SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 224

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed from all services with Norfolk Southern Railway) of Mr. M. Robinson issued by letter dated November 10, 2011 in connection with his alleged improper performance of duty as a machine operator, in that while operating stabilizer PST 88304 he collided with track broom TB930 12 in the vicinity of Mile Post CD317 .2 near Wauseon, Ohio on September 29, 20 II was arbitrary, capricious, unjust, unwarranted, unreasonable and harsh or excessive (Carrier's File MW -DEAR-11-56-SG-380).

2. As a consequence of the violation referred to in Part 1 above, Mr. Robinson shall be restored to service, exonerated of all charges placed against him and paid for all time lost, with seniority, qualifications, vacation and all other rights unimpaired."

Upon the whole record and all the evidence, after hearing, the Board finds 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 precedent in any other case.

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 Claimant entered service for the Carrier on March 2, 2009 as a Roadway Laborer. On September 29, 2009 the Claimant was working as a Machine Operator when his machine collided with a Track Broom machine in front of him. After going past a road crossing, the Track Broom machine in front of the Claimant began to speed up as normal but experienced a mechanical problem which required the machine to be stopped. The Track Broom machine operator properly notified the Claimant via radio that the

machine had been stopped. However, the Claimant failed to bring his machine to a full stop before colliding with the Track Broom which resulted in substantial damage.

As a result of this incident the Carrier removed the Claimant from service on October 5, 2011 and held a formal investigation including a hearing on October 27, 2011. The Carrier found the Claimant was guilty of improper performance of duty due to his role in the collision and dismissed him from service via letter on November 10, 2011.

The Carrier argues at the time of the incident the Claimant had been operating as a Machine Operator for over a year and as such was well aware of proper procedures and the importance of keeping a safe distance from other machines (see Carrier Brief, pages 4-5). Additionally, Supervisor J.W. Broce testified that there were no mitigating factors in terms of weather or track structure. The Carrier refutes the Claimant's submitted pictures that show a distorted view from the Machine by stating they are factually inaccurate and in conflict with the testimony of other employees and the testimony of F.G. Little, who is a repairman for the Carrier (see Carrier Brief, page 6).

The Carrier states that the Organization's procedural arguments are without merit. The Carrier points out that its records show the Claimant did receive a copy of the dismissal letter within 20 days of the hearing. Additionally, the Carrier claims that the mailing of the dismissal letter under the Charging Officer's name was an administrative error and this error did not prejudice the investigation or discipline process (see Carrier Brief, page 8).

The Organization makes a procedural argument that the Carrier failed in providing a fair investigation because the same employee withheld the Claimant from service, formally charged the Claimant, testified at the hearing, and dismissed the Claimant via letter (see Organization Brief, pages 7-12). The Organization also argues that the Carrier failed to uphold its burden of proof because it did not provide enough substantial evidence to support its allegations, but nevertheless imposed the "ultimate discipline" of dismissal (see Organization Brief, page 19). Finally the Organization argues that there were several factors which impeded the ability of the Claimant to stop on time, including broken brake lights and a tinted window which impaired depth perception (see Organization Brief, pages 20-23).

The Board finds no dispute in the record that the Claimant did actually cause the collision that led to this case. At issue here is whether dismissal was appropriate in light of the Claimant's actions. We do not find that the Claimant's submitted photos (see Carrier Brief, Exhibit A, pages 63-65) regarding his view from his Machine as substantial enough to be considered a mitigating factor. The Carrier offered testimony from multiple sources that suggests that the condition of the window was not deteriorated enough to impact the operator's view in any way. Even if the view was an issue, the Claimant has some level of responsibility to report that he cannot operate the machine in the prescribed manner in accordance with the Carrier's safety rules - which he did not until after the collision occurred. Concurrently, we do find other mitigating circumstances. The Claimant does not dispute he caused the accident and admits some level of guilt, and he

otherwise appears to have a clear discipline record. As such, we reinstate the claimant with overall seniority intact but he will forfeit his seniority in the Machine Operator position. We do not find cause to award back pay.

The claim is partially sustained.

