

PUBLIC LAW BOARD NO. 6394

AWARD NO. 36

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
(CONSOLIDATED AND PENNSYLVANIA FEDERATIONS)**

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of M. E. Clement for reinstatement to service and pay for all time lost at his applicable rate as a result of his dismissal from service following a formal investigations held on September 23, 2008, in connection with improper performance of duty in that on August 25, 2008, while working as Foreman in charge of a gang replacing bridge ties, he (1) failed to ensure that a loose piece of grating was secured, resulting in an employee falling through the grate and being injured; (2) engaged in other tasks while working as the Watchman/Lookout and also failed to maintain proper sight distance; and (3) gave false statements during a post-incident inquiry.

(Carrier File MW-DEAR-08-122-BB-524)

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:

On April 25, 2008, Claimant was the Foreman in charge of a gang that was replacing ties on Track 1 of a double track bridge over the Vermillion River. On the outside of each track was a three-foot walkway with guardrails. Between the two tracks was a six-foot space with a grating that served as a walkway. In the process of replacing the ties, the guardrails and grating were removed. Stop boards provided protection to the employees.

The stop boards expired at 5:00 p.m. Assistant Foremen J. R. Jokinen and S. K. Holley worked the stop boards. As the expiration time was approaching, they took down the stop boards. As work was not yet completed for the day, Claimant provided on-track protection by serving as Watchman/Lookout. Meanwhile, Mechanic D. A. Perry set two 20-foot long sections of grating secured to the outriggers. A gap of 8 feet, 3 inches remained between the two sections. Perry set a piece of grating 8 feet 2 inches in the gap, but the piece was not secured and was supported by only one outrigger in the middle. After removing the stop boards, Jokinen and Holly returned to the bridge around 5:30 and assisted with the remaining work. Jokinen

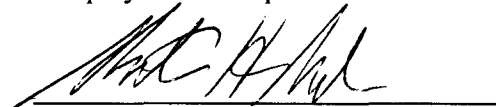
was was driving lag screws into the guard timber. He was not wearing fall protection. He stepped on the unsecured grating and fell through the bridge, striking the pier and then falling into the river.

At the investigation, Claimant faced three charges: responsibility for the unsafe conditions that resulted in Jokinen's accident and injuries, failing to properly perform Watchman/Lookout duties, and making false statements during the inquiry into the incident. As to the first charge, the record is clear that, although Claimant conducted a job briefing with Jokinen and Holly when they returned from removing the stop boards, he did not warn them about the unsafe grating and did not require them to wear fall protection. Claimant testified that he was not aware that the grating was unsafe to walk on, but Mechanic G. Strobbe testified that he advised Claimant that the grating was not secure and not safe and that Claimant responded that they would deal with it at the end of their work for the day and advised Strobbe to keep chains on the grating to mark it as hazardous. The Organization argues that Strobbe briefed Jokinen and Holly and advised them that the grating was unsafe. The evidence is conflicting as to what specifically Strobbe told the two Assistant Foremen but at most he told them to stay in the gauge. There is no evidence that anyone told them to wear fall protection. We conclude that Carrier proved the first charge by substantial evidence.

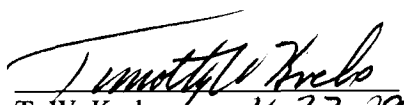
With respect to the second charge, there is no dispute in the record that Claimant continued to perform his Foreman's duties while serving as Watchman/Lookout. This is a direct violation of Rule 756(b) which provides, "Watchman/Lookouts assigned to provide train approach warning must devote full attention to detecting the approach of trains . . . and must not be assigned or perform any other duties while functioning as watchman/lookouts." Carrier proved the second charge by substantial evidence.

With respect to the third charge, there is no dispute that Claimant told the Track Supervisor, the Assistant Division Engineer and the FRA Inspector that the section of grating set between the two twenty-foot sections overlapped each section by two inches. There is also no dispute that this information was false. Carrier proved the third charge by substantial evidence but in evaluating the seriousness of this offense, we must take into consideration that Claimant's statements were made shortly after an employee under his supervision had suffered a serious accident which could have been fatal. We are unable to agree with Carrier's characterization of these inaccuracies as deliberate falsehoods.

Having concluded that Carrier proved all three charges by substantial evidence, we turn to the penalty assessed. Claimant had more than thirty years of service and the only prior discipline in the record was a single deferred suspension. We find that the penalty of dismissal was excessive. Carrier shall reinstate Claimant to service with seniority unimpaired but without compensation for time out of service. The lengthy period of time that Claimant has been out of service should reinforce to him the importance of his responsibility for the safety of all employees who report to him.



M. H. Malin
Chairman and Neutral Member


T. W. Kreke
Organization Member
D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on April 10, 2009