

PUBLIC LAW BOARD NO. 6394

AWARD NO. 34

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 M. A. Smith for reinstatement to service following his dismissal as a result of a formal investigation held on May 1, 2007, in connection with his improper performance of duty as a backhoe operator, violation of Safety and General Conduct Rule GR-32, violation of HV-1 Rule 40 and, upon getting the backhoe stuck on the track, taking no action to protect the machine against approaching train movements.

(Carrier File MW-PITT-07-13-LM-152)

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.

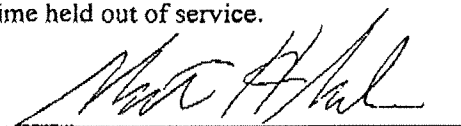
Claim disposed of as follows:

The record reflects that on April 10, 2007, Claimant was operating the backhoe putting in ties at MP 35.6 on the Mon Line. When the employees broke for lunch, Claimant secured permission from his foreman to drive the backhoe around 1,800 feet along the right-of-way to get within walking distance of a McDonald's restaurant. The Foreman warned Claimant that he had cleared a train to enter into the block where the gang had been working.

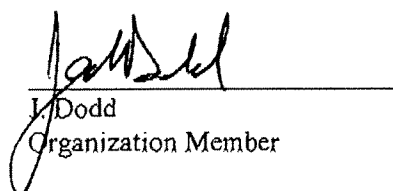
There is no dispute that as Claimant operated the backhoe along the right-of-way, he encountered concrete pipes which left only ten and a half feet to get by. The backhoe was six feet, eleven inches wide, which meant that Claimant could not get past the concrete pipes without coming within four feet of the track and thereby fouling the track. Claimant decided he could get past the pipes quickly and before the train that he had been warned would be approaching. Unfortunately, he became stuck in a ditch and was unable to extricate the backhoe from the ditch. He did not contact his Foreman or the crew of the on-coming train to warn them of the backhoe fouling the track. Instead, he got himself clear of the backhoe, leaving it fouling the track. When the train came through, the crew placed it into emergency but the hopper cars struck the cab of the backhoe, causing \$33,000 in damage.

There is no question that Carrier proved the charges by substantial evidence. The critical issue is the severity of the discipline. We cannot over-emphasize the seriousness of Claimant's misconduct. Claimant is lucky that his actions did not result in serious bodily injury or a fatality. Claimant must learn to think before taking action and to avoid taking risks that are totally unnecessary and unacceptable.

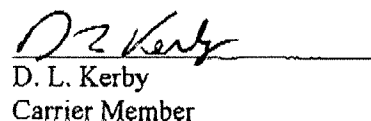
However, we note that Claimant's actions were not intentionally malicious. Rather, they were stupid and unthinking. Claimant's unthinking actions were aggravated by a second bout of stupidity apparently brought on by panic when Claimant was unable to free the backhoe from the ditch. Under the circumstances, we conclude that a lengthy suspension, equivalent to time held out of service, will serve the purpose of underscoring to Claimant the importance of making safety his top priority and of working smartly and reacting appropriately when facing emergencies, including self-created emergencies. Accordingly, 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.



M. H. Malin
Chairman and Neutral Member



J. Dodd
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on January 19, 2008