

AWARD NO. 336  
Case No. 336

File No. MW-DECR-22-07-SG-736 SOU

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

PARTIES ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
          ) 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 (dismissal) of Mr. B. Morrison, issued by letter dated January 6, 2023, in connection with his alleged improper performance of duty in that at approximately 5:00 P.M. CST on October 12, 2022, while operating anchor squeezer machine (AAM 14054) near Mile Post (MP) SP 359.5 in Ellsworth, Illinois, he collided with ballast regulator (BR13009BX) which resulted in damage to both machines was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (Carrier's File MW-DECR-22-07-SG-736 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant B. Morrison shall now be exonerated of all charges filed against him, that he be reinstated back to service effective immediately, that he be fully made whole for any lost wages, per diems, holiday pay, all credits for his vacation and all other benefits under our Collective Bargaining Agreement.

**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 October 12, 2022, Claimant B. L. Morrison was working as a machine operator on T&S Gang 20. Claimant's regular bid assignment was as a spike puller operator, but on that date, he was assigned to operate an anchor squeezer machine (AAM). Due to inoperability of some new spiker machines, the gang had to back up to a siding to obtain working spiker machines, with Claimant following a ballast regulator. When the ballast regulator stopped to perform work after traversing a crossing, Claimant did not stop before his machine collided with the ballast regulator.

By notice dated October 28, 2022, 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, while operating the AAM, he collided with the ballast regulator, resulting in damage to both machines. The hearing was held December 19, 2022, after which Claimant was found to be guilty as charged, and by notice dated January 6, 2023, he was dismissed from service. The Carrier unilaterally reinstated Claimant to service on June 12, 2023, so at issue here is the 243 days which Claimant was withheld 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, and that the Carrier failed to comply with Rule 40 of the applicable agreement. Among its procedural objections, the Organization states that the hearing officer improperly allowed the charging officer to provide hearsay and speculation, including his opinion about what had occurred, including whether Claimant attempted to apply the brakes, even though he was not present at the time of the incident in question.

The Organization further objects that the hearing officer went off the record and instructed the charging officer to contact a mechanical supervisor to produce a statement regarding his inspection of the machine Claimant was operating. It states that it is the duty of a hearing officer to conduct an investigation that is fair and impartial, and it asserts that for the hearing officer to stop the recording of the hearing so he could instruct the charging officer on what specific witness to call and what alleged evidence to obtain is patently improper. It argues that the charging officer is the one responsible for obtaining such information prior to an investigation. The Organization asserts

that the lack of a fair and impartial hearing 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 collided with the ballast regulator, no objective proof was presented to establish that Claimant was at fault

The Organization states that the charging officer was not present when the incident occurred, so his description of the event was secondhand. It states that there is nothing other than the charging officer's vague testimony that the ballast regulator operator flashed his lights to indicate his intent to stop. The Organization points to the charging officer's testimony that Claimant had never been trained on the AAM, that he did not attempt to ascertain whether Claimant had been properly trained before assigning him the machine, and that prior to the date of the incident, Claimant had never operated that machine. It cites Article 11 of the applicable agreement as providing that employees "will not be placed in charge of roadway machines until after they have qualified to operate such machines," and it faults the charging officer for assigning Claimant to operate the AAM due to Claimant's lack of qualifications, stating that there were four other qualified AAM operators on the gang that could have been assigned.

The Organization cites Claimant's testimony that he did attempt to stop the machine, but that the brakes did not respond to his inputs. It also notes his testimony that the incident was a result of a combination of factors, including his lack of training on the machine and its different braking mechanisms, and by the failure of the brakes after he attempted to apply them.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. The Organization 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, even when the leniency reinstatement is considered. The Organization concludes that discipline 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 indication that the hearing officer or the assistant hearing officer acted improperly or that they had prejudged Claimant's guilt. The Carrier states that it was not a due process violation to allow a written statement from the mechanical supervisor, and it claims that Claimant admitted guilt, thereby obviating any procedural objections.

