

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 183

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of J. L. Pugh requesting that he be paid for all time lost as a result of his dismissal following an August 20, 2007 formal investigation concerning improper performance of the duties of a Machine Operator in that the Mark III Tamper that he was operating collided with a tractor trailer at the Thomasville Lumber road crossing on July 23, 2007.

(Carrier File MW-BHAM-07-12-LM-310)

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.

AWARD

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

The record reflects that Claimant was tramming his Mark III Tamper from Thomasville, Alabama to Lamison, Alabama. As Claimant was approaching the Thomasville Lumber crossing, he slowed because he saw a forklift on the crossing. Claimant observed a lumber truck that appeared to be parked by the crossing. Claimant increased his speed after the forklift cleared the crossing. The truck then moved into the crossing but Claimant was unable to stop and struck the truck in the crossing.

Rule 815 requires that on-track equipment approaching a crossing be prepared to stop short. Claimant admitted that he did not comply with Rule 815. Carrier clearly proved the charge by substantial evidence.

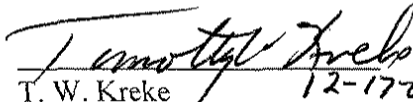
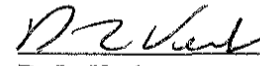
We turn to the penalty assessed. In reviewing the penalty our role is not to determine whether we would have imposed the same discipline in the first instance. Rather, our role is limited to determining whether the discipline imposed was arbitrary, capricious or excessive.

In the instant case, two mitigating factors stand out. First, Claimant had more than thirty years of service, having entered service in November 1975. Second, the police found the truck driver culpable in the accident as the truck driver reportedly failed to see the Tamper at the crossing. Although the truck driver's culpability does not excuse Claimant's violation of Rule 815, we do regard it as a mitigating

factor. Considering all of the circumstances, we conclude that the penalty of dismissal was excessive. Carrier shall reinstate Claimant to service with seniority unimpaired but without compensation for time out of service. As a condition of his reinstatement, Claimant shall be disqualified as a Tamper Operator.



M. H. Malin
Chairman and Neutral Member


T. W. Kreke 12-17-08
Organization Member
D. L. Kerby 12-17-08
Carrier Member

Issued at Chicago, Illinois on November 30, 2008