

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 145

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-CN-04-8-SG-141)

Statement of Claim:

Claim on behalf of K.M. Baker for all time lost as a result of his dismissal from service following a formal investigation on August 5, 2004, in connection with his violation of Rule N concerning his alleged on-duty injury that was reported on June 23, 2004.

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' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

K. M. Baker, the Claimant herein, entered the Carrier's service on January 2, 2003 as a Laborer. In June 2004¹, the Claimant was working as a Laborer on Timber and Surfacing Gang 2 (T&S 2). The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

¹ All dates noted herein occurred in calendar year 2004 unless otherwise noted.

The record evidence shows that on June 9th, the Claimant had completed his duties on a gang after working a four ten-hour day schedule encompassing Sunday through Wednesday, after which he drove home for his rest days. On June 11th, the Claimant was involved in an automobile accident. On June 12th, the Claimant telephoned his supervisor to request an unscheduled one week of vacation, advising the supervisor that he had seen his doctor on June 10th, and needed to take time off in connection with treatment for a possible muscle strain in his shoulder. At that time, the Claimant attributed his shoulder strain to normal activity, and that he had possibly "slept on it wrong." There was no mention of, nor did the Claimant attribute his muscle strain to any work related incident.

Subsequently, the Claimant informed his supervisor that he wanted to remain off for another week of unscheduled vacation in order to care for his shoulder pain. The Supervisor advised the General Division Engineer of the Claimant's request, whereupon the General Division Engineer arranged to meet with the Claimant on June 23rd in order to discuss the matter. The Claimant was instructed to bring medical information to support his request to the meeting. At the meeting of June 23rd, the record reflects that the Claimant, for the first time, attributed his shoulder ailment to an on-duty incident. The Claimant thereupon completed a Form 22, a Personal Injury Report, in which he stated as follows:

Over a period of 1 – 2 weeks [May 31 through June 9], I had a soreness in (R) side shoulder. By the end of the second week, I [sic] was a sharp pain. I went home on that Wednesday and the following morning was in need of medical attention. Then by the following morning (Fri), it was worse and hasn't changed up until present time. June 23, 2004.

The Claimant failed to bring any medical documentation to the June 23rd meeting to support his claim. Moreover, as noted above, the Claimant could not attribute his alleged on-the-job injury to any specific incident, nor could he relate a time, day or place regarding the alleged incident giving rise to his claim.

As a direct result of the Carrier's position regarding the Claimant's failure to comply with General Safety and Conduct Rule N, the Claimant was notified by letter dated June 23, 2004 to attend a

formal investigation on July 9, 2004 to determine his responsibility, if any, in connection with his violation of Norfolk Southern Safety and General Conduct Rule N. The investigation was subsequently postponed and ultimately held on August 5, 2004. The Claimant was at all times represented by the Organization. By letter dated August 17, 2004, the Hearing Officer, following his review of the transcript together with evidence admitted at the formal investigation, determined that the Claimant was guilty of the charge alleged, and advised that he was dismissed from the Carrier's service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

At the investigation, the Claimant raised a number of defenses designed to explain his delay in reporting his alleged injury. Such defenses included:

- His claim that he was not familiar with his obligations under Rule N. The record evidence shows, however, that the Claimant was provided with a copy of the Carrier's General Safety and Conduct Rule Book. Moreover, the Claimant passed a Rule Test on August 13, 2003.
- His claim that he initially believed that his alleged on-duty injury was simply a "sore muscle", and not related to a specific injury. However, the record, at TR 51 and 77, reveals the Claimant disclosed at the investigation, for the first time, that he recalled how and when the alleged injury occurred. The Claimant's sudden recollection represents a material inconsistency with his initial alleged claim.
- His claim that during the June 12, 2004 call to his supervisor, that he informed his supervisor that he had sustained an on-duty injury. Yet the record reflects that on this date, the Claimant believed that the pain was caused by a sore muscle that would heal overnight.

Moreover, at his meeting with the General Division Engineer on June 23rd, the Claimant did not make any reference to his alleged report to his supervisor on June 12th regarding his on-duty incident.

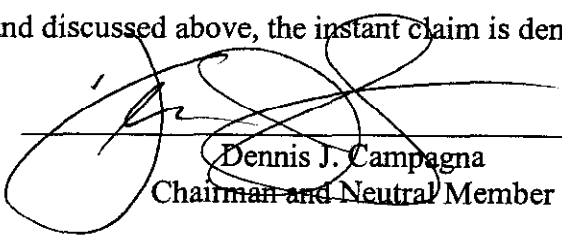
Given the foregoing review of the relevant facts as contained in the record, we find that the Hearing Officer's conclusion bears a rational relationship to the record evidence. Accordingly, there is substantial evidence in the record to support the Carrier's assertion of a Rule N violation by the Claimant in this matter.

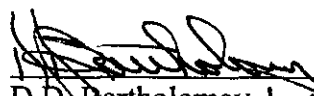
Turning now to the discipline sought to be imposed, it is well established arbitration precedent that the penalty sought to be imposed by an Employer will not be disturbed so long as it is not arbitrary, capricious or discriminatory.

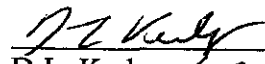
The Rule N violation at issue is an extremely serious offense. It is critically important that employees promptly report all injuries, whether on or off duty, in order to apprise the Carrier of any such instances that could impede their ability to perform their jobs in a safe and effective manner. Clearly, a failure to act on the Claimant's failure to report could very well have placed him and/or his fellow workers in a potentially injurious situation. Accordingly, given the severity of the Claimant's inaction, together with his brief time in the Carrier's employ, the Board cannot find that the discipline sought to be imposed by the Carrier, consisting of the Claimant's dismissal from service, is arbitrary, capricious or discriminatory.

CONCLUSION

For the reasons noted and discussed above, the instant claim is denied in its entirety.


Dennis J. Campagna
Chairman and Neutral Member


D.D. Bartholomay 6-15-05
Organization Member


D.L. Kerby 6-20-05
Carrier Member

Dated May 12, 2005, Buffalo, New York