waiting to engage. The violation was proven by substantial evidence.

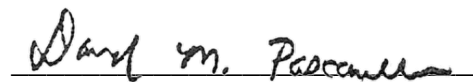
Relative to the question of whether the discipline assessed was commensurate with the violation proven, the Board finds that this was a serious deviation from safe working practices that could have had devastating consequences to both personnel and equipment. The Board does not find the discipline assessed to be arbitrary, capricious or harsh and therefore finds no basis to disturb the discipline assessed on the property.

AWARD:

Claim denied.



Richard K. Hanft, Neutral Chairman



D. M. Pascarella, Labor Member



D. L. Kerby, Carrier Member

Dated at Chicago, Illinois, November 21, 2018