SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 141

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of J. P. Russell 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 October 21 and November 10, 2003, in connection with his violation of Rule N for failure to properly report a personal injury that allegedly occurred on July 8, 2003, and making false and conflicting statements in connection with this alleged injury.

(Carrier File MW-CN-03-12-BB-265)

FINDINGS

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.

OPINION

Claimant J. P. Russell began service as an apprentice in the Bridge and Building Department on August 15, 1988. He was working as a B&B Mechanic on July 8, 2003, when he fell while helping set a steel frame at a bridge. At the time he fell, he told both his supervisor and foreman, with whom he was working at the location, that he was not injured. He continued to work the remainder of the day, and worked the next two days.

What happened next is in dispute. According to the Claimant's supervisor, Claimant called him the following Sunday, July 13, 2003, and requested a week of vacation beginning the next day. According to the Claimant, he called his supervisor on July 13th to tell him he was injured as a result of the fall on July 8th, and to ask him to fill out an accident report. Similarly, the facts regarding what occurred during the next forty days or so are also in dispute. Suffice it to say,

Claimant contends he reported his injury to his supervisor as soon as the injury began to manifest itself, and that his supervisor put him off and showed him either on vacation or working on the payroll, when in fact he was off work due to the injury and had surgery on his shoulder on July 31, 2003. His supervisor denies any knowledge that Claimant alleged he sustained an injury until August 15, 2003, when he met with Claimant and his brother. The record is clear, however, that Claimant did not submit a completed injury report prior to August 18, 2003.

As a result of the delay between the date of the incident and the time the alleged injury was reported, Claimant was notified by letter dated August 27, 2003, to attend a formal investigation for failing to properly report the alleged injury, and for making false and conflicting statements regarding the alleged injury. After postponement, the investigation commenced on October 21, 2003, and after a recess it was concluded on November 10, 2003. Thereafter, Claimant was found guilty of the charges and dismissed from service by letter dated November 26, 2003.

The Organization raised three procedural issues in connection with the conducting of the investigation. The first procedural issue raised by the Organization is the allegation that the investigation was not held within 30 days of the Carrier's first knowledge of Claimant's alleged injury. The Claimant contends that on July 13th he advised his supervisor he was injured, and that the August 27th letter of charges scheduling the formal investigation for September 8th was well beyond the 30 day time limit for holding the investigation. This objection is without merit because, no matter what the Claimant may or may not have said to his supervisor on July 13th, there is no doubt that he did not actually submit a completed injury report to the Carrier until, at the earliest, August 18th, when he faxed the report to his supervisor. Even if he told his supervisor about the injury on July 13th, mere verbal report of the injury would not, in this instance, have started the 30 day period because at that point there was no basis for charging the Claimant. The time limits for holding the investigation could not start until a completed report was filed and the Carrier became aware that Claimant failed to comply with Rule N and may have made false and conflicting statements in connection with the alleged injury. The 30 day time limit started when the completed report was filed, and the September 8th investigation was clearly scheduled to be held within 30 days of the Carrier's first knowledge of the reason for the investigation.

The next procedural objection made by the Organization was that the presence of the Division Engineer as an assistant hearing officer denied the Claimant a fair and impartial investigation. This objection is also without merit, because as soon as the objection was made early on during the investigation (on page 15 of the 271 page transcript), the Division Engineer was immediately excused from his role as assistant hearing officer. Review of the transcript does not indicate that the Division Engineer's presence prejudiced the Claimant.

Similarly, with regard to the third procedural argument raised by the Organization, the fact that Claimant was required to testify prior to the testimony of all of the Carrier's witnesses did not deny Claimant the right to a fair investigation. Carrier's main witnesses testified prior to the Claimant, and although it may not be common procedure, there is no prohibition against requiring a charged employee to testify before every one of the Carrier witnesses. In this case, the witnesses were called in logical order, and the objection was properly overruled by the hearing officer.

Additional procedural issues arose under Sections (g) and (h) of the System Discipline Rule, in pertinent part:

> (g) The right of appeal in the usual manner is accorded under the applicable rule governing the time limits for presenting and progressing claims or grievances. However, the initial appeals concerning dismissal, suspension or reprimand are to be made directly to the highest officer of the Carrier designated to handle appeals of such disputes within 30 days of date discipline decision was rendered and any disallowance of such appeal must be issued within 30 days from the date such appeal is filed. . . .
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> (h) The time limits of this Rule may be extended by written agreement between the authorized Carrier Officer and the employee's duly authorized representative. When U.S. mail is used, the postmark will determine when the correspondence was placed in the mail. (emphasis added)

Claimant was dismissed on November 26th; that is the date the discipline decision was rendered. The discipline was appealed by certified letter dated December 22nd, which was also post marked on December 22 and signed for by the Carrier on January 2nd.

The Carrier's position is that the appeal is void ab initio because it was not timely "filed," since it was received 37 days after the date of the discipline decision. Several awards are cited in support of the generally accepted notion that a claim is not filed until it is received. The Organization's position is that the General Chairman complied with Sections (g) and (h) of the Discipline Rule when it appealed Claimant's dismissal by certified mail postmarked 26 days after the date of the letter issuing the discipline.

