

PUBLIC LAW BOARD NO. 6394

AWARD NO. 59

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed from all service with Norfolk Southern Corporation) of Mr. J. Reed, issued by letter dated June 14, 2010 in connection with alleged violation of Norfolk Southern Safety and General Conduct Rule N in that he failed to properly report an injury which allegedly occurred on April 29, 2009 and for making false and conflicting statements in connection with the alleged on-duty injury, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File MW-DEAR-10-06-LM-079).
2. As a consequence of the violation referred to in Part 1 above, Mr. Reed shall be placed back in service, compensated all straight time and overtime hours for which he has been deprived (which shall include the date he was released from his personal physician and continuing until he is reinstated to service), granted all benefits and credits for the days that the Carrier has held him out of service and exonerated of all charges, with the proceedings of this investigation and the discipline of 'dismissed from all service' removed from his personnel record immediately."

Upon the whole record and all the evidence, after hearing, the Board finds 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 under Public Law 89-456 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 precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant entered service for the Carrier on June 20, 2005 in the position of Trackman. On April 29, 2009 the Claimant was working as a Crane Operator as part of the Chicago Maintenance Gang at CP 518 in Chicago, Illinois. The Claimant approached his supervisors around 11:45AM that day and requested medical attention because he was having stomach and groin pain. The Claimant was treated and discharged at the

Hammond Medical Clinic. The Claimant's attending physician filled out the Carrier's required Return to Work form containing a diagnosis of a "personal medical problem" and stated this problem was not caused by work. This form was signed by both the physician and the Claimant (see Carrier Brief, Exhibit A, page 71).

A supervisor, Mr. Brewer, contacted the Claimant via phone to follow up with him after returning from the hospital. Mr. Brewer asked specifically if the issue was in any way related to something which occurred on the job that needed to be reported (see Transcript, Page 10). The Claimant replied in the negative and submitted the Return to Work form stating the injury was not due to work on April 29, 2009. The Claimant was on medical leave from April 30, 2009 until December 7, 2009 when the Carrier's medical department approved his return to work. On February 15, 2010 the Carrier's Claims Department received a bill from the Brosnan Emergency Room for services provided on April 30, 2009. The Carrier sent a Claims Agent to discuss the bill for April 30 on February 17, 2010.

At this point in the record, it is not clear what happened. The Carrier's version of events was that in a meeting with the Claims Department the Claimant stated he sought treatment on April 30, 2009 because he did in fact have an on the job injury on April 29, 2009 (see Carrier Brief, page 4). But the Claimant's testimony is at best unclear on what type of conversation he had with the Carrier's Claims Department. The Claimant did testify that he could not recall telling anyone before the date of the meeting that he was injured on the job on April 29, 2009 (see Transcript, page 52).

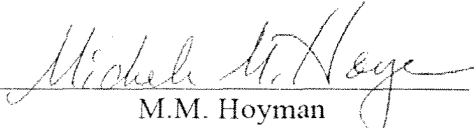
As a result of these events, the Carrier charged the Claimant with making false and conflicting statements as well as a violation of Rule N. Rule N states that employees who have an injury while at work must report it to a supervisor and fill out an incident form before leaving the work site. A formal investigation was held including a hearing. The Carrier concluded the Claimant was guilty, and dismissed him from service via letter on May 18, 2010.

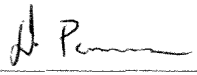
The Carrier states both the Claimant and his supervisor, Mr. Brewer, both testified that the Claimant stated on April 29, 2009 that his injuries were unrelated to work and continued saying that until the February 17, 2010 meeting with the Carrier's claim agent (see Carrier Brief, page 8). The Claimant's statements to the Carrier's claims agent specifically conflict with, among other evidence, the Work Status Form as filled out by the attending physician and signed by the Claimant on April 29, 2009 (see Carrier Brief, Exhibit A). Additionally, the Carrier's Medical Director determined via analysis of medical documentation submitted by the Claimant that the diagnosed conditions and related pain were not related to work. The Claimant had an opportunity to rebut this at the hearing, but declined to testify (citing confidentiality) about his April 30 visit to the Brosnan Emergency Room. Finally, the Carrier dismisses the Organization's many procedural arguments via stating that the language of the collective bargaining agreement was followed.

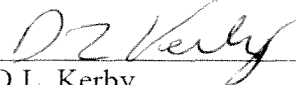
The Organization argues that the Carrier has a heightened burden of proof in the instant case which it failed to meet. It argues that the Claimant had to rely on the Carrier's doctor for a diagnosis and he had no way of knowing whether the pain he experienced was work related, and it was the Carrier's appointed doctor who gave a questionable diagnosis (see Organization Brief, page 9). The Organization further argues that the Claimant's own doctors were unable later on to concretely pinpoint the source of the Claimant's pain but were able to rule out the diagnosis offered by the Carrier's doctor (see Organization Brief, page 11). The Organization also states that (1) the Carrier's charges were not corroborated in the record, (2) the Claimant denies stating his pain was due to an on-duty injury and no evidence was offered to the contrary except hearsay, (3) neither the Carrier's medical staff nor the Claimant's own doctors could conclusively identify the source of his pain so it cannot be conclusively linked to a work injury, and (4) the Claimant timely reported his medical issues to the Carrier (see Organization Brief, pages 12, 15, 16, 22-25).

The Board finds there is no dispute in the record that the Claimant did commit a violation of Rule N. On the day he left the work site to seek medical attention, he did not state his pain was related to work and the Return to Work form confirms this. Concurrently, the Board recognizes that it may not always be possible to determine whether pain is connected to something which happened on the job on such an immediate basis. However, if the Claimant later determined that his diagnosis was related to a work injury on April 30 he had a responsibility to notify the Carrier. Instead, the issue was not brought to the Carrier's attention until it received a bill from the hospital. In reviewing the record, we find that the Claimant's actions do not constitute grounds for dismissal. The Claimant shall be reinstated, but without back pay.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member

 10/15/12
D. Pascarella
Employee Member

 10/15/12
D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on September 14, 2012.