

**SPECIAL BOARD OF ADJUSTMENT NO. 1048**

**AWARD NO. 132**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

Statement of Claim:

Claim in behalf of J.K. Shepherd for restoration of Foreman rights and pay for all time lost as a result of his forty-five day actual suspension and disqualification as a foreman following a formal investigation held on April 30, 2003, for improper performance of duty as an assistant foreman in that on April 9, 2003, at Ellet, Virginia, a bulldozer that he was protecting was struck by a train.

(Carrier File MW-ROAN-03-20-LM-103)

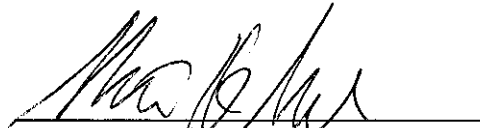
Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

**AWARD**

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

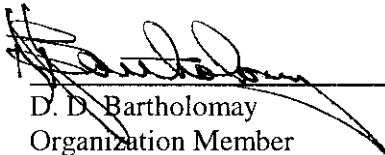
The Organization argued that Carrier did not afford Claimant a fair and impartial investigation because, during the hearing, the Assistant Division Engineer who was attending as an observer, allegedly nodded and shook his head while witnesses were testifying. However, the Organization failed to object to such alleged actions while any witness was testifying. Rather, the Organization raised the alleged conduct at the end of the hearing. By waiting until the end of the hearing, the Organization prevented the hearing officer from addressing the objections at the time the allegedly objectionable conduct occurred; in so doing, it waived the objections.

The record contains substantial evidence that Claimant failed to position himself at a point where he could see the operation of the contractor's bulldozer and that Claimant's failure to properly perform his duties in this regard as employee in charge substantially contributed to the accident that occurred when the bulldozer fouled the track and was struck by a train. Furthermore, given the seriousness of Claimant's misfeasance, we cannot say that the penalty imposed was arbitrary, capricious or excessive. Accordingly, the claim must be denied.



M. H. Malin

Chairman and Neutral Member



D. D. Bartholomay  
Organization Member



D. L. Kerby  
Carrier Member

Issued at Chicago, Illinois on October 19, 2004