

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 193

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of A. D. Gibson requesting that he be made whole and returned to service with pay for all time lost with seniority, qualifications, vacation unimpaired as a result of his dismissal from service following a formal investigation held on January 29, 2009, in connection with: 1) improper performance of duties in attempting to use a retractable metal roof that he knew to be in an unsafe condition and failing to properly secure the retractable metal roof; 2) making false and conflicting statements when he alleged on Sunday, October 19, 2008, that he experienced neck pain as a result of the retractable roof hitting his hard hat on October 16, 2008.

(Carrier File MW-CN-08-30-SG-609)

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.

AWARD

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

The record reflects that on October 16, 2008, Claimant was assigned to operate the Rail Anchor Machine (RAM) because the regular operator was off work that day. The RAM had a retractable aluminum roof which could be used to shield the operator when it was raining. There is no dispute that on October 15, 2008, the regular operator briefed Claimant that the retractable roof was broken and unsafe to use. Nevertheless, when it started to rain, Claimant used the retractable roof and, because it was could not be properly secured, the roof fell down and struck Claimant on his hard hat. There is no question that Carrier proved the first charge by substantial evidence.

With respect to the second charge of making false and conflicting statements, the Rail Supervisor testified that on October 16, Claimant told him of the defect in the retractable roof but also stated that he was not injured. Claimant testified that he told the Rail Supervisor that he had a headache and his neck was hurting him but that he wanted to see if the pain would go away. On Sunday, October 19, Claimant went to the emergency room. Claimant called the Supervisor and reported that he had a compressed disc in his neck. The following day, pursuant to the Supervisor's instructions, Claimant appeared at work to complete an injury report. Documentation that Claimant brought with him from the hospital diagnosed a cervical strain.

A forensic report from an outside consulting engineer concluded that the retractable roof could not have caused Claimant's neck pain. The consulting engineer based his conclusion on the weight of the retractable roof, the force it would have attained during its fall, the composition of the hard hat, the absence of any damage to the shell or the shock resistant liner of the hard hat, the absence of any report of pain by Claimant at the time of the incident and the inconsistency of a diagnosis of cervical strain with a blow to the hard hat.


Claimant's testimony that he told the Supervisor on October 16 that he was experiencing headaches and neck pain conflicts with the Supervisor's testimony that Claimant stated that he was not hurt. As an appellate body that does not observe the witnesses testify, we are in a comparatively poor position, relative to that of the hearing officer, to assess witness credibility. Consequently, we defer to the resolution of credibility conflicts made on the property as long as they are reasonable. In the instant case, we find that the decision on the property to credit the Supervisor's testimony over that of the Claimant was reasonable and we defer to it.

We further defer to the decision on the property to credit the consulting engineer's forensic report. Although the Organization questioned some of the assumptions made by the consulting engineer, such as the assumption that Claimant did not report any pain or discomfort on the day of the incident, we find the overall conclusion and several key bases for that conclusion, such as the absence of damage to the hard hat and the inconsistency between a blow to the hard hat and the diagnosis of cervical strain, to be unrefuted. We conclude that Carrier proved the charge by substantial evidence.

Considering the seriousness of the offenses, we cannot say that the penalty of dismissal was arbitrary, capricious or excessive. Accordingly, the claim is denied.

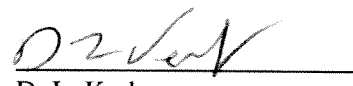


M. H. Malin
Chairman and Neutral Member



T. W. Kreke
Organization Member

Oct 5, 2009



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on September 24, 2009