

AWARD NO. 308
Case No. 308

File No. Bixler-JL-08-20-INV/MW-DEAR-20-76-SG-648 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) DIVISION – IBT RAIL CONFERENCE
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY
) (FORMER SOUTHERN RAILWAY COMPANY)

STATEMENT OF CLAIM:

Claim on behalf of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed in all capacities) of Mr. J. Bixler, issued by letter dated September 8, 2020, in connection with his alleged improper performance of duty in that on July 9, 2020 he allegedly failed to take any action to prevent the spike loading machine that he was operating from rolling into and colliding with the spike puller machine, which in turn collided with another spike puller machine ahead of it, in the siding between CP 483 and CP 482 in Porter, Indiana was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File Bixler-JL-08-20-INV/MW-DEAR-20-76-SG-648 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Bixler shall have his dismissal set aside with all notations thereof removed from all Carrier records and he shall also be restored to the Carrier's service with all seniority rights and restored from all financial and benefit losses, such as vacation and health insurance benefits occasioned as a result of the violation, including: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully removed from service); (2) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been removed from service; and (3) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he been unjustly removed from service."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

On July 9, 2020, Claimant Jeffrey Bixler was working as a machine operator on T&S Gang 24, assigned to the spike loading machine. While the gang was in a siding prior to receiving track time, Claimant changed brake pads on the front wheels of his machine. After doing so, Claimant released the brakes to test them, and when he did so, his machine rolled forward and struck the spike puller machine in front of him. That machine then collided with the machine in front of it.

By notice dated July 24, 2020, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with improper performance of duty during the incident described above in that he failed to take any action to prevent the spike loading machine from rolling into and colliding with the spike puller machine ahead of him, which in turn was pushed into and collided with the machine ahead of it. The hearing was held August 20, 2020, after which Claimant was found to be guilty as charged, and by notice dated September 8, 2020, he was dismissed from service.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that Claimant was denied his right to a fair and impartial hearing when the Carrier failed to issue precise charges, stating that the notice of investigation did not reference the specific rule Claimant was alleged to have violated. The Organization asserts that the lack of a rule citation is a violation of the applicable agreement, and it argues that the discipline should be overturned on that basis alone.

With respect to the merits, the Organization maintains that the discipline assessment was unwarranted, arguing that the Carrier failed to meet its burden of proof in connection with all of the charges. It contends that the Carrier did not provide sufficient evidence to establish that

Claimant was culpable for the alleged violation, and that while Claimant's machine bumped into another machine, no damaging collision occurred. It states that there was no damage to any of the machinery, nor was there injury to any employee involved. The Organization notes that the charging manager testified that two employees who completed injury reports did not seek medical attention nor did they miss any work.

The Organization states that the charging officer was not present when the incident occurred, such that his description of the event was secondhand. It denies that Claimant failed to take any action to prevent his machine from rolling into another machine, pointing to Claimant's testimony that he had used ballast and spikes to chock the wheels to prevent movement. It also points to Claimant's testimony that he applied the brakes immediately once the machine started rolling.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. The Organization points out that Claimant has 16 years of service and it contends that, even if the charges had been proven, which it denies, dismissal was harsh and excessive, rather than progressive, for an offense of this nature. The Organization concludes that dismissal was not warranted, and that the claim should be sustained.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment. It states that Claimant received a fair and impartial hearing, and it argues that there is no agreement requirement to cite a specific rule in a notice of investigation. The Carrier states that the purpose of a notice of investigation is to make the employee aware of the matter to be investigated so that a defense may be prepared, and it avers that the notice of investigation in this case did just that.

With respect to the merits, the Carrier maintains that the record contains substantial evidence to support the discipline assessed, stating that there is no question that Claimant was guilty of the charges levied. It asserts that the evidence, including Claimant's own admissions, establish that he failed to comply with Operating Rule 800, which required him to be responsible for safe movement and proper operation of his machine, in multiple ways. It states that Claimant released

the machine's brakes when it was too close to the spike puller, and that he did not notify the other employees he was working with that he intended to release the brakes. It also states that Claimant did not take action to prevent movement, such as chocking the wheels, while he was on a downhill grade, which increased the probability that the machine would roll.

With respect to the level of discipline imposed, the Carrier states that Claimant's actions equated to a carelessness and neglect of relevant operating rules, and it states that significant discipline is warranted, citing prior cases in which dismissal was upheld when employees failed to safely perform their duties. It states that Claimant endangered his fellow workers, and that he was fortunate no more serious injuries occurred. It also notes that Claimant's record includes several other discipline assessments, including a prior dismissal for fouling live track. The Carrier states that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that dismissal is appropriate in light of the significance of the infraction and Claimant's record.

We have carefully reviewed the record in this case and the parties' arguments, and we find no procedural barrier to our consideration of the merits. We find that the notice of investigation adequately apprised Claimant and his representative of the matter to be investigated.


With respect to the merits, we find that the Carrier has provided sufficient evidence to establish that Claimant was in violation of the cited rules. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in prior awards as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

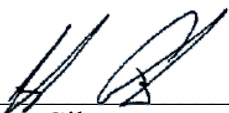
Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant was in violation of Operating Rule 800 when his actions resulted in his machine rolling forward and initiating a chain collision with other machines, as that clearly does not constitute safe movement and proper operation. While Claimant may have chocked the wheels initially when he was changing the pads, he also confirmed that he had removed the spikes


and ballast he was using to chock the wheels prior to attempting to test the brakes. The record also confirms that Claimant had other options to ensure that the machine would not roll, which he did not employ, and that he could have performed the test when the machines were not in such close proximity.

Having found substantial evidence to support the finding of guilt, the next question before us concerns the level of discipline assessed. The Carrier's concern regarding safe operation of track machinery is obviously well founded. We do believe, however, that the record contains mitigating factors which warrant a lesser degree of discipline than was imposed here, including Claimant's 16 years of service with no prior discipline events of record involving similar conduct. On the specific facts of this case, we believe that Claimant should be afforded one last chance to continue his career and to demonstrate that he can be a safe and productive employee. Claimant should be aware that he cannot expect a similar outcome if any further such incidents occur. Claimant is therefore to be returned to service, with seniority intact, but without pay for time out of service.

AWARD: Claim sustained in accordance with the findings. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.


Michael D. Phillips
Chairman and Neutral Member


Adam Gilmour
Employee Member


Scott Goodspeed
Carrier Member

Dated: November 13, 2023