

SPECIAL BOARD OF ADJUSTMENT NO. 1049
AWARD NO. 140

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of Z. M. Holder for reinstatement to service 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 April 24 and May 8, 2003, in connection with his violation of Rule N for failure to properly report a personal injury that allegedly occurred on February 24, 2003, and making false and conflicting statements in connection with this alleged injury.

(Carrier File No. MW-SOMR-03-05-SG-098)

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:

On February 24, 2003, Claimant was operating an anchor spreader when he entered a road crossing with the heads down and derailed the machine. On March 27, 2003, during an investigation that resulted in the claim before this Board in Case No. 139, Claimant presented a Form 22 Personal Injury Report stating that he was injured when the anchor spreader derailed on February 24, 2003. Claimant estimated that he was traveling at 15 - 20 miles per hour when he derailed. Claimant testified that on February 24, as a result of the accident, he was dazed and confused. He testified that on February 25 he told the foreman that he wanted to go to the doctor but he could not recall whether he told the foreman why. The foreman sent him to speak with the supervisor and he spoke with the supervisor and the Division Engineer by the supervisor's truck. According to Claimant, he asked to go to the doctor several times because he was hurt from the accident the day before and the supervisor refused to take him to the doctor. Consequently, Claimant testified, he went to the nearest emergency room on his own.

Other witnesses told a very different story. The foreman testified that the supervisor instructed him to take Claimant off the anchor spreader on February 25. However, when he told Claimant he was taken off the anchor spreader, Claimant said he wanted to go to the doctor. The foreman referred Claimant to the supervisor.

The supervisor testified that he responded to a call on his radio advising him of the derailment. According to the supervisor, this was a minor derailment and it took only a few minutes to rerail the anchor spreader. The supervisor testified that Claimant exhibited no signs of injury and assisted in rerailing the machine,

carrying a piece of asphalt to use as a tie butt. According to the supervisor, he spoke with Claimant several times later in the day and Claimant never mentioned being injured.

The supervisor further testified that on February 25, he sent the foreman to remove Claimant from the anchor spreader. The foreman radioed that when he removed Claimant from the anchor spreader, Claimant said he wanted to go to the doctor. Claimant then approached the supervisor while the supervisor was sitting in his truck. According to the supervisor, Claimant was enraged about being removed from the anchor spreader and said he wanted to go to the doctor, to which the supervisor replied "O.K." Claimant continued to complain loudly about being removed from the anchor spreader, said there was no work he was physically able to perform and that he had returned too soon from being off thirty days. The supervisor testified that Claimant calmed down a bit and said he wanted to go back to the camp to cool off and the supervisor had another supervisor drive Claimant back to the camp.

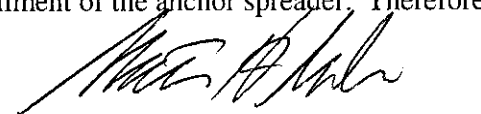
The supervisor further testified that later that day, he received a telephone call from a nurse at Hamilton Medical Center who advised that Claimant was there and inquired about drug testing. The nurse then had the supervisor hold for a while, returned and reported that Claimant stated that his reason for being at the medical center were not work related.

Claimant surreptitiously tape recorded some of his conversations with the supervisor. The Board has listened to the tapes. The tape of the February 25 conversation by the supervisor's truck is of poor quality with a great deal of background noise. However, to the extent that we are able to discern what was said, we observe that the tape tends more to corroborate the supervisor's version of events rather than the Claimant's. The tape shows that the Claimant was enraged and that he did say he wanted to go to the doctor but his primary concern and the object of his anger was being removed from the anchor spreader. The tape also corroborates the supervisor's testimony that at one point Claimant calmed down a bit and stated that he wanted to return to camp and cool off.

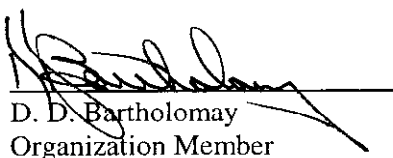
Moreover, the supervisor's version of events is corroborated by evidence from two completely disinterested individuals. The nurse-Occupational Care Representative provided a written statement which avers that on February 25, 2003, Claimant was in the emergency room and reported a complaint that sounded to the triage nurse that it might be work related. Consequently, the Occupational Care Representative spoke with Claimant who advised her that his complaints were not work-related.

A signal maintainer witnessed the derailment on February 24. The signal maintainer testified that Claimant was proceeding at between one and two miles per hour when he derailed the anchor spreader. The signal maintainer responded to the accident and asked Claimant if he was all right, to which Claimant replied that he was fine. According to the signal maintainer, Claimant did not strike his head or back against the machine, Claimant got off the machine immediately after the derailment and showed no signs of any injury or discomfort. Moreover, Claimant testified that the machine was in work mode and there is evidence that when an anchor spreader is in work mode it cannot exceed walking speed.

Accordingly, we find that there is substantial evidence that Claimant did not report his alleged injury in a timely manner as required by Rule N and that when he did report it, Claimant falsified the report by claiming to have been injured in the derailment of the anchor spreader. Therefore, the claim must be denied.



M. H. Malin
Chairman and Neutral Member



D. D. Bartholomay
Organization Member



D. L. Kerby
Carrier Member