

SPECIAL BOARD OF ADJUSTMENT 1049

CASE NO. 160

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier's File: MW-GNVL-05-16-LM-422)

Statement of Claim:

Claim on behalf of A. P. Edmonds for reinstatement 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 18, 2006, concerning violation of General Conduct Rule N in that he did not properly report an on-duty injury alleged to have occurred on December 7, 2005, and with making false and conflicting statements in connection with his alleged on-duty injury..

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

A. P. Edmonds, the Claimant herein, entered the Carrier's service on January 2, 2003 as a Laborer. On December 7, 2005, the Claimant was working as a Laborer assisting in replacing bad ties in an industry track. The instant matter concerns the propriety of the Claimant's alleged failure to properly report an injury alleged to have occurred while installing ties, making false and conflicting

statements in connection with such alleged on-duty injury, and the Carrier's action in dismissing the Claimant for these alleged severe breaches of the employment relationship.

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, it was established that on December 7, 2005, the Claimant and his co-worker were using a hammer to set spikes in the installation of new ties. At some point that morning, the Claimant mentioned to his co-worker that his shoulder was sore. Later that day, the Claimant mentioned that his back was hurting and that he would call the Track Supervisor at some point later that day. The record established that the Claimant had his cell phone with him that day, knew his Supervisor's number, but did not contact the Supervisor before leaving work at quitting time. Later that evening, the Claimant called the Assistant Track Supervisor from the hospital to inform him that he would not be reporting for work the next day. During this conversation, the Claimant maintained that he had soreness in his shoulder and was getting it examined. The Claimant noted that his condition was not work related and accordingly, there would be no need to contact the Track Supervisor in order to complete any required on-job injury report forms.

On December 11, 2005, the Claimant called the Track Supervisor to report that he had been given a 5-pound lifting restriction for a period of two to three months and requested a "light duty" assignment. When the Track Supervisor informed him that there was no light duty available, the Claimant indicated, for the first time, that he wished to report an on-job injury that occurred on December 7, 2005. The Claimant offered no cogent reason for his failure to make the required report on December 7, except for the assertion that he did not want to get anyone in trouble and had a son to raise

On December 12, 2005, the Track Supervisor and the Assistant Track Supervisor discussed the events of December 7 with the Claimant's co-workers. That same day, the Claimant advised the

Division Engineer that he had a cracked vertebra in his neck, an injury he sustained while doing some "heavy shoveling" on December 7, 2005 while installing ties. None of the Claimant's co-workers recalled the Claimant handling a shovel that day.

Following the investigation ultimately held on April 18, 2006 *in absentia*, the Hearing Officer advised the Claimant by letter dated May 2, 2006 that he was dismissed from the Carrier's service. The Organization took exception to the dismissal assessed and initiated an appeal dated May 17, 2006.

Following a careful review of the record, the Board finds that the Carrier sustained its burden of proof by establishing, through substantive credible evidence, that the Claimant failed to report his December 7, 2005 injury as required by General Safety and Conduct Rule N. In pertinent part, Rule N requires any employee who sustains an on-duty injury to report same to his immediate supervisor, before leaving Company premises. There is no dispute over the fact that the Claimant should have been aware of his obligation under this Rule. The Board also finds that the Claimant understood his obligation to contact his Supervisor and complete a written report before leaving work on December 7th. It was clear that the Claimant was capable of contacting his Supervisor by cell phone or through use of the Company radio. The fact that the Claimant did, in fact, contact his Assistant Track Supervisor and Track Supervisor on the evening of December 7th by cell phone is proof of the fact that he was aware of their contact numbers. Even though the Claimant was obligated to report his injury prior to leaving the property that date, his failure to report his injury that evening when given the opportunity to do so is troubling. The Board finds no cogent and acceptable reason for the Claimant's inaction.

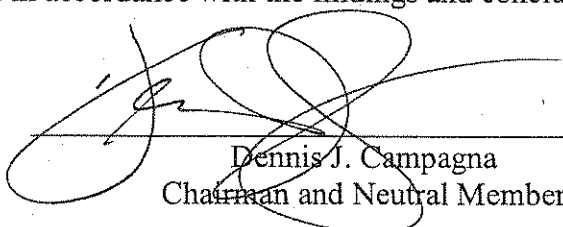
The record evidence, summarized above, also establishes that the Claimant made false and misleading statements concerning the injury he sustained on December 7th. In this regard, the Claimant stated to his Supervisor on December 7th that his pain was not attributable to an on-duty injury, only to later advise the Track Supervisor on December 11th that he wished to report an injury that occurred on the job on December 7, 2005, and ultimately advising the Division Engineer that he incurred a cracked vertebra while performing heavy shoveling on December 7th.

Given the foregoing, the Board concludes that the Carrier has carried its burden of proof in establishing, through substantial-credible evidence, the allegations set forth in the May 2, 2006 notice of dismissal from service.

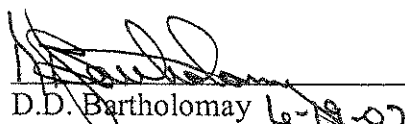
Turning now to the discipline sought to be imposed, it is clear that the Claimant sustained a serious injury, and that it is more likely than not that he sustained such injury while on-duty on December 7, 2005. Why the Claimant failed to make his Supervisor aware of his injury before leaving the property on December 7, 2005 is a mystery this Board will not solve. Suffice it to say, however, that the Carrier has a legitimate right to insist upon strict compliance with the requirements of Rule N, and as a result of his failure to comply with this important rule, the Carrier has every right to impose a severe disciplinary action. However, the Board finds that while it would have been a prudent move by the Claimant to strictly comply with his obligations under Rule N, given the foregoing unique facts and circumstances in this matter, and without setting a precedent for future cases which must be decided on their own merits, the Board finds that the Claimant's actions, while clearly improper, do not warrant his dismissal from service. Accordingly, the Board concludes that a more fitting and appropriate discipline is the Claimant's reinstatement to service without back pay. The time served without pay shall be deemed a disciplinary suspension. Let this serve as a warning to the Claimant however that he is obligated to follow all Carrier rules, and that his future failure to do so may very well warrant his termination from service.

CONCLUSION

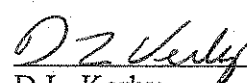
The Claim is sustained in accordance with the findings and conclusions noted and discussed above.



Dennis J. Campagna
Chairman and Neutral Member



D.D. Bartholomay 6-19-07
Organization Member



D.L. Kerby
Carrier Member

Dated May 31, Buffalo, New York