

SPECIAL BOARD OF ADJUSTMENT 1049

CASE NO. 180

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier's File: MW-HARR-07-24-SG-244)

Statement of Claim:

Claim on behalf of A. T. Wallace for exoneration 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 August 9, 2007, in connection with his improper performance of duties, as well as violation of Operating Rule 817, when the Spiker Machine in which he was riding collided with another Spiker Machine that had come to a stop on the track ahead of this machine on June 12, 2007, resulting in the Claimant's personal injury.

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

A.T. Wallace, the Claimant herein, entered the Carrier's service on July 18, 2005 as a Laborer. On June 12, 2007, the Claimant was riding on a Spike Machine in the seat beside the Operator, when he R-11 rail Gang machines were coming out of a side track to travel to the work site. The instant matter concerns the propriety of the Claimant's failure to assist the Spiker Machine Operator in

keeping vigilant lookout for other equipment or obstructions in that the Spiker Machine on which he was riding collided with another Spiker Machine that had come to a stop, and the Carrier's determination to dismiss the Claimant as a result of his negligent violation of safety rules.

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 that the Claimant was guilty of the charges at issue. Specifically, on the date in question, the Claimant was assisting the Operator of a Spiker Machine. As the Operator pulled on to the main line and then made a reverse movement, the Spiker Machine struck another Track Machine which had stopped behind it. Upon the collision, the Claimant hit his head on the back windshield of the Spiker Machine and received medical treatment for his injury. The record also establishes that the Claimant was aware of the types of moves the Spiker Machine would make having been briefed prior to the beginning of the work day on the Machine's reverse movement. The Operator testified that he might not have backed into the other stopped machine had the Claimant assisted him by keeping a vigilant look out. It is clear, therefore, and the Carrier established that the Claimant was not keeping a vigilant lookout for other machines and equipment on the day in question. Moreover, it was established that the Claimant was fully capable of reaching the parking brake on the Spiker Machine from where he was sitting, and could therefore have assisted in avoiding the collision. It is clear, therefore, that the Claimant's inaction rose to a level of a violation of Operating Rule 817 which provides:

Each employee must assist the operator in keeping vigilant lookout for trains, other equipment or obstructions, on or off the track, including people, vehicles, animals, contractor's equipment or anything that could affect safe movement.

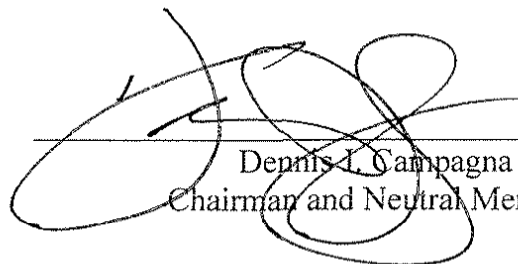
Operators and occupants of equipment must not engage in any unnecessary conversation or in boisterous conduct while equipment is in motion.

Turning now to the discipline sought to be imposed, the Board finds that while the Claimant was negligent, he acknowledged his violation of the Carrier's Rules, and was contrite in his approach to the situation. 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, such isolated instance does not warrant his dismissal from service. In this regard, absent involvement in egregious acts, not present here, the purpose of discipline should be rehabilitative and not punitive in nature.


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 in the nature of ordinary negligence and/or carelessness, and accordingly, that a more fitting and appropriate discipline is the Claimant's reinstatement to service without back pay. The Claimant's time off without pay shall be regarded as an unpaid disciplinary suspension. In addition, and as a condition to his reinstatement, the Claimant is reminded of his obligation to comply with all Carrier Rules and Regulations, including Rule 817.

CONCLUSION

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



Dennis J. Campagna
Chairman and Neutral Member



T. Kreke
Organization Member

June 27, 2008



D.L. Kerby
Carrier Member

Dated May 31, 2008