

PUBLIC LAW BOARD NO. 6394

AWARD NO. 40

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 C. M. Biddle requesting that he be paid for all time lost as a result of his dismissal following a May 6, 2009 formal investigation, concerning his improper performance of duty as a Machine Operator in that Spike Puller SP 87306R he was operating collided with Spike Puller SP 87317L.

(Carrier File MW-HARR-09-06-SG-128)

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:

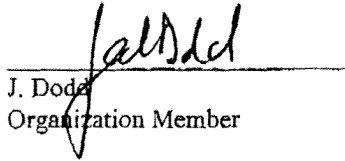
On March 19, 2009, Claimant was operating Spike Puller SP 87306R, tramping behind Spike Puller SP 87317L. The lead Spike Puller stopped and Claimant's machine collided with it, causing damage to the machines and injuring the operator of the lead Spike Puller who suffered a broken rib. The critical issue concerning whether Carrier proved the charge that Claimant failed to maintain the ability to stop within one-half the range of vision focused on Claimant's contention that the brakes on his machine failed. Following the collision, the Mechanic found that a valve on Claimant's machine was partially closed. However, he testified that the valve would not close just from the vibrations of tramping, but was probably partially closed as a result of the collision. Furthermore, the Mechanic testified that if the valve had partially closed while Claimant was tramping it would have caused the engine on the machine to behave erratically and Claimant would have noticed the problem before he needed to stop short of the lead Spike Puller.

Another Machine Operator testified that he operated the same Spike Puller about a month earlier and encountered a situation where, after making a saw cut in the rail, the brakes failed. He notified the mechanic who quickly made the repair by opening a valve which had become partially closed. The Mechanic testified that the valve at issue in the earlier incident was located at the front of the machine and was vulnerable to being accidentally bumped when the rail was cut. In contrast, the location of the valve which was found partially closed following the collision was located in a position where it could not be accidentally bumped. Based on the Mechanic's testimony, we conclude that Carrier proved the charge by substantial evidence.

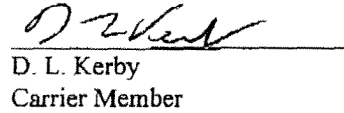
However, considering all of the surrounding facts and circumstances, we conclude that the penalty of dismissal was excessive. Claimant shall be reinstated to service with seniority unimpaired but without compensation for time held out of service. Furthermore, Claimant shall forfeit his Machine Operator seniority.



M. H. Malin
Chairman and Neutral Member



J. Dodge
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on September 24, 2009