

SPECIAL BOARD OF ADJUSTMENT 1049

CASE NO. 156

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier's File: MW-ATLA-06-02-LM-020)

Statement of Claim:

Claim on behalf of L. E. Roundtree requesting that he be paid for all time lost as a result of his dismissal following a February 7, 2006 formal investigation concerning his improper performance of duties as a Machine Operator and failure to comply with Norfolk Southern Operating Rule 814 in that on January 17, 2006, the Track Brush Cutter (TBC) 8402 he was operating collided with TBC 8401N at Mile Post 74.9-G, Industrial Boulevard, in Arabi, Georgia.

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

L. E. Roundtree, the Claimant herein, entered the Carrier's service on September 20, 1976 as a Track Laborer. On January 17, 2006, he was regularly assigned as a Track Brush Cutter Machine Operator on Bush Hog Gang 575 working between Ashburn and Arabi, Georgia. The instant matter concerns the propriety of the Claimant's performance of duties and his failure to comply with the Operating Rules that resulted in a collision between the Track Brush Cutter Machine that he was

operating and another Track Brush Cutter machine that had stopped in the track, and the Carrier's action in dismissing the Claimant for his negligence.

DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

At the investigation, the Carrier sustained its burden of proof by establishing, through substantive credible evidence, including the Claimant's own admission that he was not prepared to stop within "half the range of vision" as required by Rule 814, that the Claimant improperly performed his duties as a Machine Operator in that he collided with TBC 8401N which had stopped on the track, thereby causing damage to both machines assessed at over \$5,300. More specifically, the Claimant admitted that his actions violated Rule 814.

Turning now to the discipline sought to be imposed, the Board finds that while the Claimant was negligent, he quickly admitted his error, acknowledged his violation of the Carrier's Rules, and was contrite in his approach to the situation. However, the Board must also take notice of the fact that while the Claimant is a long-term employee, he does not enjoy an exemplary service record. In this regard, the Claimant has incurred suspensions in 2001 (5 day actual suspension for a crossing accident, back hoe operated by the Claimant stuck a dump truck) and in 2004 (30 day actual suspension for removing co-owned items from Carrier property).

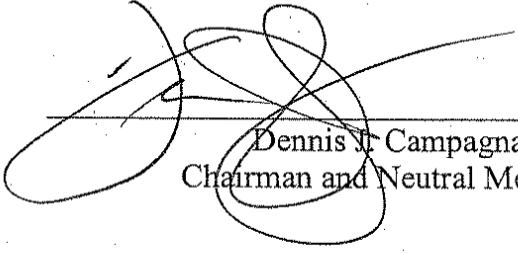
While the Board recognizes that safety is paramount in the railroad industry, and that the Carrier has every right to have a "zero tolerance" policy for careless and negligent acts, we find that while the Claimant was negligent, he was not grossly negligent. In this regard, Arbitrators generally consider "negligence" to be the failure to do what a reasonably prudent employee would have done, or not done, under the same or similar circumstances. "Carelessness" is the absence of ordinary care and is often used to describe poor or substandard work performance that did not result from errors in judgment. These cases are normally analyzed as unsatisfactory performance and subject to the

ordinary steps of progressive discipline. By contrast, "gross negligence" denotes intentional or willful acts or omissions, in flagrant or reckless disregard of the consequences to persons or property. In cases of gross negligence, the act or omission by the employee often justifies termination, even for a first offense.

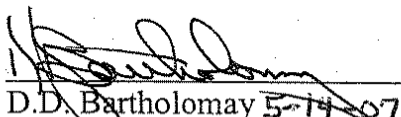
Given the foregoing unique facts and circumstances in this matter, and without setting a precedent for future cases which must be decided on their own merits, the Board finds that the Claimant's actions, while clearly improper, were more in the nature of ordinary negligence and/or carelessness, and accordingly, when taking this action into account with the Claimant's "checkered" history, that a more fitting and appropriate discipline is the Claimant's reinstatement to service without back pay. The time served without pay shall be deemed a disciplinary suspension. When put in the context of a progressive disciplinary system, this means that the next instance of a proven disciplinary action will be grounds for the Claimant's removal from service. Finally, and as a condition to his reinstatement, the Board finds that the Claimant must forfeit his Machine Operator's Seniority, and that there shall be a six (6) month ban from the Claimant's date of reinstatement before his eligibility to bid in order to reinstate his Machine Operator's Seniority.

CONCLUSION

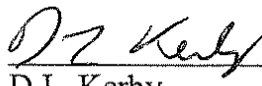
The Claim is sustained in accordance with the findings and conclusions noted and discussed above.



Dennis J. Campagna
Chairman and Neutral Member



D.D. Bartholomay 5-14-07
Organization Member



D.L. Kerby
Carrier Member

Dated April 27, 2007, Buffalo, New York