

PUBLIC LAW BOARD NO. 6394

AWARD NO. 10

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 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 September 28, 2001, for falsification of payroll and claiming excessive mileage on August 4, 2001.

(Carrier File: MW-PITT-01-42-LM-353)

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 charges against Claimant were based on his having claimed to have worked thirteen hours on August 4, 2001, and on his submission of a mileage reimbursement request for using his personal vehicle for 199 miles on the same day. On the date in question, Claimant was the foreman in charge of the track between CP Rochester and Waltham. There had been ongoing allegations that the contractor who was working the T-Cubed project was not clearing the track when instructed and was fouling the track after the track had been given up. Claimant testified that, because of these concerns, after he gave the track up at 4:07 p.m., he observed crucial areas to see if the contractor had vacated the track. Claimant testified that from 4:20 to 4:40 p.m., he was on the Rte. 558 bridge observing the contractor fouling the track. After the contractor left the track, Claimant got a sandwich and coffee at McDonald's, because he had not taken a lunch break. He returned to the bridge to ensure that the contractor had left for good at 4:55 p.m. He then returned the hi rail vehicle to the Conley Inn, transferred his equipment to personal vehicle, drove to Wampum to ensure that the contractor had left the track, then drove to Rochester for the same purpose and finally drove to Hazelton and went off duty at 7:30 p.m. Claimant's explanation fully accounted for the time and mileage that he claimed.

Carrier offered only two pieces of evidence against Claimant. First, the Track Supervisor testified that

Claimant had told him that he (Claimant) had left the property between 3:30 and 4:00 p.m. on August 4. However, it is undisputed that Claimant did not give up the track until 4:07 p.m. on August 4. When asked about the Track Supervisor's testimony, Claimant testified:

Well, after we had had our discussion on that Wednesday after the Saturday where all this had happened with the contractors staying on the property after I had left, I could have been a little mixed up. But as far as I wasn't off. I didn't give the track back until 4:07. I didn't leave Vail until 4:20, after talking with these contractors and trying to get them clear of the property as I so stated.

Even assuming that the Track Supervisor accurately remembered his conversation with Claimant, the Track Supervisor's testimony establishes at most a mistake in communication. It does not establish that Claimant did not perform the tasks to which he testified in the investigation and it does not establish that Claimant falsified his time and mileage on August 4.

Second, Carrier relied on Claimant's testimony during the investigation held on August 29, 2001, into charges that were the subject of this Board's Award No. 9. The following exchange occurred between Claimant and Hearing Officer Hamilton:

Hamilton: Well you said they kept going, they were still working.

Flower: After 4 o'clock I see the water truck coming across the track and a backhoe. And I told them, I said I told you guys I couldn't protect you after 4 o'clock. That they have trains coming, two Northbounds, one Southbound. Ted Stanford told me, he says you are not going to get any more track until after 6 o'clock. And I do not stand there past 6 o'clock.

Hamilton: You left at that point?

Flower: I left at that point and went to an overhead bridge where I had view of them and they just kept on going back and forth, with the water truck and the back hoe. I stayed there until about 4:30 and then they started wrapping it up.

Claimant's testimony at the August 29 investigation does not prove that he falsified his time and mileage report for August 4. Claimant did not testify at the August 29 investigation that he went off duty at about 4:30 on August 4. He testified that he "stayed there," i.e. on the overhead bridge until about 4:30 when the contractor started wrapping up. That is entirely consistent with his testimony in the instant investigation that he left the bridge at 4:40 p.m. Claimant did not testify at the August 29 investigation as to his actions after he left the bridge, but no one asked him about that.

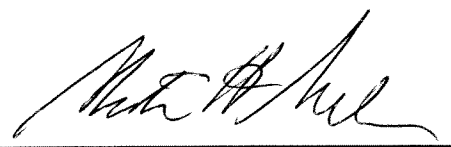
When asked at the instant investigation to explain the reference to 4:30 in the August 29 investigation, Claimant testified:

Yes, on that day of that trial, uh, I really didn't have the exact times down in my mind. I was focused on uh this other day of the incident. And I was a nervous wreck at the time and I couldn't give them an exact time off the top of my head until I checked my other figures that I had wrote down.

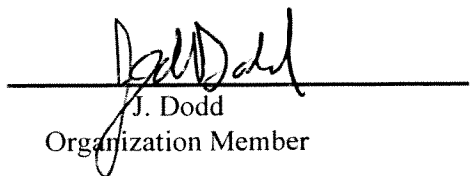
Claimant's explanation is logical and there is nothing in the record to discredit it. The charges under investigation on August 29 concerned incidents that occurred on August 8 and 9, not August 4. The events of August 4 were background to Claimant's defense that on August 8 and 9 he was suffering from a flare-up of shingles brought on by stress resulting from the contractor's failing to clear the track in a timely and proper manner. No one at the August 29 investigation asked Claimant what he did after leaving the bridge at about 4:30 p.m. and there was no reason for Claimant to elaborate on his actions. Claimant's testimony at the August 29 investigation offers no proof that he falsified his time and mileage reports for August 4.

Accordingly, we conclude that Carrier failed to prove the charge by substantial evidence and the claim must be sustained. However, in Award No. 9, we held that Carrier proved the charges of insubordination and leaving the property without permission by substantial evidence. We further held that, considering all of the circumstances, the penalty of dismissal was excessive and ordered Carrier to reinstate Claimant with seniority unimpaired but without compensation for time held out of service. In light of Award No. 9, Claimant is not entitled to compensation for time held out of service in connection with the instant claim, as that time overlaps with the time held out of service on the charges that resulted in the August 29 investigation.

Accordingly, our Award is that the claim be sustained but that Carrier need not compensate Claimant for time held out of service.



M. H. Malin
Chairman and Neutral Member



J. Dodd
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on August 17, 2002