

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 144**

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of D. K. Johnson 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 August 27, 2004, in connection with his violation of Rule N for failure to properly report a personal injury that allegedly occurred the week of June 30, 2003, and making false and conflicting statements in connection with this alleged injury.

(Carrier File MW-SOMR-03-18-SG-362)

**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**

In June 2003, Claimant D. K. Johnson was assigned as a laborer on a timber and surfacing gang. Claimant alleges that on the last work day of the week of June 30, 2003, he injured his wrist while tying down equipment to be transported to a new work site over the July 4<sup>th</sup> holiday weekend. It was determined that the date in question was July 2, 2003. According to Claimant, he advised the assistant supervisor on the job site that he had injured his wrist during a phone call from the emergency room on the date of the alleged injury, but no written report of injury was made. The assistant supervisor observed Claimant with a brace on his wrist on the next work day, July 6, 2003, and Claimant advised his supervisor of the alleged injury during a phone call on August 17, 2003, but no written report of injury was completed.

Subsequently, Claimant was involved in a separate investigation regarding the charge that he failed to properly report a different injury after an equipment collision on July 10, 2003. During that investigation, on November 7, 2003, Claimant testified that he remained on a spiking machine rather than attempt to jump off before the collision occurred, in part because he had injured his wrist during the week of June 30, 2003.

On November 14, 2003, Claimant verbally advised Carrier's claim agent of the alleged injury to his wrist during a telephone conversation. Thereafter, by letter dated November 19, 2003, Claimant was notified to attend a formal investigation on December 11, 2003, for failing to properly report the alleged injury to his wrist and for making false and conflicting statements in connection with the alleged injury. Because the formal investigation was already in progress regarding the charges in connection with the July 10, 2003 injury claim, the investigation regarding the instant case was postponed for many months and did not commence until August 27, 2004.

The Board notes that at the time the August 27, 2004 investigation commenced, Claimant had been dismissed from service as a result of the previous investigation. Nonetheless, Claimant was again dismissed from service as a result of the August 27, 2004 investigation.

As previously noted, a report of injury for July 2, 2003 was never made, and in this respect the Claimant is technically guilty of violating Rule N. However, there is reason to find that Claimant made a verbal report of injury in a timely manner. Further, the Board finds that the Carrier failed to prove that Claimant provided false and conflicting statements regarding the injury, other than some understandable confusion regarding the date of the injury.

This case presents a conflict in testimony between Claimant and the Assistant Supervisor on the job site on July 2, 2003. Claimant contends that he immediately reported his injury to the Assistant Supervisor, and even called the Assistant Supervisor from the emergency room while receiving treatment that same day. While the Assistant Supervisor denies Claimant's version of the case, it is apparent that the Assistant Supervisor was aware that Claimant sustained an injury to his wrist on July 2, 2003, if for no other reason than the fact Claimant was wearing a brace on his wrist on the next work day, July 6, 2003.

Further, evidence in a tape recording between Claimant and the Supervisor supports Claimant's version of events. In Award 142 of this Board, we held that the tape recordings of telephone conversations between the Claimant and the Supervisor and Assistant Supervisor will be considered as a reasonable, although not perfect, representations of what was said by those being recorded. That determination is also applicable in this case. During a conversation with his Supervisor on August 17, 2003, Claimant asked if the Assistant Supervisor didn't like him because he failed to come to the emergency room when Claimant was being treated for the injury to his wrist. In response, Claimant's Supervisor indicated that the Assistant Supervisor told him about

the Claimant injuring his wrist, and expressed concern that the Assistant Supervisor did not immediately report the injury.


The concept of self-serving testimony applies equally to any witness who may have something to gain, or a reason to present information in a way that deflects responsibility away from him. In this case, the Assistant Supervisor had ample reason to deny any knowledge that Claimant reported an injury in a timely manner. His testimony cannot be determined to be more credible than that of the Claimant, and there is no other evidence, and therefore no proof, that the Claimant was guilty of the charges.

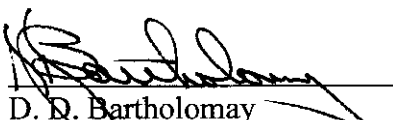
For the reasons stated, this claim shall be sustained to the extent that all reference to the letter of charge, formal investigation, and the dismissal of Claimant in this matter shall be expunged from his record. This Board has previously reinstated Claimant to service without back pay in Award No. 142, and is of the opinion that Claimant is not entitled to back pay as a result of this award. Claimant had been dismissed from service on July 9, 2004, and he had no loss of earnings as a result of the September 13, 2004 disciplinary action in the instant case. To award back pay in this case would be to impose a penalty against the Carrier, and this Board has no authority to do so.

#### 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 per the opinion. 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 it is signed by two members of the Board.

  
Mark D. Selbert  
Chairman and Neutral Member

  
D. D. Bartholomay  
Organization Member

  
D. L. Kerby  
Carrier Member

Issued at Saint Augustine, Florida on January 16, 2005