

**SPECIAL BOARD OF ADJUSTMENT NO. 1048**

**AWARD NO. 205**

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 Railway) of Mr. D. McClair issued by letter dated March 19, 2012 in connection with his alleged conduct unbecoming in that on August 16 and 19, 2011 he made false and conflicting statements regarding an alleged injury to his knee, on the same dates reported an on-duty injury which he alleged to have sustained two (2) to three (3) weeks prior in violation of Safety and General Conduct Rule N and on August 15 and 16, 2011 direct abusive, profane and unprofessional language at his supervisor and a co-worker was unjust and in violation of the current working Agreement (Carrier's File MW-DECR-11-40-SG323).
2. As a consequence of the violation referred to in Part 1 above, Mr. McClair shall receive the remedy prescribed under Rule 30(d) of the Agreement."

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 1, 1982 as a Laborer. On the date of the events which led to this case, the Claimant was working as a Material Handling Truck Operator for Flash Butt Welding Gang No. 104 in and around the Bryan, Ohio area. On August 16, 2011 the Claimant informed Gang Foreman Brown that he

needed to talk to the Gang Supervisor about a knee injury. In a subsequent meeting with Gang Supervisor Cochran and Gang Foreman Brown, the Claimant stated he had sustained a knee injury about two weeks previously. The Claimant stated he did not report the injury because he thought it was minor and would heal without further action. Gang Supervisor Cochran informed the Claimant of the need to report the injury immediately as required by the Carrier's Rule N. At this initial meeting, there is a dispute in the record over whether Gang Supervisor Cochran discouraged the reporting of the injury by stating something to the effect of doing so would result in "big trouble" (see Organization Brief, page 2). It should be noted that another interpretation of the supervisor's remarks is that the supervisor was referring to the fact that Rule N requires an immediate reporting of on the job injuries and that a lot of time had passed. The Claimant subsequently left the meeting but shortly thereafter returned to state the injury had happened about three weeks ago (instead of two weeks).

The Claimant then requested vacation time off in order to address the knee injury. Gang Supervisor Cochran then asked if the Claimant needed medical attention and again informed him of the need to report the injury. The Claimant declined the offer for medical attention and stated he did not want to report the injury. Upon being asked to clarify the nature of the injury and whether it occurred on the job or not, the Claimant became angry and allegedly insulted Gang Supervisor Cochran. Gang Supervisor Cochran contacted his supervisor, General Division Engineer Pennington about this matter. General Division Engineer Pennington emphasized the need for the Claimant to state in front of a witness whether or not he sustained an injury while on the job. The Claimant stated in the presence of Gang Supervisor Cochran and Gang Foreman Brown that he did not get injured while on duty and thus would not report an injury, but was requesting vacation time to get an off-duty knee injury examined by a Doctor. The request for vacation time was granted.

On August 18, 2011 the Claimant spoke to General Division Engineer Pennington via phone and stated he indeed had suffered an injury while working three weeks earlier. The Claimant stated that three weeks earlier he was trying to open the sliding back door on the back of a welding truck, and the door became stuck. The Claimant climbed onto the back of the truck to try to free the door and in the process became injured. The Claimant then stated on the phone that he would be willing to sign a statement that the injury was not job related. General Division Engineer Pennington responded to the Claimant that he could not do that.

The Carrier charged the Claimant with a violation of General Conduct Rule N and held a formal investigation including a hearing on January 12, 2012 and February 29, 2012. Rule N states in part that "An employee who sustained a personal injury while on duty...must, before leaving Company premises, report it to his immediate supervisor...." (see Carrier Brief, page 5). Following the hearing the Carrier found the Claimant guilty of violating Rule N and dismissed him from service via letter on March 19, 2012.

The Carrier's view is that the Claimant clearly violated Rule N by admitting he injured himself at work and not immediately reporting it. The Carrier notes there is no

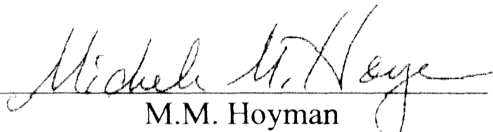
dispute regarding the fact that the Claimant did not report any on duty injury before leaving work on either of the two dates the injury was alleged to occur. In addition, when informing the Carrier two to three weeks after the injury occurred, the Claimant told several different versions of the event. At various times, the claimant's recollection of events was that the injury either occurred on the job or had not occurred on the job. The Carrier notes the injury in and of itself seems suspect as the Claimant's co-workers testified that the Claimant was working unimpaired during the period from the date of the alleged injury until when it was reported. Additionally, in his initial communications with the Gang Foreman and Supervisor, the Carrier alleges the Claimant acted in unprofessional and abusive way via insulting language. Although the Claimant denies this behavior, the Hearing Officer found the allegation had merit because it was confirmed via the testimony of the Gang Supervisor and Gang Foreman. Finally, the Carrier refutes the Organization's allegations of multiple procedural and due process violations related to the investigation. The Carrier contends that it is not required to supply any document prior to an investigation's completion so its failure to do so in this case is not a procedural issue. In response to the Organization's claim that the Hearing Officer was not impartial because he was a supervisor of the Flash Butt Welding Gang, the Carrier notes the Hearing Officer was two levels of management above any direct supervision of Gang. In response to the Union's contention that the dates in the charge letter were incorrect, the Carrier acknowledges the error but argues that the error was clerical and did not adversely impact the hearing or due process.

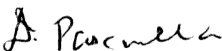
The Organization does not dispute that the Claimant alleges to have sustained an injury but did not report it until two or three weeks later. However, it does contend the Claimant was discouraged from reporting it later by the Gang Supervisor. Any appearance of false and conflicting statements were due to the Claimant's genuine fear of reporting the injury due what the Claimant perceived as the Gang Supervisor's discouraging comments. In terms of the alleged abusive language, the Organization characterizes the Claimant's comments as being a normal part of railroad culture and that the remarks were not intended to be offensive. The Organization notes that due to the nature of the charges the Carrier has a heightened burden of proof. It believes this heightened burden of proof has not been met. The Organization argues the injury was of such a nature that it was not immediately apparent to Claimant, and thus no intentional violation of Rule N occurred. The Organization also makes a series of procedural and due process arguments. First, before the investigation hearing the Organization sought information regarding the Hearing Officer to determine if there was any likelihood of bias but did not receive a response to its informational requests. Second, the Organization contends that the investigation was not managed in a fair manner by the Hearing Officer as demonstrated by multiple statements in the transcript.

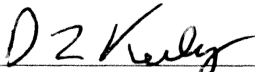
The Board finds that the Claimant suffered a knee injury while working but failed to immediately report it as required by Rule N. However, we do not believe Claimant's explanations for his actions constitute an intentional falsification of the injury. Concurrently, we find there is sufficient evidence that the Claimant acted in an unprofessional manner by insulting a supervisor. The Board considers this action as an aggravating factor in this case, although we find that the insulting statement was likely

said "in the heat of battle" and thus was probably not meant to be intentionally malicious. In coming to its decision, the Board has weighed these factors against the Claimant long record of service with the Carrier. We conclude that dismissal was not appropriate in this case. The Claimant shall be reinstated, but without back pay due to his violation of Rule N and unprofessional conduct.

The claim is partially sustained.

  
M.M. Hoyman  
Chairperson and Neutral Member

  
D. Pascarella  
Employee Member

  
D.L. Kerby  
Carrier Member

Issued at Chapel Hill, North Carolina on June 20, 2013.