

PUBLIC LAW BOARD NO. 6394

AWARD NO. 9

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 W. F. Flower, II 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 August 29, 2001, for insubordination and leaving the property without permission on August 8, 2001 and making a false statement to an officer of the company on August 9, 2001.

(Carrier File: MW-PITT-01-33-LM-285)

On 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 contains substantial evidence that Claimant disobeyed a direct order on August 8, 2001, to obtain track time for a contractor. The record further contains substantial evidence that, on August 8, 2001, when Claimant told his supervisor that he was going home sick, the supervisor asked him to wait a moment to discuss the matter as the supervisor was on the telephone, but Claimant did not wait and left the property. Accordingly, we find that Carrier proved Claimant guilty of insubordination and of leaving the property without permission.

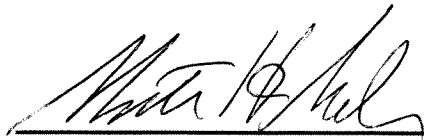
The offenses that we find Carrier proved by substantial evidence are very serious and very frequently justify dismissal. In the instant case, however, we find several factors strongly mitigate against the penalty of dismissal. First, we find that Carrier failed to prove the charge of making a false statement to an officer of the company. Carrier alleged that Claimant falsely told the Assistant Division Engineer that he called in sick on August 9, 2001, attempted to speak with the Track Supervisor or Assistant Track Supervisor who were not available and, therefore, told the Foreman that he was sick. There is no dispute that Claimant called in on August 9, spoke to the Foreman and told the Foreman that he was sick. The allegedly false portion of Claimant's statement to the Assistant Division Engineer was Claimant's indication that he had attempted

to speak with the Track Supervisor or Assistant Track Supervisor. Claimant testified that he did ask to speak to the Track Supervisor or Assistant Track Supervisor when he called and spoke with the Foreman. The Foreman testified that Claimant did not make such a request. The Foreman also testified that he told Claimant that the Assistant Track Supervisor was off. The Foreman speculated that Claimant did not know the status of the Track Supervisor but added that the Track Supervisor was usually at another office.

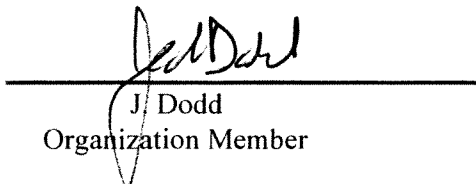
Thus, although the Foreman's testimony contradicts Claimant's testimony in part, it also corroborates Claimant in part, at least to the extent that both agree that the Assistant Track Supervisor's status came up in their conversation. The evidence that Claimant made a false statement to the Assistant Division Engineer is weak, at best. Most significantly, however, all witnesses, including the Assistant Division Engineer, agreed that the Foreman was authorized to receive Claimant's report of his illness. Thus, even if Claimant's statement to the Assistant Division Engineer that he had asked to speak to the Track Supervisor or Assistant Track Supervisor was false, it was not material because by speaking to the Foreman, Claimant properly reported his illness and absence. There was no reason for Claimant to have fabricated a story about asking to speak to the Track Supervisor or Assistant Track Supervisor. He had no need to try to protect himself against a charge of failing to properly report his absence because Claimant properly reported it by reporting it to the Foreman.

Second, Claimant had twenty-six years of service at the time of the incidents. Moreover, there is nothing in the record that reflects any blemish on Claimant's record prior to the incidents of August 8, 2001.

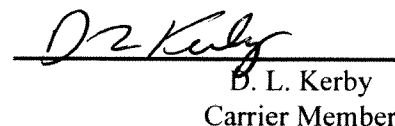
Third, Claimant's actions on August 8, 2001, arose out of safety concerns he had voiced in good faith concerning a contractor failing to leave the track when required. Furthermore, the incidents arose during a period where the stress Claimant felt as a result of those concerns stimulated an attack of shingles. Considering the circumstances that led to his insubordination and leaving the property without permission and balancing those circumstances against an otherwise unblemished twenty-six year work record leads us to conclude that dismissal for an admittedly very serious but also clearly aberrational instance of misconduct is excessive. Therefore, we order Carrier to reinstate Claimant to service with seniority unimpaired but without compensation for time held out of service.



M. H. Malin
Chairman and Neutral Member



J. Dodd
Organization Member



B. L. Kerby
Carrier Member

Issued at Chicago, Illinois on August 17, 2002