The clear language of the System Discipline Rule provides that appeals of discipline ". . . are to be made directly to the highest officer . . . within 30 days of date discipline decision was rendered. . . " (emphasis added). It does not state that the appeal must be "filed" within 30 days, which would imply receipt by the Carrier, and the use of the word "made" as opposed to "filed" is dispositive of the matter. Also, despite its placement at the end of the Rule, the sentence, "When U.S. Mail is used, the postmark will determine when the correspondence was placed in the mail," clearly applies to all of the correspondence between the parties, not just correspondence regarding time limit extensions. Indeed, the sentence would have no meaning otherwise, as there are no specified time limits for extending time limits. The language is unambiguous, and it clearly means that an appeal is timely "made" when it is postmarked within 30 days of the discipline decision. This provision clearly applies to situations like the one at issue here, where the appeal was mailed (determined by postmark) on December 22, but not received until eleven days later, on January 2.

According to the Carrier's interpretation of the Discipline Rule, the appeal in this case had to be placed in the mail by December 15th, some 20 days after the discipline letter was issued and 15 or so days after received by the Claimant, in order to assure that it was timely filed before December 26th. Indeed, the Discipline Rule does not even provide a full 30 days for an appeal of discipline, as the appeal must be made within 30 days of the date the discipline is issued

(determined by postmark), not within 30 days of receipt of the letter issuing discipline. An appeal letter would have to be mailed some five to ten days before the expiration of the 30 day time limit in order to ensure the appeal was timely "filed." The language used to write the Discipline Rule makes a clear distinction between when an appeal is "made" and when it is "filed." The Rule clearly gives the Organization 30 days from the date discipline is issued to make an appeal by placing it in the mail, and of course, it must prove it has placed it in the mail.

The intent of this decision is not that the time limits for responding to an appeal begin at any time prior to when it is received. This award holds only that an appeal (and a response, for that matter) is properly made on the date it is postmarked, a determination with considerable precedent. See, for example, Third Division Award No. 27649, which refers to ". . . the principle permitting postmarks to serve as criteria for timely communications in this industry." It is also clear that under the Discipline Rule an appeal is filed with the Carrier when it is received, and that the Carrier is obligated to disallow the appeal within 30 days after the appeal is received.

Claimant had an accident on July 8, 2003, which was witnessed by his foreman and his supervisor. Although he told them he was not injured at the time, he sought medical attention for pain in his shoulder at a clinic on his way home from work on the day of the accident. He worked July 9 and 10, 2003, and did not return to work after that. He returned to the clinic on July 10, 2003, and visited his personal physician the next day. He spoke to his supervisor on July 13, 2003, although the content of that discussion is disputed. An MRI was performed on July 15, 2003, and rotator cuff surgery was performed to repair his shoulder on July 31, 2003.

The statements that on July 7, 2003, Claimant was overheard telling "someone" he fell on his deck at home do not prove he was not injured at work as a result of the fall on July 8, 2003. Even if he had previously fallen at home, there is no dispute that Claimant fell as a result of an accident while working on July 8, 2003, and that he received medical attention very soon thereafter. Nor is there any dispute that the date he filled out the injury report, August 18, 2003, was over a month after the accident, and two weeks after the surgery.

The Claimant alleges that he did not realize that he had become injured from the July 8, 2003 incident until July 13, 2003, at which time he attempted to call his Supervisor. Two irreconcilable understandings of this July 13, 2003 conversation and subsequent events have been presented. The Supervisor indicated that during this call the Claimant only requested vacation. The Claimant contends that he indicated to the Supervisor in the July 13, 2003 call that he needed to turn in something for the July 8, 2003 incident and he thought his supervisor "was taking care of it."

The Supervisor contends that after July 13 he had no further contact until the August 8 request by phone to meet, which led to a Friday, August 15, 2003, meeting at a restaurant. That meeting, according to the Supervisor, was his first knowledge of the Claimant's July 31, 2003 surgery, twice a week therapy sessions, and assertion that he hurt his arm at work. At that meeting the Claimant, accompanied by his brother, presented a filled out and signed Form 11131 to the Supervisor, but did not fill out the prescribed Form 22 at that time.

Claimant's wife testified at the investigation that she overheard her husband's side of the July 13, 2003 conversation when he indicated to his Supervisor that he needed to report the incident. Likewise, the Claimant's brother testified that at the August 15, 2003 meeting he asked the Supervisor if he had filled out the report of injury form as asked. Although the Claimant was shown as being on vacation the week following the July 13, 2003 call, as indicated by the Supervisor, the Claimant was for some reason subsequently carried on the payroll for the following weeks until the August 15, 2003 meeting with his Supervisor, after which he was shown on sick leave. During the weeks following the July 14, 2003 vacation week until the August 8, 2003 phone call with his Supervisor, the Claimant left "checking in" messages on the Supervisor's cell phone. The Claimant further testified that he left messages on the Supervisor's phone on July 28 and August 4, 2003 concerning his surgery.

While the Supervisor's testimony directly contradicted the Claimant, his wife and his brother, in this case there is ample reason to give at least as much credence to the testimony of Claimant and his witnesses as to the testimony of the Supervisor. Therefore, considering the particular circumstances in this case, the Board finds that the Carrier has failed to carry its burden to prove by substantial evidence that the Claimant did not take sufficient action prior to the August 15, 2003 meeting to essentially meet his obligations per Rule N.

Claimant shall be reinstated to service and paid for all time lost as a result of his dismissal from service on November 26, 2003. That said, Claimant is not entitled to lost pay for any time he was physically unable to work, and any compensation he may have earned while dismissed shall be deducted from the back pay amount. Further, Claimant's reinstatement is subject to successful completion of a return to work physical examination.

AWARD

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

The claim is sustained. The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board sign this award.

Mark D. Selbert
Chairman and Neutral Member

D. D. Bartholomay
Organization Member

D. L. Kerby
Carrier Member

Issued at Saint Augustine, Florida, on January 17, 2005.