

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 148**

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-CN-05-19-SG-315)

Statement of Claim:

Claim on behalf of M. A. Leach for reinstatement with seniority, vacation and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on October 12, 2005, in connection with making degrading, offensive, and unprofessional remarks to Senior Rail Supervisor Tharpe on Wednesday, September 14, 2005.

Upon the whole record and all 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.

**AWARD**

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

**BACKGROUND**

R. A. Leach, the Claimant herein, entered the Carriers' service on February 26, 1996 as a Laborer. On September 14, 2005<sup>1</sup>, the date of the incident at issue, the Claimant was working as a Machine Operator on T & S Gang-15 in the vicinity of Chalmette, Louisiana. The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

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<sup>1</sup> All dates noted herein occurred in calendar year 2005 unless otherwise noted.

The record evidence shows that on September 14th, T & S Gang-15 was loading equipment in preparation for moving the Gang from Chalmette, Louisiana closer to New Orleans, Louisiana in order to continue track repair. Upon observing the loading process, the Claimant questioned Supervisor Tharpe who regarding the safety regarding the manner and method used. Supervisor Tharpe stopped to listen to the Claimant's concerns following which Mr. Tharpe attempted to resume the loading process. It was at this point that the Claimant, in the presence of Track Supervisor Hudson as well as several employees remarked to Mr. Tharpe as follows:

That's when he told me I was crazier than hell. I said, wait a minute Mark, what did you say? He said, I said you were fucking crazier than hell. That's when I told him he no longer worked for the company . . .

(Transcript of the Official Investigation, Tharpe testimony, at page 25)

While the Claimant denied use of the "f" word, he acknowledged that he told his Supervisor that he was "crazy as hell." (Id, pages 152, 180)

As a direct result of this incident the Claimant was directed to attend a formal investigation that was held on October 12<sup>th</sup>. The Claimant was at all times represented by the Organization. By letter dated October 27th, the Hearing Officer, following his review of the transcript together with evidence admitted at the formal investigation, determined that the Claimant was guilty of "conduct unbecoming and improper performance of duty in connection with making degrading, offensive, and unprofessional remarks to Senior Rail Supervisor Tharpe on Wednesday, September 14, 2005. The Claimant was thereupon dismissed from service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

## **DISCUSSION**

By letter dated October 6, 2005, Gary Cox, the Organization's General Chairman, requested the presence of six employees to be summoned to the investigation for the purpose of giving testimony as to the incident giving rise to the Claimant's termination. Mr. Cox's request was grounded in his

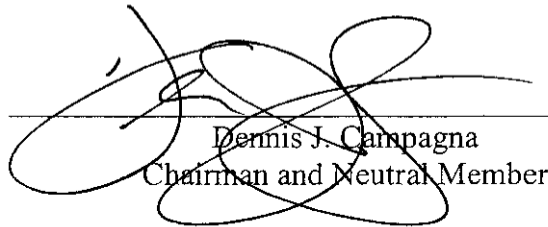
good-faith belief that each of these six individuals was present at the incident, and accordingly, could give testimony regarding their best recollection of the relevant events that occurred that day. Mr. Tharpe summarily denied Mr. Cox's request. Upon review of the transcript created during the investigation, the Board took notice of the fact that the testimony of two Carrier witnesses was not totally consistent. For example, while Mr. Tharpe testified that the Claimant stated the he [Tharpe] was "fucking crazy", the testimony of R. O. Baxter, a Foreman on T & S 15 noted that the Claimant stated that "Johnny was crazy as hell", making no reference to the Claimant's use of the "f" word. (See TR 86). The difference is material given that the Claimant's continued employment is at stake. According, noting the disparity in the testimony of key witnesses, the Board finds that Mr. Tharpe's summary denial of the Organization's request compromised the Claimant's right to a full, fair and complete investigation.

Notwithstanding the Board's finding noted above, it is clear that the Claimant is not without blame in this matter. Indeed, even by his own admission, he stated, in a tone loud enough to be heard by onlookers, that in his opinion Mr. Tharpe was "crazy as hell." Claimant's comments were out of line, unnecessary and unprofessional. However, while the Claimant's behavior cannot be excused, it was not of the kind exhibited in cases cited by the Carrier where employees engaged in abusive, violent and vulgar tirades against their supervisors while in the presence of others. Indeed, while abusive, vulgar and violent tirades warrant termination from employment, the circumstances here present, while serious, do not warrant the Claimant's termination.

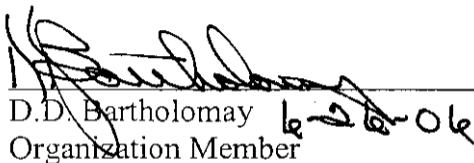
## CONCLUSION

For the reasons noted and discussed above, the Board finds and concludes under the unique facts of this case that the penalty of dismissal from service is excessive. While the Board finds the Claimant's reinstatement to service is appropriate, such reinstatement shall be conditioned upon his attendance and successful completion of an Anger Management Program as determined and designated by the Carrier. The Carrier shall be obligated to determine and designate such a program within 30 days following its receipt of this Decision. Following the Claimant's successful completion of said program, the Carrier is ordered to reinstate the Claimant to service, with seniority and benefits unimpaired, but without compensation for the time held out of service. As a last note of

warning, let this decision serve as formal notice to the Claimant that he is on "thin ice", and accordingly, if he has any hopes of continuing his employment with this Carrier, he is duty bound to act in a professional manner at all times, and to follow all Rules, Regulations and Procedures promulgated by the Carrier for the efficient and safe operation of its business as well as the general welfare of all its employees.



Dennis J. Campagna  
Chairman and Neutral Member



D.D. Bartholomay  
Organization Member



D.L. Kerby  
Carrier Member

Dated June 11, 2006, Buffalo, New York