SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 104

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of M. A. Shively for reinstatement with 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 on August 3, 2000, for violation of Rule N and making false statements and malingering in connection with an alleged injury on April 17, 2000.

(Carrier File MW-ROAN-00-40-SG-259)

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 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 a precedent in any other case.

AWARD

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

The record reflects that on or about April 3, 2000, Claimant's job responsibilities were changed and he began the task of flipping tie plates. About April 17, 2000, Claimant noticed pain in his back. He treated himself with over the counter pain relievers and a heating pad but the pain persisted. He went to his doctor on April 28, 2000, not knowing what the cause of his pain was but believing that it might be a kidney infection. His doctor diagnosed a strained ligament around the sciatic nerve and asked Claimant if his job responsibilities had changed recently. Claimant advised the doctor of the change to flipping plates and the doctor opined that the condition was caused by the repetitive motion and strain of the new job responsibilities. Claimant contacted supervision. On May 2, 2000, the Division Engineer went to Claimant's home to have him complete an injury report. Claimant was unable to complete the report himself, but he dictated answers to the questions to the Division Engineer who filled out the report. Claimant told the Division Engineer that the problem had developed over time and that he could not pinpoint an exact date. The report leaves the date and time of the injury blank. On June 30, 2000, the attorney representing Claimant on his FELA claim against Carrier wrote to Carrier and referred to Claimant's "injury of April 17, 2000." Thereafter, Carrier noticed Claimant for an investigation, found him guilty of violating Rule N by not reporting his injury in a timely fashion and of falsifying his injury report, and dismissed him from service.

The Board has reviewed the record meticulously. We find absolutely no evidence in support of the charges. Claimant has consistently maintained that the injury developed over time and that he did not know it arose out of his employment until so informed by his doctor on April 28, 2000. Claimant explained this to the Division Engineer when completing the injury report. He testified similarly at the investigation. Despite intense cross examination by the hearing officer who attempted to portray Claimant's injury report as involving a discreet event on April 17, 2000, Claimant did not waiver in his testimony.

Carrier makes much of the letter from Claimant's attorney and of Claimant's testimony in the investigation that he did not know why his attorney represented his injury as occurring on April 17, 2000. The Board is troubled by the hearing officer delving deeply into conversations between Claimant and his attorney. In any event, we find nothing sinister about the attorney's letter or Claimant's testimony. The only truthful answer Claimant could have given to the question was, "I don't know," the answer that he gave. Claimant is not the attorney and Claimant could not know what was in his attorney's mind when the attorney composed the letter.

Claimant testified that he told his attorney that he began feeling pain on April 17, 2000, and that the attorney took matters from there. It is apparent from the face of the attorney's letter that it is a boilerplate first letter notifying a carrier about an FELA claim and the lawyer's representation of the claimant. It is a reasonable inference that the attorney derived the April 17 date from Claimant's statement that he began feeling pain on April 17 and plugged the date into his standard boilerplate. Indeed, the Board can think of no other explanation and Carrier has advanced none.

Thus, the attorney's letter and Claimant's testimony concerning his conversation with his attorney provide no evidence of dishonesty. The record is clear that when Claimant first experienced the back pain he did not know what the cause was. He treated himself in a reasonable manner but when that did not help, he went to see his doctor. When he went to his doctor, he still did not associate the pain with his job, believing that he might have a kidney infection, something that would not be job related. It was only after his doctor's diagnosis and his doctor's inquiries about possible recent changes in his job duties that Claimant understood that his injury developed over time from the repetitive motion and strain of flipping tie plates. Claimant promptly contacted supervision and reported exactly what happened, no more and no less. He told the same thing to his attorney.

There is absolutely no evidence that Claimant violated Rule N or that he was dishonest. Claimant must be returned to service with all rights unimpaired, his record must be cleared, and he must be paid for all time lost. The claim is sustained.

M. H. Malin
Chairman and Neutral Member

D. D. Bartholomay
Organization Member

D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on March 14, 2002