

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1048

BROTHERHOOD OF MAINTENANCE OF WAY)	
EMPLOYEES DIVISION – IBT RAIL CONFERENCE)	Case No. 240
)	
and)	
)	Award No. 240
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)	
NORFOLK & WESTERN RAILWAY COMPANY))	

Richard K. Hanft, Chairman & Neutral Member
D. M. Pascarella, Employee Member
S. M. Goodspeed, Carrier Member

Hearing Date: July 25, 2019

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

1. The Carrier’s discipline [ten (10) day actual suspension] of Mr. A. Carwile, issued by letter dated September 6, 2016, in connection with his alleged improper performance of duty as a trackman in that on July 14, 2016, while working with his gang installing ties in Portlock Yard, he walked into the line of fire of the backhoe being operated by Mr. J. Zarth without communicating with Operator Zarth as instructed in the morning safety meeting and in a subsequent job briefing, was harsh and excessive (Carrier’s File MW-BLUE-16-79-LM-720 NWR).

2. As a consequence of the violation referred to in Part 1 above, Claimant A. Carwile shall be allowed to return to service when he receives medical clearance, have all charges expunged from his record, be reinstated with all rights unimpaired and be reimbursed for any loss of earnings sustained as a result of the Carrier’s action.”

FINDINGS:

Upon the whole record and all of 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.

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 had just over five (5) years' tenure on July 14, 2016 when the accident giving rise to the instant dispute occurred. Claimant, on that day, was working as a trackman in Carrier's Portlock Yard. His work group was tasked that day with changing six (6) cross ties on Track 28.

The crew attended a morning safety meeting before going to the worksite and it is undisputed that one of the subjects discussed at that meeting was backhoe safety generally, and specifically that employees on the ground must stay out of the swing radius of the backhoe's boom and that if an employee needed to enter the machine's swing radius that the employee must maintain eye contact with the machine operator at all times.

Upon arriving at the work site and setting up protection for the workers, a second pre-job meeting took place where the crew, it is also undisputed, discussed and reiterated the instructions given at the morning meeting to stay outside of the backhoe's swing radius and if an employee needed to enter the machine's swing zone they must first make and maintain eye contact with the machine operator.

The gang went to work and began replacing the first of the six (6) cross ties scheduled to be replaced. The Claimant's statement, taken after the accident occurred recounts the following: "...After the backhoe operator stuck the tie and it was plated, he began nipping up the tie. It appeared as if he was finished when I saw the plate was low on the high side. At this time, the backhoe bucket was stopped. I began to walk around to tell him to nip up the high side again. That's when the bucket swung around and hit me on my left side from behind. I think we both were in a blind spot at the wrong time. The backhoe arm created a blind spot for the operator. I also should have made him aware of me."

Moreover, the Claimant testified at the investigation on the property when asked whether he had clear communication with the backhoe operator prior to stepping into the backhoe's line of fire: "So, I'm standing in the gauge of the track. I made maybe one step, a half a step to my right to have clear communication with [the operator] ... Did I have clear communication? No."

Hence, the accusation that Claimant improperly performed his duty in not following instructions issued at both the morning meeting and the subsequent pre-job meeting not to step into the backhoe's line of fire before making and maintaining eye contact with the machine's operator is proven by Claimant's own admissions.

While the Organization asserts that the ten (10) day suspension meted out as discipline in this matter was excessive for a first time rule violation for an employee with five years' unblemished service, the Board finds that the discipline assessed was commensurate with Claimant's failure to abide by instruction repeatedly issued concerning personal safety and breach of which could have potentially been fatal.

AWARD:

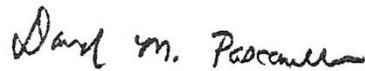
The Claim is denied.



Richard K. Hanft, Chairman



S. M. Goodspeed, Carrier Member



D. M. Pascarella, Labor Member

Dated at Chicago, Illinois, August 26, 2019