

PUBLIC LAW BOARD NO. 6394

AWARD NO. 26

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 J. S. Haar for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for time lost as a result of his dismissal from service following a formal investigation held on February 21, 2006, in connection with his improper performance of duties in that he failed to timely and properly carry out the job assignment given by Track Supervisor Brewer, and also, conduct unbecoming an employee concerning displaying unprofessional and discourteous behavior toward, and engaging in a verbal altercation with, Track Supervisor L. E. Brewer on February 6, 2006.

(Carrier File MW-DEAR-06-05-LM-038)

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.

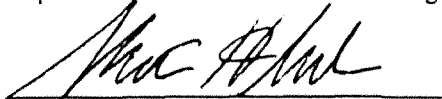
This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

Claim disposed of as follows:

The record reflects that on February 6, 2006, Claimant was the Foreman in charge of a gang that was to replace a frog in a crossover switch leading from Track 1 to Track 2. The work necessitated taking Track 1 out of service and erecting stop boards to control movement on Track 2. At 8:00 a.m., the Track Supervisor notified Claimant that the Dispatcher had advised that Track 1 was ready for work. However, as of 9:00 a.m. no one had contacted the Dispatcher to obtain the Form D necessary to take Track 1 out of service. Claimant maintained that traditionally the employee in charge of the stop boards also obtained the Form D. That employee on February 6 was an Assistant Foreman, who, as of 9:00 a.m. was still gathering and erecting the stop boards. Claimant's testimony to this effect was corroborated by other witnesses. However, it is undisputed that no rule precluded Claimant from securing the Form D. Moreover, during the period between the gang's arrival at the job site at around 8:17 a.m. and 9:00 a.m. no work was accomplished. No job briefing was held. Furthermore, the gang did not have all of the material needed for the job at the site and Claimant did not send anyone to obtain the missing material, specifically joint bars.

The record further reflects that when the Track Supervisor questioned Claimant concerning his failure to secure the Form D, Claimant responded in an unprofessional manner, yelling and cursing at the Track Supervisor. Although Claimant testified that he was not the aggressor and placed all responsibility for the verbal altercation on the Track Supervisor, his testimony was disputed. As an appellate body, we defer to the resolution of such disputes in the testimony reached on the property.

We conclude, that carrier proved the charges by substantial evidence. However, under the circumstances, particularly considering Claimant's more than twenty years of service, we find that the penalty of dismissal is excessive. Claimant shall be reinstated to service with seniority unimpaired but without compensation for time held out of service. For a period of six months commencing with the date Claimant is reinstated, he shall be disqualified from any Foreman position. Following the six month disqualification period, Claimant shall be eligible to bid on Foreman positions in accordance with the Agreement.



M. H. Malin
Chairman and Neutral Member



B. A. Winter
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on November 15, 2006