

PUBLIC LAW BOARD NO. 6394

AWARD NO. 39

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 D. C. Setting requesting reinstatement to service and payment for all time lost as a result of his dismissal following a formal investigation held on January 13, 2009, concerning conduct unbecoming and improper performance of duty in connection with his unauthorized use of video film making equipment to record on-track equipment movements on at least four separate occasions while on duty, and his unauthorized publication of the improperly recorded video on the Internet.

(Carrier File MW-PITT-08-161-SG-651)

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.

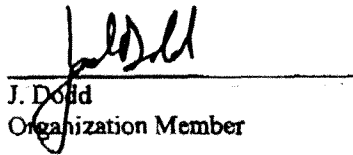
Claim disposed of as follows:

There is no question that Carrier proved the charges by substantial evidence. Claimant admitted videotaping while at the controls of moving equipment and posting the videos on YouTube. The critical question is the appropriateness of the penalty of dismissal. It is clear that Claimant's actions were not malicious – rather they were stupid. Furthermore, when the Chatsworth derailment, an incident involving a different Carrier in California where the engineer of a passenger train collided with a freight train while sending a text message, Claimant, on his own initiative, ceased videotaping. It appears that the Chatsworth incident made Claimant realize how unsafe his actions were.

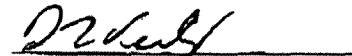
Claimant's misconduct, while very serious, would appear to be correctable with discipline short of dismissal. We conclude that the penalty of dismissal was excessive. Carrier shall reinstate Claimant to service but without compensation for time out of service. Furthermore, Claimant shall forfeit his machine operator seniority.



M. H. Malin
Chairman and Neutral Member



J. Dodd
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on September 24, 2009