Michael M. Hoyman

M.M. Hoyman
Chairperson and Neutral Member

D. Pascarella 10/15/12

D. Pascarella
Employee Member
Dissent to follow

D L Kerby 10/15/12

D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on September 14, 2012.

LABOR MEMBER'S
CONCURRENCE AND DISSENT
TO
AWARD 224 OF SPECIAL BOARD OF ADJUSTMENT NO. 1049
(Referee Hoyman)

Since the claim was sustained in part, a dissent is required only to the extent that the Claimant herein was not awarded the full remedy due to him under Rule 40(d) of the Agreement. As such, we dissent in part, inasmuch as this reinstating award provided the Claimant with no back pay, by way of recompense for the Carrier's clear and egregious overreaching, in dismissing him from its service under the circumstances involved herein.

At the outset, it is important to note that in this case the same Carrier official withheld Claimant from service initially, formally charged him, served as the charging officer at Claimant's investigation, offered testimony at the investigation against Claimant and then made the post-investigation decision to discipline Claimant with the ultimate discipline of permanent dismissal. Even if the facts of this case had not nearly so much favored Claimant, this placement of Claimant's fate totally in the hands of but one Carrier official throughout, who was impossibly charged with "objectively" passing on the credibility of his own secondhand and predetermined testimony, was such an affront to Claimant's Agreement rights to a "fair and impartial investigation" that no remedy less than a total one would fairly address the wholesale and blatant evisceration of Claimant's basic entitlement to elementary "due process".

To this, the Carrier offered no defense, save to claim (without any evidence) that the Carrier official in question did not actually render the decision and impose the discipline in Claimant's case. Rather, the Carrier alleged (again, in completely unsupported fashion) that a mere "clerical error" explained why this Carrier official's name found itself on Claimant's dismissal letter. Even were this accepted (without a shred of evidence) as true, however, this would merely beg the question: If this Carrier official did not render the decision in this case, then who did? No answer to this further conundrum is even hinted at and this omission itself would be fatally damaging to the Carrier's attempt to support any measure of the discipline imposed, as a discipline can only be valid, whatever its extent, where it rests on substantial evidence. If the hearing officer at an investigation does not even make credibility determinations where material facts, as herein, are in issue, then it is beyond dispute that in such a case no substantial evidence can be found in support of the discipline. With no hearing officer findings in this respect even so much as implicitly placed on record by a decision even facially or ostensibly authored by the hearing officer in summary fashion, this Board had no proper findings to defer to in its appellate review of this case. This Board, then, not properly having any "substantial evidence" providing findings to defer to, and not being empowered to decide matters *de novo*, should only have properly sustained the claim in full, as no burden of proof could have been sustained under such circumstances by the party charged with it in a discipline case, namely the Carrier.

To the extent that this Board had no "substantial evidence" of record proved up against Claimant, such as hearing officer credibility findings against Claimant's case might have provided, this Board had no appropriately grounded evidence to defer to from the property and, thus, were this Board to yet respect its delimited appellate grant of authority, its decision in this case could only have then properly rested on undisputed facts, which are not subject to such credibility disputes/resolutions. If this Board decided this case thusly, it is equally clear that nothing short of a complete sustaining of this claim would have been due Claimant. There is no dispute that the incident in question occurred, but it was also admitted on the record/at the investigation that the Carrier's repairman was notified by Claimant concerning the poor condition of the machine's front window, with nothing being subsequently done to remedy this situation for an appreciable period of time leading up to the incident. The Carrier only alleges that the window's condition did not so impair Claimant's view that it might have been responsible for Claimant being involved in a minor incident, through no fault of his own. Of course, the condition of the window, as opposed to the fact that Claimant had properly complained of it to the repairman charged with addressing it, who undisputedly did nothing thereafter, is disputed and thus is not a matter that the Board could have resolved in the Carrier case's favor or against Claimant. Given as much, we are left with what must be taken as a materially deficient window that Claimant properly reported, but that the Carrier improperly did nothing to remedy. Under these circumstances, Claimant yet safely worked with this window to the very best of his conscientious ability, before an incident finally and inevitably took place. Under such circumstances as are thus undisputed and as have additionally not been proven against Claimant in fulfillment of the Carrier's burden of proof, we are again left with a Claimant who should have been completely exonerated but who nevertheless was subjected to "industrial capital punishment" by the Carrier, with this Board failing to see to it that Claimant (who must be found blameless under such circumstances) was compensated for the accumulated losses resulting from the Carrier's unsupportable finding of fault and consequent discipline.