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 a collision occurred, and 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 812, which required him to be prepared to stop within half the range of vision, and that such failure was the direct cause of the collision. The Carrier states that Claimant was qualified on the AAM, citing Claimant's work history which included a previous assignment to a rail anchor machine, and it asserts that the braking system on the AAM was similar to the machine Claimant was regularly assigned. The Carrier contends that it therefore was proper for the charging officer to assign Claimant to operate the AAM, and it adds that Claimant did not voice any concerns to his supervisor about being assigned to operate the AAM. It points to Claimant's testimony that he had been able to stop the AAM without incident throughout the day, and it posits that the brakes therefore were in proper working order and that Claimant should have been able to stop when he saw the ballast regulator stop, had he been in compliance with OR 812 and OR 814.

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 was the sole cause of the collision due to his failure to properly control his machine. It also notes that Claimant's record includes two other discipline assessments, and it argues that this indicates a history of irresponsible behavior. The Carrier states

that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that the discipline assessment 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 first note that the Carrier's representations are not supported by the record in at least two significant aspects. One, there is nothing in the record to support the notion that Claimant admitted responsibility. Claimant did not dispute that a collision occurred, but he in no way conceded he was at fault.

Second, there is no support for the Carrier's assertion that Claimant was previously qualified on the AAM. In its on-property correspondence, the Carrier claimed that Claimant had been assigned to the machine for a period of 27 days in 2021, and that he had not been disqualified. The Organization pointed out, however, that Claimant had been awarded a different machine, and that he had gone on FMLA leave immediately thereafter until the position was abolished. The Carrier did not refute those facts, so the claim that Claimant had been previously qualified is inaccurate, to be generous. To the contrary, the charging officer candidly testified at several points that this was Claimant's first day on the AAM, and that he was not a qualified AAM operator.

With respect to the Organization's procedural challenges, find no barrier to our consideration of the merits. While the hearing officer's conduct regarding production of a statement from the mechanical supervisor is questionable at best, it did become apparent during the hearing that the mechanical supervisor's information was relevant, and the fact that it came in the form of a written statement is not itself a fatal defect.

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 812 when he was traveling at a speed which did not allow him to stop within half the range of vision. Whether the ballast operator flashed his lights or not, it was still incumbent on Claimant to operate at a speed which would allow him to stop short of a collision.

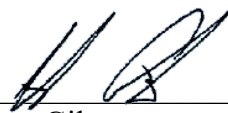
Nevertheless, we find that the Carrier did not give adequate, if any, consideration to mitigating factors which were plainly developed during the hearing. As noted above, there is no evidence that Claimant had ever operated the AAM prior to the charging officer assigning him to do so on the date in question. The charging officer stated at several points that Claimant was not a qualified AAM operator, and he gave no substantial reason for assigning Claimant to that position rather than to one of the other four employees who were qualified. And while the charging officer said that he thought the regularly assigned employee would give Claimant adequate information about operation of the machine, Claimant's testimony that he did not receive any substantive instruction was not refuted, as the supervisor was not privy to any discussions with the other employee. The record also confirms that the AAM braking system is substantially different from the braking system, and other operating mechanisms, of the machine Claimant was regularly assigned.

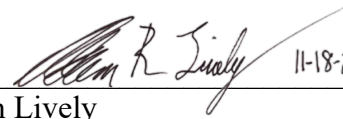
Our review of the transcript indicates to us that the charging officer, and the assistant hearing officer who issued the notice of discipline, had little to no interest in the fact that Claimant had not operated an AAM before, that its braking systems were different, and that he was not qualified on the machine. In our view, those factors should have been taken into consideration in the assessment of discipline. Perhaps they were when the Carrier later decided to return Claimant to service, but we think that was too late. On this record, we find that a 30-day suspension would have been more than adequate to address Claimant's responsibility when the mitigating factors above are considered. While the Board is advised that Claimant was not medically cleared for service for some or all of his suspension period, to the extent he was medically cleared for service, Claimant is therefore entitled to lost wages for the period he was out of service in excess of thirty (30) days. The Carrier is directed to comply with this Award on or before thirty (30) days

following the Award date below.

AWARD: Claim sustained in accordance with the findings.

  
Michael D. Phillips  
Chairman and Neutral Member

  
Adam Gilmour  
Employee Member

 11-18-2024  
Adam Lively  
Carrier Member

Dated: November 18, 2024