

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 149**

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-CN-05-21-SG-347)

Statement of Claim:

Claim on behalf of G. A. Fitzgerald requesting he be paid for all time lost as a result of his thirty-nine (39) actual suspension following a November 3, 2005 formal investigation concerning his responsibility in connection with violating Norfolk Southern Operating Rules 814 and 816 on that on October 10, 2005, the Track Broom Machine he was operating collided with a parked Tamper Machine.

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

Gregory A. Fitzgerald, the Claimant herein, entered the Carriers' service on February 27, 1989 as a Track Laborer. On October 10, 2005<sup>1</sup>, the date of the incident at issue, the Claimant was working as

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

a Track Broom Machine Operator on the S-3 Surfacing Gang-15 in the vicinity of Chalmette, Louisiana. The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

The record evidence shows that on October 10<sup>th</sup>, the S-3 Surfacing Gang, consisting of seven on-track machines was preparing to clear its on-track machinery and equipment for the day by putting into a seldom used siding, which was of a descending grade and partly overgrown with grass and vines. Claimant's Track Broom was the rear machine, and normally would have been the first to enter the siding, followed by the remaining S-3 Gang machines. However, in this instance, and departing from the norm, a switch tamper and the C Series Tamper were to be switched out and put into the siding before the Claimant's Track Broom, which in turn would have been followed by the remaining S-3 machines. The S-3 Gang Foreman was at the switch for the siding and directed the switching out of the two tampers to enter the siding. The switch tamper and the C Series Tamper entered the siding and parked at the bottom of the downgrade, stopping short of where the new tamper was being unloaded in the siding. The operator of the C Series Tamper radioed the rest of the Gang that the rail was slick and to be careful coming down. As the Claimant approached the switch with his Track Broom and began the process of backing down into the siding, the Foreman signaled him to move slowly. The Claimant's Track Broom, unable to stop short of the buggy that extends from the front of the C Series Tamper, stuck the Tamper, causing over \$25,000 in damage. The record also shows that the Track Stabilizer Machine that followed the Claimant's Track Broom into the siding also struck the Track Boom before coming to a complete stop.

By letter dated October 11, 2005, the Claimant was notified that he was out of service pending a formal investigation. On October 13<sup>th</sup>, the Claimant was directed to attend a formal investigation that was held on November 3<sup>rd</sup>. The Claimant was at all times represented by the Organization. By letter dated November 18, 2005, the Claimant was advised that he was "assessed discipline as time already served," amounting to a thirty-nine (39) day actual suspension. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

## DISCUSSION

Following a careful review of the record evidence, while it is clear that the Claimant was not, under the circumstances then present, sufficiently proactive in his effort to avoid the mishap that occurred, the Board concludes that the imposition of a 39 day unpaid suspension period is too harsh a penalty. The Board supports this conclusion with the following:

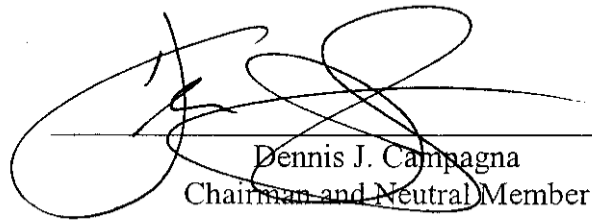
- First, it is undisputed that the Claimant was not traveling on the downgrade in an unreasonable speed. In fact, the record shows that Claimant was traveling at less than a walking speed for the duration of his travel time.
- Second, there is no indication in the record that either of the first two machines to run down the track into the siding informed the Foreman of the track's condition and advised him to hold up the movement of the remaining five machines. In this same general regard, there is also no indication that the Foreman sufficiently warned the Claimant about the extremely slippery condition of the track.
- Third, the record shows that the machine that immediately followed the Claimant's Track Broom slid into the Claimant.
- Next, the record shows that the track was so slippery that it was necessary to sand the track the next day in order to get the machines out of the siding.

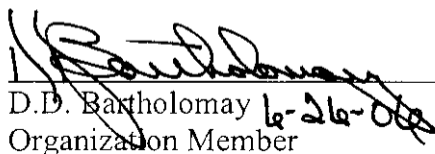
Given the foregoing, it is clear to the Board that while the Claimant may have been technically culpable for his actions, the lack of adequate and due notice from the Foreman to the Claimant about the condition of the track must be taken into consideration, particularly when assessing an appropriate penalty,

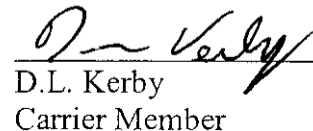
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**CONCLUSION**

For the reasons noted and discussed above, the Board finds and concludes under the unique facts of this case that the penalty of a 39 day unpaid suspension is excessive, and further concludes that a ten (10) day deferred suspension is a more appropriate and fair penalty. Accordingly, the Carrier is directed to reimburse the Claimant, at his regular straight time rate, for the 39 days of pay lost as a result of his suspension.

  
Dennis J. Campagna  
Chairman and Neutral Member

  
D.D. Bartholomay  
Organization Member

  
D.L. Kerby  
Carrier Member

**Dated June 11, 2006, Buffalo, New York**