

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 223

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed from the services of Norfolk Southern Corporation and its affiliates) of Mr. E. Nelson, issued by letter dated November 13, 2009 in connection with alleged violation of Safety and General Conduct Rule N in that on Monday, October 12, 2009 you reported to your supervisor that you had incurred an on-duty injury on Friday, October 9, 2009 and that you also made false and conflicting statements concerning the alleged on-duty injury was capricious, unjust and excessive (Carrier's File MW-GNVL-09-36-LM-471).
2. As a consequence of the violation referred to Part 1 above, Mr. Nelson shall be made whole and restored to the service of the Carrier, with pay for all time lost, seniority and vacation unimpaired. "

Upon the whole record and all the evidence, after hearing, the Board finds 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 precedent in any other case.

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 Claimant entered service for the Carrier on January 5, 2009 in the position of Track Laborer. On October 12, 2009 during routine morning warm up exercises Track Supervisor B.W. Bioddix noticed the Claimant performing an exercise in an unusual manner and inquired if everything was OK. The Claimant stated that his arm was sore but he would be able to work. Later the Claimant was approached by Track Supervisor H.S. Simmons, who also noticed the Claimant was not using his arm, and at that point the

Claimant described an injury to his arm which occurred on a previous work day. When Supervisor Simmons asked the Claimant to clarify whether he was stating he had been injured or not, the Claimant replied that he had not been injured and was able to work. A few hours after this, the Claimant approached Supervisor Simmons and reported his arm was hurt and he needed to see a doctor – at which point he then affirmatively stated he was reporting an injury that had occurred on October 9, 2009. The Carrier investigated the Claimant's injury by interviewing Foreman B. Smith and employees D. Mason and D. Rudd who had worked with the Claimant on the alleged date the injury occurred. None of the interviewed employees indicated they at any point heard the Claimant reference his injury or recalled anything out of the ordinary about their observations of the Claimant that day.

As a result of these events the Carrier removed the Claimant from service and held a formal investigation including a hearing dated October 27, 2009. The Carrier found the Claimant was guilty of violating rule N (failing to properly report an on-duty injury) and making false and conflicting statements in connection with the injury.

The Carrier argues first that the veracity of the Claimant's alleged injury on October 9, 2009 is suspect. In support of this it points to the interviews conducted with a Supervisor and two employees who were working in direct contact with the Claimant for that day who, at no point observed the Claimant make any reference to being hurt or otherwise appearing to be in pain. In addition, the Claimant on October 12, 2009 told two different supervisors that although he was hurt it was not work related and he could do his job (see Carrier Brief, page 5). In addition, the Claimant later changed his story at the hearing to state that the injury was connected with an event that occurred on May 13, 2009, even though the witnesses he called to support this version of events could not recall the Claimant indicating he was injured or in pain during the events of that day (see Carrier Brief, page 8-9). The Carrier concludes with its argument that dismissal was appropriate in this case because the Claimant's statements were obviously conflicting and constitute a form of dishonesty (see Carrier Brief, page 10).

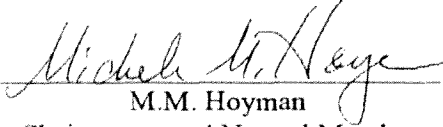
The Organization argues that because the Carrier's allegations are charges that fall under "moral turpitude" that the level of proof required is raised from "substantial evidence" to "clear and convincing evidence" (See Organization Brief, pages 7-8). The organization contends that the Carrier failed to meet this heightened standard of evidence. The Organization points out for the first time in its submission, that the Claimant had filed an Occupational Safety and Health Administration (OSHA) complaint (see Organization Brief, Exhibit B) and that this is relevant to his defense. The OSHA complaint was related to the Carrier's alleged creation of a 'chilling effect' that intimidates employees from reporting on-the-job injuries. (See Organization Brief, pages 9-11). The Organization further contends that, viewed in context, the Claimant's actions were explicable because he was fearful of retaliation due to attempts by the Carrier to discourage reporting of work related injuries. In fact, this is why the Claimant attempted to "have his own medical treatment manipulated to avoid discipline." The nature of the Claimant's injury was such that he initially felt some pain but symptoms did not return until after work was over (see Organization Brief, page 13).

The Board finds that the Claimant in this case does appear to have made conflicting statements. The record clearly shows that the Claimant made no reference to his pain being related to the earlier May injury during the multiple times he was asked about his injury in October by supervisors (see Transcript, pages 21 and 30). The case before the Board would be substantially different if the Claimant had when asked connected in any way his injury with the incident that occurred earlier in May. The record shows that at the hearing the Claimant attempted to establish the October incidents in this current case to an earlier incident in May but the hearing officer ruled it as inadmissible (see Transcript, pages 8, 53, 63-64, 83-85). The Hearing Officer also overruled the Organization's objection that the Claimant's personal statement should be read into the record in full, since it contained important information that would explain the October incidents (see Transcript, pages 96-97).

The Board finds there are several mitigating factors in this case. First, the board recognizes there are "late manifest" injuries which could occur on the work site but do not show symptoms until later. The Board's review of the record does not find sufficient evidence that refutes the Claimant's assertion that this was a type of late manifest injury. Second, we find that the Claimant may have had a legitimate fear of retaliation for filing work-related injury reports. The Claimant's fears seem to be supported by his interactions with his doctor in that he attempted through multiple avenues to avoid having the injury reported. He even tried to bargain for his job back by going to the doctor to ask her to rescind her work restrictions recommendations after being removed from service (see Organization Exhibit B, pages 3-4). There was also information entered that during the relevant time period in which he was out of work, that he was medically unfit for work.

In considering these mitigating factors, the Board notes that this decision stays within the four corners of the contract when considering the appropriateness of the Claimant's dismissal. The Board notes in regard to the complaint filed with OSHA that the document was first made as part of the Organization's arguments in at the hearing. At the hearing the Carrier responded that this complaint was issued as a preliminary finding but was later reversed on appeal to an administrative law judge. The Board only views the OSHA findings as a part of the Organization's defense for the Claimant's actions. In coming to its conclusions, the Board has carefully weighed the entirety of the case record. Given the circumstances in this case, the penalty of dismissal is unwarranted. The Claimant shall be reinstated, with no back pay.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member


D. Pascarella
Employee Member


D.L. Kerby
Carrier Member

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