

PUBLIC LAW BOARD NO. 6394

Award No. 17

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 R. W. Moore 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 August 16, 2002, for violation of Rule N for failure to properly report an injury which alleged occurred on April 18, 2002 and making false and conflicting statements in connection with such alleged on-duty injury.

(Carrier File: MW-DEAR-02-28-LM -131)

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 June 13, 2002, Claimant reported that he had injured his back on duty on April 18, 2002. Claimant testified that on April 18, 2002, he felt pain in his back but believed that he could work it out without medical attention. According to Claimant, his back became progressively worse. During May 2002, Claimant received medical attention but submitted the bills under the regular health insurance and still did not report the alleged on-duty injury. He finally reported the injury on June 13, 2002.

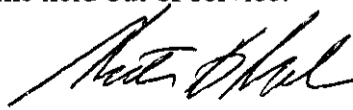
There is no question that Claimant violated Rule N, as he was required to report the incident on the day it occurred. Claimant maintained that he did not report the injury because he feared that he would be dismissed in retaliation if he reported an on-duty injury. There is no evidence in this record that Carrier retaliates against employees who report on-duty injuries. Furthermore, Claimant's credibility in this regard was significantly undermined when he was asked to name employees who he believed had been dismissed in retaliation for reporting on-duty injuries. One of the employees Claimant named had reported his injury after Claimant had been injured and

could not have influenced Claimant's decision not to report. It then came out that Claimant's testimony was not based on his personal knowledge but that the Assistant General Chairman, who was Claimant's representative, had given Claimant the names of the employees. The Assistant General Chairman's conduct was absolutely improper. His role was to represent Claimant zealously and protect Claimant's interests. His role was not to attempt to defraud Carrier and this tribunal by manufacturing evidence by putting words in Claimant's mouth. We find that Carrier proved that Claimant violated Rule N.

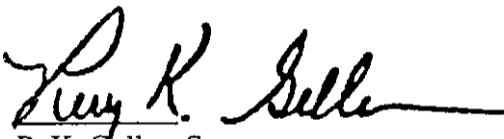
Carrier further proved that Claimant made inconsistent statements. Claimant initially stated that his back injury was not work-related and submitted the medical bills through the regular health insurance program. Subsequently, Claimant maintained that he had been injured on duty.

Although we find that Carrier proved the charges by substantial evidence, we also find two significantly mitigating factors. First, although Carrier proved that Claimant made false and conflicting statements, the clear thrust of the evidence is that Claimant did not falsify his claim of an on-duty injury. Numerous coworkers testified that at various times between April 18 and June 13, Claimant complained of back pain due to an on-duty injury and had to take breaks and had to have coworkers assist him in performing his duties because of the back pain. They further testified that Claimant asked them not to mention his back injury to supervision because he did not want to report it. Thus, although Carrier proved the charge of conflicting statements, we cannot say that Carrier proved by substantial evidence that Claimant falsified the claim of an on-duty injury.

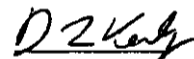
Second, the consensus of all witnesses, including management and supervision, was that Claimant was an excellent worker who always gave 110 percent. Considering these circumstances, we find that the penalty of dismissal was excessive. The Claim shall be sustained to the following extent. Claimant shall 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.