Even were we, *arguendo*, to ignore both the Carrier's complete evisceration of Claimant's "due process" Agreement rights to a "fair and impartial investigation", as well as its complete failure to carry its burden of proof on the merits, still Claimant would have been clearly due an award which featured back pay (in addition to reinstatement) for at least most of the time that Claimant was held out of service, if not quite for all of it. This is so because even if we assume, *arguendo*, that the Carrier had actually given Claimant some passing semblance of a "fair and impartial investigation", and even if the Carrier is assumed to have appropriately found evidence at such an investigation that carried its burden of proof in showing Claimant to have been responsible for the incident in question, still the incident in question was as minor as they come in the industry, and Claimant otherwise enjoyed a spotless work record/history. To the extent that the principles of progressive discipline and discipline in service of employe rehabilitation and education are involved, as they must be under sound arbitral practice and precedent, a discipline

far short of dismissal was called for. Indeed, by the Carrier's own lights (i.e., its own "Investigation and Discipline Policy Manual"), any discipline that falls short of meriting summary dismissal could only merit a thirty (30) day suspension, at the maximum. Since Claimant was out of service for approximately a full year, it is plain that even accepting the Carrier's own sense of the maximum progressive discipline that is both allowable and sensible herein commands that Claimant be compensated for the residually plain overreach involved in this case on the part of the Carrier [i.e., a year's worth or so of out-of-service time minus, at most, thirty (30) days' worth of maximal, progressive discipline]. We do not think for a second that the most minor of incidents, combined with Claimant's spotless discipline record prior thereto, would merit the maximal, progressive discipline that could have been meted out by the Carrier, but we also will not quibble at this point. The salient point is, even if this Board, in the exercise of its remedial discretion, found Claimant culpable to the maximal degree on a non-dismissible basis, and it is clear that in reinstating Claimant it found him unworthy of dismissal, then back pay of a decidedly non-trivial nature was unquestionably due.

To deny Claimant any and all back pay, under even these circumstances (viewing the case, arguendo, in the unearned but most favorable light possible, from the vantage point of the Carrier), was plain error, which can only serve to deny Claimant his just dignity, by placing him completely at the Carrier's mercy, no matter the trumped up nature of the case brought against him, nor the existence of standing, protective rules and policies which are supposed to apply in binding fashion. So too, such plain error can only serve to embolden the Carrier to administer similarly draconian punishments in other discipline cases where such are just as plainly inappropriate and unjust, because the Carrier is hereby signaled that its patent violations of the employes' rights under the Agreement and its wiping out of employes' protections under reigning labor arbitral precedent will be tolerated with impunity, and will thus be subject to no condign, inhibiting cost in the least. Under such circumstances, the industrial democracy that is supposed to attend an enforceable collective bargaining agreement is but a parchment dream, belied by the everyday reality of arbitrary and unchecked railroad management-perpetrated tyranny.

No self-respecting "white collar worker", working without the supposed benefit and protections of a real, bilaterally negotiated and collectively bargained employment agreement, would stand for being treated without such fundamental fairness, as judged by the standing and understood rules of proper due process, evidence and proportionate discipline. Maintenance of Way employes, covered by such an agreement, can hardly be supposed to have to stand, at the cost of their own dignity, for such wrongful treatment, without recourse to a truly compensating remedy. Unfortunately, the Board's award herein compels that they do just that, without further possibility of just recourse. We recognize that this decision of this Board is hardly alone in erring in such a manner on precisely this issue, but additionally observe that an error's pandemic nature

is no sound argument for its further casual acceptance and repetition. The logic of justice can never be properly erased by any antithetical practice which improperly negates further concern with what is otherwise clearly right.

For all of these reasons, I concur with the findings of this award insofar as the discipline is overturned, but emphatically dissent with respect to the lack of full remedy provided.

Respectfully submitted,

David M. Pascarella
Employe Member
SBA No. 1049