

**PUBLIC LAW BOARD NO. 6394**

**AWARD NO. 37**

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 R. M. Burdette for reinstatement to service with all rights and privileges and pay for all time lost as a result of his dismissal from service following a formal investigation held on August 18, 2008, in connection with his violation of Norfolk Southern Safety and General Conduct Rule GR-26 concerning being in a slouched position with head down and eyes closed while on duty during a mandatory safety meeting on July 28, 2008.

(Carrier File MW-HARR-08-19-SG-423)

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.

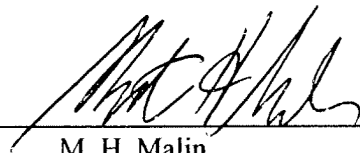
This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

Claim disposed of as follows:

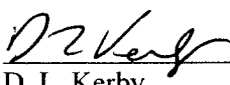
The basic facts are not in dispute. On July 28, 2008, Claimant was assigned to Rail Gang R-10. The Gang Supervisor began a safety meeting at 6:00 a.m. Around 6:20 a.m., the Process Engineer entered the dining car where the meeting was taking place and observed Claimant with his head down resting on his wrists and arms crossed in front of him on the table. The Process Engineer slammed the door but Claimant did not respond. The Process Engineer then yelled at the Supervisor asking if the Supervisor tolerated such conduct during his safety meetings. As the Process Engineer yelled, Claimant began to lift his head up.

Claimant maintained that he was not sleeping. Rather, according to Claimant, his eyes were irritated due to a combination of dust stirred up from the gravel by the comings and going of various people and his insertion of this contact lenses. Claimant maintained that he was rubbing his eyes against his wrists. Rule 26 provides, "Sleeping on duty is prohibited. An employee lying down or in a slouched position with eyes closed or with eyes covered or concealed will be considered sleeping." There is no question that Claimant was in a slouched position with his eyes covered. Thus, even if Claimant's explanation was credited, he would still be in violation of Rule 26. There is no question that Carrier proved the charges by substantial evidence.

The critical issue is the severity of the discipline. Claimant's misconduct is extremely serious. Claimant himself conceded that an impartial observer seeing him with his head down would have assumed that he was not paying attention to an important safety meeting. However, under the circumstances, we conclude that the penalty of dismissal was excessive. A lengthy suspension, equivalent to time held out of service, will serve the purpose of underscoring to Claimant the importance of avoiding even the appearance of sleeping while on duty and of giving his Supervisor his undivided attention, especially at safety meetings. Claimant shall be reinstated to service with seniority unimpaired but without compensation for time held out of service.

  
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M. H. Malin  
Chairman and Neutral Member

  
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J. Dodd  
Organization Member

 5/4/09  
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D. L. Kerby  
Carrier Member

Issued at Chicago, Illinois on April 10, 2009