

PUBLIC LAW BOARD NO. 6394

Award No. 18

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 T. W. Dewitt 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 30, 2002, for violation of Rule N for failure to properly report an injury which alleged occurred on July 5, 2002 and making false and conflicting statements in connection with such alleged on-duty injury.

(Carrier File: MW-DEAR-02-33-LM -160)

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 July 7, 2002, Claimant telephoned his supervisor and requested a vacation day so he could go to the doctor the following day because of back pain. Upon inquiry by the Supervisor, Claimant replied that he had hurt his back at work on July 5, 2002. Rule N required Claimant to report the injury before he left the property on July 5. He failed to do so. Thus, we find that Carrier proved the alleged Rule N violation by substantial evidence. Indeed, the evidence allows to other conclusion.

The charge of making false and inconsistent statements stems from allegations that Claimant reported an on-duty injury that never occurred. The evidence in support of this charge included testimony from the Welder and the Foreman that Claimant did not mention anything about injuring his back on July 5. However, the most significant evidence consisted of alleged inconsistencies in Claimant's statements when reporting the alleged injury a few days later. For example, Claimant told the Supervisor and the Division Engineer that he was hurt at Edgerton, when he was working at Waterloo. He told them that he placed two cables under one rail and

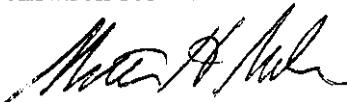
went to a different crib and placed the electrical wire and air-wire underneath it. Inspection revealed that the cables went under three rails and that all cables and wires went under the same crib. There was also discrepancy concerning the time that the alleged injury occurred.

Claimant testified that he was not sure of exactly when and how he had injured his back, only that he had injured it during the workday on July 5, 2002. However, the Supervisor and Division Engineer pressed him for details and he responded to the best of his ability. Claimant testified without contradiction that Edgerton and Waterloo were next to each other and it was easy to confuse the two locations.

Looking solely at the transcript, the evidence reasonably supports two conflicting inferences: that Claimant fabricated the claim of on-duty injury and his fabrication was revealed when he was unable to provide coherent supporting details, or that Claimant did not fabricate the claim of on-duty injury but was unsure of and honestly confused as to the details. Of course, as an appellate body that did not hear the testimony or observe the witnesses, we are in a poor position to determine which inference is more likely to be accurate. For that reason, we defer to the factual findings made on the property. On the property, it was determined that Claimant had fabricated the claim of an on-duty injury. Such an inference is reasonable and we defer to it. Therefore, we find that Carrier proved the charge of false and conflicting statements by substantial evidence.

Although we find that Carrier proved the charges by substantial evidence, we also find two significantly mitigating factors. First, although the evidence of false and conflicting statements was substantial, it was far from overwhelming. As indicated above, although Carrier drew a reasonable inference from the evidence that Claimant fabricated his claim of on-duty injury, the evidence also could have supported an inference of honest confusion rather than falsification. Second, Claimant's service with Carrier dated from 1978; thus, at the time of his dismissal, Claimant had 24 years of service. There was no evidence of any prior disciplinary record.

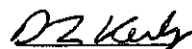
Considering these circumstances, we find that the penalty of dismissal was excessive. The Claim shall be sustained to the following extent. Claimant shall be reinstated to service with seniority unimpaired, but without compensation for time held out of service.



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.