

PUBLIC LAW BOARD NO. 6394

AWARD NO. 28

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 G. A. Clare for reinstatement to service seniority, vacation and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation held on November 1, 2005, in connection with his violation of Safety and General Conduct Rule N concerning his October 7, 2005 report of an on-duty injury that allegedly occurred on September 26, 2005, and making false and conflicting statements in connection with this alleged injury.

(Carrier File MW-DEAR-05-75-LM-362)

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:

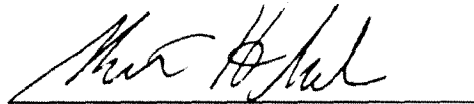
There is no dispute that Claimant violated Rule N. Claimant testified that he injured himself twice on September 26, 2005, first while lifting a ramp and again when he fell on the ballast. Claimant testified that he felt pain in his back both times, yet he did not report any injury until October 7. This was a clear violation of Rule N.

With respect to the charge of making false and conflicting statements, we are troubled by the actions of the hearing officer. Part of the case against Claimant consisted of evidence that Claimant had injured his back in a prior off-duty vehicle accident. The Organization requested a recess to obtain medical records which, it represented, would show that Claimant's prior injury was to his lower back while his alleged on-duty injury was to his middle back. The hearing officer denied the request. This was clear error. Although the notice of investigation clearly placed Claimant on notice concerning the nature of the charges, there was no requirement that it be so specific as to list the probable evidence against him and a reasonable person reading the notice would not have realized that the evidence was to include evidence of a prior back injury.

Consequently, in our review of the evidence concerning the charge of false and conflicting statements, we will disregard any inference that might be drawn from Claimant's prior back injury. Even when that evidence is disregarded, however, the evidence of Claimant's guilt was not only substantial, it was overwhelming. Not only did Claimant not report any on-duty injury until October 7, he affirmatively represented on October 3 that he was experiencing back pain from his prior vehicle accident. He also sought time off because of his mother's illness, flooding in his basement and a broken furnace. Thus, regardless of whether one credits Claimant's contention that he injured his back on duty on September 26, he was dishonest with Carrier either in the reasons he gave for seeking time off or in filing his on-duty injury report on October 7.

Claimant testified that he fell on the ballast while turning off the power pack on the truck, an action necessitated by a hose becoming detached. Yet, the vehicle operator testified that it took only thirty seconds for Claimant to get to the truck and turn the power off, testimony that would exclude the possibility that Claimant fell down an embankment and onto the ballast. Furthermore, Claimant maintained that the Signals Supervisor was standing within two feet of him and saw him fall but the Supervisor emphatically denied seeing Claimant fall. Two other coworkers who were present at the scene also testified that they did not see Claimant fall.

If the evidence were not so overwhelming, we would seriously consider sustaining the claim because of the hearing officer's error in denying the requested recess. However, even when we disregard the evidence of the prior back injury, the record leaves no doubt as to Claimant's guilt of the charge of making false and conflicting statements. Accordingly, the claim is denied.



M. H. Malin
Chairman and Neutral Member



B. A. Winter
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on November 15, 2006