

PUBLIC LAW BOARD NO. 6394

Award No. 16

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. A. Beldon for reinstatement with seniority and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on July 19, 2002, for violation of Rule N for failure to properly report an injury which alleged occurred on November 6, 2001 and making false and conflicting statements in connection with such alleged on-duty injury.

(Carrier File: MW-DEAR-01-85-LM -548)

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: Carrier learned of Claimant's alleged injury on March 26, 2002, when the Track Supervisor was notified by the District Claim Agent that he had received a March 14, 2002, letter from Claimant's attorney alleging that Claimant had been injured on duty on November 6, 2001. The Division Engineer notified Claimant to complete an on-duty injury report but Claimant never did so. Thus, there is no question that Claimant violated Rule N.

The charge that Claimant made false and conflicting statements contends that the alleged on duty injury did not occur. However, during the investigation, Claimant's representative requested a recess to retrieve medical documentation and to obtain two eye witnesses. The Hearing Officer stated:

Mr. Beldon is being charged with a Rule violation and which is not reporting an injury. I fail to see how retrieving some medical documentation is going to prove his case that he

reported an injury. To report the injury you need to get in contact with the Supervisor and fill out the appropriate paper work. He was afforded the opportunities on November 6th and several months after that while he was still working. And from what we (sic) came out of this investigation so far was that he did not do it on November 6th and he admits to not filling out any paperwork all the way through February.

Claimant's representative responded:

I understand what your (sic) saying in regards to the charge of Rule N. So are you telling me as a Hearing Officer you are dropping the charge of falsification of injury pertaining to an alleged injury? That is a separate charge all to itself that Mr. Beldon could be found guilty of one, but not the other. Or he could be found incident (sic) of both, however we are facing two charges here, not just one.

The Hearing Officer replied:

At this point in the investigation I really only see the violation of Rule N as pertinent information is brought out on that and I have no attention (sic) of this time of pursuing a second charge of falsification of information.

Following that exchange, there was no further evidence that might show that Claimant's claim of on-duty injury was false. Carrier may not disclaim one of the charges during the hearing and then find Claimant guilty of that charge.

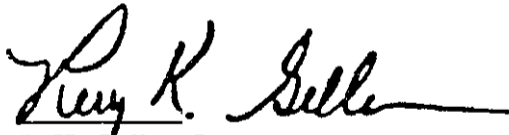
Furthermore, the record reflects that the Hearing Officer indicated that he was prepared to summon the two eye witnesses to testify. Claimant's representative objected to bringing them to the hearing on short notice and pulling them off of their jobs to do so and reiterated his request for a recess of a few days. The Hearing Officer denied the requested recess and Claimant and his representative walked out of the hearing. Thereafter, the Hearing Officer stated that he saw no reason to bring in the witnesses and concluded the hearing.

Claimant's representative's actions in walking out of the hearing were highly improper. However, in concluding that he saw no reason to bring in the witnesses following the walk-out, the Hearing Officer misconceived his role. The Hearing Officer is not an adversary to the employee under charge. Rather, the Hearing Officer's role is to develop the facts in an impartial manner. Claimant had alleged that he was injured when he bumped a switch panel with the front end loader that he was operating. The Track Supervisor testified that he never saw Claimant bump the switch panel. The two witnesses were alleged to be present and to have seen Claimant bump the switch panel. By concluding the hearing without calling the witnesses, the Hearing Officer precluded full development of the record. Perhaps had the witnesses testified, they would have corroborated the Track Supervisor. Perhaps they would have testified to seeing Claimant bump the switch panel. Because the Hearing Officer prematurely terminated the hearing, we will never know.

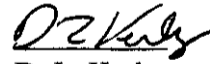
Under these circumstances, both because the Hearing Officer disclaimed reliance on the charge of false and conflicting statements and because the Hearing Officer prematurely terminated the hearing without calling two potentially critical witnesses, the charge of making false and conflicting statements cannot form a basis for discipline. However, Carrier did prove the charge of violating Rule N by substantial evidence. A violation of Rule N is quite serious but, under the circumstances presented, we find that it cannot support a penalty of dismissal. The Claim shall be sustained to the following extent. Claimant shall be reinstated to service with seniority unimpaired, but without compensation for time held out of service.



M. H. Malin
Chairman and Neutral Member



P. K. Geller, Sr.
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois, July 23, 2003.