

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 190

Parties to Dispute:

BROTHERHOOD OF MAINTENCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

“Claim of the System committee of the Brotherhood that:

1. The dismissal of Claimant Ronnie Lewis for the alleged violation of Safety and General Conduct Rule N in that on September 16, 2009, you reported that you had been injured while using a ballast fork at work on July 8 or 9, 2009. You are additionally charged with making false and conflicting statements concerning this alleged on-duty injury, was based on un-proven charges and was arbitrary, capricious and in violation of the Agreement (Carrier’s file MW-ROAN-09-40-LM-435).
2. As a consequence of the unjust dismissal(s) described in Part 1 above, Mr. Lewis shall be made whole and restored to the service of the Carrier, with pay for time lost, seniority and vacation unimpaired.”

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 allegedly injured his back while working on July 8 or July 9, 2009 in his capacity as a Trackman. During the time of the alleged injury, the claimant was removing asphalt behind a backhoe and smoothing the surface of a crossing using a ballast fork. A supervisor noticed the claimant had briefly stopped working and inquired whether he was injured. The claimant replied that he was feeling stiff from arthritis that

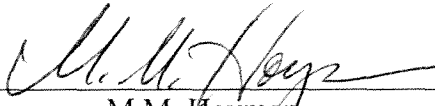
he had suffered from for a long time. No other remarks were made regarding being in pain. The claimant requested vacation on August 4, 2009 because of pain related to arthritis and returned to work on August 6, 2009. On September 9, 2009 the claimant again requested vacation related to stiffness in his back that he attributed to arthritis and returned to work on September 14, 2009 where he told a supervisor he was fine. On September 15, 2009 the claimant did not report to work and did not notify a supervisor of the reasons for his absence. Upon being contacted by a supervisor, the claimant stated he was going to see an orthopedic doctor for pain in his back. On September 16, 2009 the claimant again failed to show up to work or notify a supervisor, and a Supervisor went to his home. At that point, the claimant notified the supervisor that the pain in his back was work related. The claimant filled out Form 22 – Report of Personal Injury indicating that the pain he felt in his back began while clearing out asphalt on July 8 or 9, 2009.

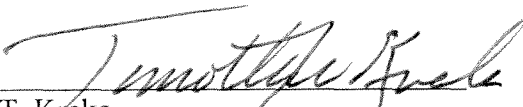
The claimant has noted that he was unaware of his injury until he received an MRI on August 28, 2009 and had the result reviewed by an orthopedic specialist on September 15, 2009. The Carrier in response states that evidence submitted by the claimant does not note a specific cause, and as such there is not enough evidence to claim that the injury was work related. This Board is not in a position to evaluate the veracity of the medical evidence provided. Instead, we defer to the credibility made by the medical specialists, since there is no evidence presented by the Carrier that the specialist would be biased against it in any way.

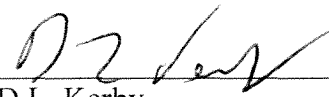
Concurrently, we do find that the claimant made inconsistent statements regarding his injury even though he did report it in a timely manner after receiving the MRI results. At several points in time the claimant expressed his pain was strictly related to a pre-existing condition until September 16, 2009. However, with back pain, it is often difficult to discern what is going on – whether it is an old ache or a new ache and certainly impossible for the patient to know what was only revealed later on an mri. Admittedly, if the claimant could not be sure about the nature of his injury before the MRI, he should not have made statements attributing it only to his pre-existing arthritis while suspecting other causes. However, it is understandable.

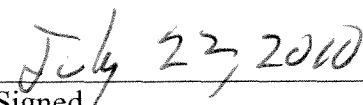
Considering all the circumstances, we conclude that the carrier had cause to discipline the claimant but that the penalty of dismissal was excessive. It is a serious offense not to have timely filled out a Form 22, but it is not in and of itself enough for dismissal. The timely reporting of workplace injuries, or even suspected injuries, is critical. However, we do not find any intention on the part of the claimant to intentionally defraud the Carrier in this incident. Consequently, the Carrier shall reinstate the claimant to service with all benefits unimpaired but without compensation for time held out of service.

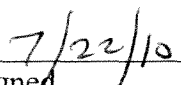
The claim is sustained in accordance with the findings. Carrier is directed to make this Award effective within thirty days following the date two members of this Board affix their signatures thereto.


M.M. Hoyman
Chairperson and Neutral Member


T. Kreke
Employee Member


D.L. Kerby
Carrier Member


Date Signed


Date Signed

Issued at Chicago, Illinois on May 27, 2010.