

SPECIAL BOARD OF ADJUSTMENT NO. 1049

Award NO. 118

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

Norfolk Southern Railway Company

Statement of Claim:

Claim on behalf of T. E. Bray requesting reinstatement with seniority, vacation and all other rights unimpaired and pay for time lost, as a result of his dismissal from service following formal investigation held on January 13, 2000, for his responsibility in connection with conduct unbecoming an employee for providing false and conflicting statements concerning the reason he was off from work to see his medical doctor.

(Carrier File MW-BHAM-99-28-BB-490)

Findings and Opinion

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.

Claimant was employed by the Carrier on December 20, 1976 as a Bridge and Building ("B&B") Apprentice. At the time of the incident that resulted in his dismissal from service he was regularly assigned as a Bridge and Building ("B&B") Mechanic on Gang W-2.

On October 4, 1999, the Claimant was unable to report for work and called his supervisor to mark-off. Since his supervisor was unable to take the call, the Claimant spoke to another employee and informed him that he had severe muscle spasms in his back and would be seeing his doctor that day. Claimant advised that he would call back with the diagnosis. Later on that day, he called the supervisor's office and spoke to the same employee and told him that he had been examined by his doctor and given prescribed medication for his back spasms. According to the Claimant, this medication was to be taken for ten days. He further advised that his doctor was attempting to schedule him for an MRI. Shortly thereafter, the Claimant again called the supervisor's office and informed the employee he had spoken to earlier that he had been scheduled for an MRI on October 6, 1999 and had another doctor's appointment scheduled for October 11. The employee who was given this information relayed it to the Claimant's supervisor with the putative statement that

the Claimant's alleged back spasms occurred at his residence on October 3, 1999 "when he was picking up something in his yard."

Claimant called the supervisor's office on October 5, 1999 to report that it would be necessary for him to be off the remainder of the week. He told the same employee he had spoken to on October 4 to convey all the information he had given him to date to his supervisor. On October 8, 1999, Claimant's supervisor called him to inquire about his condition. During this conversation, the Claimant told his supervisor that he had been to the doctor and had an MRI performed which indicated that he had two bulging discs and one ruptured disc. The supervisor mentioned to the Claimant that he had been told that he may have hurt his back when gathering firewood. Claimant denied ever making such a statement to anyone.

On October 11, 1999, the Claimant's supervisor called him to inquire whether he had seen his doctor on this day. Claimant said he had and informed his supervisor that he would be off another six weeks and would see his doctor again on November 4, 1999. During the Claimant's telephone conversations of October 4, 5, 8 and 11, he never mentioned that his back problem was caused by a job-related injury. However, on October 28, 1999, Claimant's supervisor received a letter the Claimant had written to a Carrier Claim Agent on October 27 which, for the first time, indicated that his current medical condition (i.e., the one he initially reported on October 4, 1999) was attributed to a purported on-the-job injury that allegedly occurred on December 17, 1998 - ten months prior to marking off sick. Claimant revealed in his letter that he never reported that alleged injury and had only "recently learned" that it was supposedly job-related.

As a result of the Claimant's October 27, 1999 letter, the Carrier notified him on December 9, 1999 that he was to attend an investigation in connection with "conduct unbecoming an employee and in providing false and/or conflicting statements" relative to the reason for marking off sick. The investigation was subsequently held on January 13, 2000. Based on the evidence adduced at the investigation which the Carrier credited, the Claimant was dismissed from service on January 31, 2000. The Organization filed a claim on behalf of the Claimant, challenging his dismissal. After exhausting the appeals process without resolving the instant claim on the property, the matter at issue was submitted to this Board for adjudication.

The Board has thoroughly reviewed the evidence of record in context with the parties' respective agreements. Although an on-the-job injury, which the Claimant purportedly sustained, should ordinarily be reported immediately, the Carrier did not charge or find the Claimant guilty of failing to report his injury in a timely manner. Nor was the Claimant charged or found guilty of falsifying a job-related injury, or even charged and found guilty of seeking medical treatment on the basis of an undisclosed job-related injury. Instead, the Claimant was found guilty of acting in an unbecoming manner for having provided conflicting statements regarding his alleged injury and for marking off from his assignment in a dishonest attempt to defraud the Carrier. To prove the

substance of these allegations, intent to defraud must be shown. While the record in this case may reveal conflicting statements, the Carrier failed to meet its burden of proof with clear and convincing evidence of any intent on the Claimant's behalf to defraud management as alleged. In this regard, the Board is not satisfied that the record here either exonerates the Claimant or proves his guilt. To similar effect, see Second Division Award No. 9530 (Doering, 1983).

Accordingly, the Claimant's dismissal from service will be vacated and any reference thereto expunged from his personal record. He will be reinstated to service, subject to a physical examination to satisfy the Carrier's medical standards for fitness for duty. Further, the Claimant will be entitled to pay for all time lost as a result of his dismissal from the date it is established that he is medically fit to return to service with seniority rights and benefits unimpaired.

The findings and conclusions herein are based on facts and circumstances of this particular case and shall not serve as a precedent in any other case.

AWARD

Claim sustained.



C. P. Fischbach
Chairman and Neutral Member



R. A. Lau
Organization Member



D. L. Kerby
Carrier Member

Issued at Norfolk, VA on September 11, 2000