

PUBLIC LAW BOARD NO. 6394

Award No. 21

Parties to Dispute:

Brotherhood of Maintenance of Way Employes
(Consolidated and Pennsylvania Federations)

and

Norfolk Southern Railway Company

Statement of Claim:

Claim on behalf of L. D. Root for reinstatement with seniority and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on March 26, 2003, in connection with his failure to follow instructions to appear for a physical examination on February 27, 2003.

(Carrier File: MW-DEAR-03-05-LM -056)

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 and has jurisdiction of the parties and subject matter.

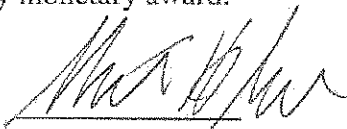
This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

Claim disposed of as follows:

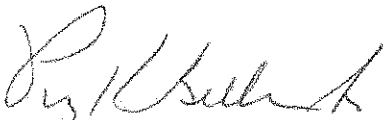
The record reflects that Claimant had been off duty for medical reasons since March 2002. In February 2003, Claimant advised Carrier that he was able to return to work. On February 26, 2003, the Track Supervisor instructed Claimant to report for a return-to-work physical exam on February 27 at 10:00 a.m. Claimant did not report as instructed. Claimant called the Track Supervisor the following day and requested that the exam be rescheduled. The exam was not rescheduled and Claimant was notified to report for an investigation. Following the investigation, Claimant was dismissed from service. Carrier reinstated Claimant six months later.

Carrier clearly proved the charge of failing to follow instructions by substantial evidence. Claimant did not report for the physical as instructed. However, we note that Claimant was not charged with and was not found guilty of insubordination, a much more serious offense. Considering all of the circumstances, we find that the penalty of dismissal and the penalty to which the dismissal was ultimately converted, a six month suspension, were excessive. Indeed,

we cannot see any justification for a penalty more severe than a suspension equal to the amount of time Claimant was out of service between the notice of investigation and the determination that he was guilty of the charge. However, it appears from the record in Case No. 23, which we have considered simultaneously with the instant claim, that beginning in March 2003, Claimant was medically unable to perform his duties. Accordingly, although the penalty must be reduced, Claimant is not entitled to any monetary award.



M. H. Malin
Chairman and Neutral Member



P. K. Geller, Sr.
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois, October 19, 2004.