

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 175

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of L. L. Hardy requesting reinstatement to service and payment for all time lost at the laborer rate of pay as a result of a dismissal assessed following a formal investigation held on October 14, 2008, in connection with conduct unbecoming an employee for 1) failing to protect his assignment and being absent without permission on September 15, 16, 18, and 19, 2008, as well as marking off under false pretenses on those dates; and 2) falsifying an on-duty injury and making false and conflicting statements in connection with an alleged on-duty injury report.

(Carrier File MW-DEAAR-08-141-LM-564)

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.

AWARD

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

On September 11, 2008, Claimant was using a torque wrench to tighten bolts when he reported experiencing back pain. Claimant requested medical attention. The Track Supervisor came to transport Claimant to a doctor. Claimant spoke by telephone with the Assistant Division Engineer and then told the Track Supervisor that he had taken Motrin which he had in his lunchbox and that the pain was subsiding and he no longer desired medical attention. Claimant worked the morning of September 12, assigned to assist that Assistant Track Supervisor inspecting track, but requested and was allowed to leave early to take care of personal business.

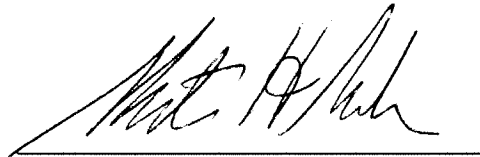
Claimant's next scheduled day of work was Monday, September 15. Claimant did not report for work and did not call in to advise of his absence. He went to the emergency room where he was treated for back pain. On September 16 Claimant again was a no call, no show. At around 10:30 a.m., Claimant's sistered call in and advised that Claimant would not be in to work. At 4:00 p.m., Claimant called in and advised that he would drop off medical documentation for his absence. Claimant dropped off a release indicating he could return to work on September 18 and a copy of his hospital discharge instructions. Claimant was again a no call, no show on September 18 and did not work on September 19. On the evening of September 19, he arranged to come in on September 20 to discuss his absences. At that time, Claimant provided Carrier with a copy of his discharge instructions from a different hospital emergency room where he was seen on September 19.

Claimant did not attend the investigation and, over strenuous objection from Claimant's representative, the hearing was held in absentia. The record reflects that notice of the hearing was mailed by certified mail to Claimant's last address on record with Carrier. Moreover, Claimant's representative confirmed that his secretary had spoken with Claimant and that Claimant was aware of the date and time of the investigation. We find no violation of the Agreement in Carrier's decision to proceed in absentia.

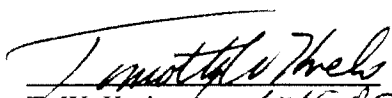
We further find that Carrier proved the charge that Claimant failed to protect his assignment by substantial evidence. Claimant did provide medical documentation for his absences but that did not excuse his failure to call in.

On the other hand, we are unable to find substantial evidence that Claimant deliberately falsified his claim of an on-duty injury. Carrier urges that the medical documentation Claimant produced makes no reference to an on-duty injury. However, the documentation Claimant produced consisted only of a release to return to work and generic discharge instructions. It is not appropriate to infer from such an incomplete record that Claimant did not advise the emergency room doctors of the injury of September 11. We also cannot infer a deliberate fabrication from Claimant's declining medical attention after initially requesting it on September 11 or from his working on a light duty type assignment on September 12. It would not be unusual for back pain to respond initially to over-the-counter medication and flair up more severely a few days later. There is no dispute that Claimant reported the injury on September 11 and that he was treated twice in the emergency room for back pain the following week. We are unable to infer anything from the fact that Claimant had Motrin in his lunchbox, given the strenuous nature of trackman's work. Finally, Carrier infers deliberate falsification from Claimant having given varied accounts of the details as to how he sustained the back injury. Claimant at one point reported that he felt the pain after pulling a hydraulic hose, at another point he indicated that he felt the pain after bending down to pick up a socket and at another point he stated he felt the pain while standing up with the wrench in his hand. We do not find the latter two versions to be necessarily inconsistent with each other. We do find, however, that these variations in details are insufficient to support an inference of intentional falsification when weighed against the other facts, particularly Claimant's prompt report of the injury and his follow up treatment on two occasions in hospital emergency rooms. We conclude that Carrier failed to prove the charge of falsification by substantial evidence.

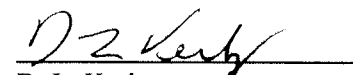
We turn to the penalty assessed. We note that Claimant failed to protect his assignment on four of the five days during the week on September 15, 2008. Furthermore, although he had almost 29 years of service, his disciplinary record was poor. But, Claimant's dismissal was based in part on a finding of falsification that was not supported by substantial evidence. Under the circumstances, we award that Carrier reinstate Claimant to service with seniority unimpaired but without compensation for time out of service.



M. H. Malin
Chairman and Neutral Member



T. W. Kreke 6-15-09
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on May 30, 2009