

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 2

Case No. 3

STATEMENT OF CLAIM

Claim of C. L. Smith, III, that he be returned to service with all seniority and other rights unimpaired and that he be compensated for all wage loss suffered and that the charge be stricken from his record.

F I N D I N G S

Following an investigative hearing, the Claimant was dismissed from service for the "submission of a falsified personal injury report which you performed [sic] on February 4, 1986 and in which you alleged a muscle pull was sustained while you performed service at 11:30 a.m., February 3, 1986". The Carrier apparently reached its decision based on its conclusion as to the improbability of an accident occurring in the manner described by the Claimant and on his supervisor's understanding of some deliberate misconduct by the Claimant. The supervisor testified that two other employees had reported to him that the Claimant

had told them, before the incident, that he was "going to get hurt". The two employees supported their contentions through written statements and testimony.

Following the alleged accident, the Claimant obtained medical treatment. When he reported to his supervisor, on or about February 5, 1986, the supervisor advised him that he was "disqualified" from his position. The Claimant later provided a medical note finding him fit for return to duty on February 27.

The Board first sees no basis for the "disqualification" of the Claimant. If it were assumed that the Claimant was providing false information about an alleged accident, the proper step was for the Carrier to initiate disciplinary action (which it did by notice of investigation dated March 10, 1986). Pending such investigation and after the Claimant had medical evidence that he was fit for duty, there was no basis for withholding the Claimant from work.

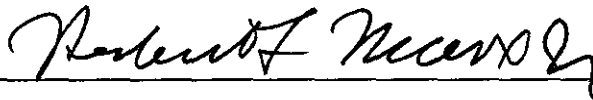
The Carrier has a substantial burden to prove that the Claimant's accident report was fabricated, despite allegations by two other employees that they inferred from the Claimant's remarks that he was going to falsify an accident. Absent from the record is any medical review by the Carrier as to examination of the Claimant's alleged muscle strain. Such determination cannot be made with any assurance by the supervisor or by laymen

reviewing the hearing record. Convincing proof was lacking that the events of February 3 did not occur as promptly reported by the Claimant and as supported in medical notes which he provided.

The claim will be sustained. Remuneration for wage loss suffered, however, must take into account the medical evidence of Claimant's incapacity until February 27, 1986. Pay for the period thereafter must also be consonant with what his seniority standing would have been had he not been "disqualified" on or about February 5, 1986.

A W A R D

Claim sustained to the degree provided in the Findings. The Carrier is directed to put this Award into effect within thirty (30) days of the date of this Award.



HERBERT L. MARX, JR., Referee

NEW YORK, NY

DATED: June 9, 1988