

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 144

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-FTW-04-25-LM-155)

Statement of Claim:

Claim on behalf of J.A. Haynes 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 August 12, 2004, in connection with his violation of Rule N for failure to properly report a personal injury that allegedly occurred on March 16, 2004, and making false and conflicting statements in connection with this alleged 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

J. D. Haynes, the Claimant herein, entered the Carriers' service on August 23, 1977 as a Laborer, and was working as a Section Laborer on March 6, 2004¹ on the New Castle Section Gang of the

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

Carrier's Lake Operating Division. The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

The record evidence shows that on March 16th, the Claimant was working as a Laborer on the New Castle Section Gang changing out rails in Oakville, Indiana, when he reported some pain and discomfort in his back and legs. He was taken to New Castle, where he was unsuccessful in contacting his personal physician. His Supervisor then transported the Claimant to a local medical facility, where he was examined by a physician and sent home. At that time, the Claimant told his Supervisor that the pain was possibly due to a "flare-up" of his arthritis, and he neither made mention of his pain as being related to an on-duty incident, nor did he seek to report an on-duty injury.

Claimant remained off duty through April 5th, and upon his return to duty, met with the Assistant Division Engineer in the Track Supervisor's office on April 7th. At that time, the Claimant again stated that the pain he experienced from March 16th on was not related to any on-duty injury. On June 28th, the Claimant entered the Assistant Division Engineer's office, and informed him of his desire to report an on-duty injury in order that he could have his medical bills paid. Such bills amounted to \$500, representing co-payments made by the Claimant for treatment associated with the March 16th pain he experienced. Thereinafter, the Claimant completed a Form 22 Personal Injury Report, dated June 28, 2004, in which he described the incident giving rise to his claim as "Leg start hurting." Aside from this description, the Claimant did not give any further information describing, in sufficient detail, the specific incident or occurrence giving rise to his alleged March 16th injury. Claimant was thereupon referred to the Division Engineer's office.

A subsequent review of the Claimant's medical records by the Carrier's Medical Director revealed that the Claimant had received treatment for lumbago, or low back pain, without mention of any specific injury or incident, either on or off duty. Claimant's records also indicated that he had a chronic condition related to underlying degenerative disc disease, from which the Medical Director concluded that the Claimant's medical problem appeared to be related to a personal health condition, and not, as the Claimant maintained, the result of an FRA reportable injury. The Claimant was thereafter notified to attend a formal investigation:

"[t]o determine your responsibility, if any, in connection with your violation of General Safety Rule N. Wherein you alleged an injury occurred on March 16, 2004 and reported it on June 28, 2004. You will also be charged with making false and conflicting statements about the alleged injury.

By letter dated August 25, 2004, following the formal investigation held on August 12th, the Hearing Officer, upon reviewing the transcript together with the evidence admitted at said investigation, advised the Claimant 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 Organization proffered the excuse that at the time of the initial examination on March 16th, the Claimant and his treating physician were of the opinion that the Claimant's medical problem was attributed to a recurrence of an arthritic condition for which the Claimant had previously been treated, a diagnosis the Organization maintains was inaccurate. Accordingly, the Organization maintained that the Claimant was forced to rely on an inaccurate diagnosis from the same doctor the Track Supervisor (Hobbs) took the Claimant to see. Therefore, the Organization asserts, it is "reasonable" that the Claimant was unaware of the nature of his medical condition until his report of an on-the-job injury on June 28th. The Hearing Officer rejected this proffered excuse. Following a review of this Record, the Board finds support for the Hearing Officer's conclusion. In this regard, it is curious at best, that while given ample opportunity to do so, the Claimant twice stated to Carrier Officials that the pain he was experiencing was not work related, and on at least one occasion, advised his Supervisor that he did not trip, slip or fall, only later to report to the contrary after having experienced a liability of \$500 in co-payments for medical attention received as a result of the pain he experienced on March 16th. Indeed, on June 28th, the Claimant told the Division Engineer that he now chose to report an on-duty injury allegedly sustained on March 16th because he had approximately \$500 in medical bills, and he had been told that the only way to get these medical

bills paid was to turn them in as related to an on-the-job injury. The Organization also maintained that the Claimant's alleged injury was due to excessive hours he had worked as a direct result of the Carrier's insufficient manpower. In support of the Hearing Officer's decision to reject this proffered excuse, the Board notes that there is not one scintilla of evidence in the record to support such an assertion. Given this 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, and that the Carrier has proven that the Claimant, by his inactions, violated Rule N. However, while the Carrier charged the Claimant with a Rule N violation, and also charged the Claimant with "[m]aking false and conflicting statements about the alleged injury", the Carrier did not prove the later serious allegations. This fact standing alone however does not diminish the severe nature of a Rule N violation.

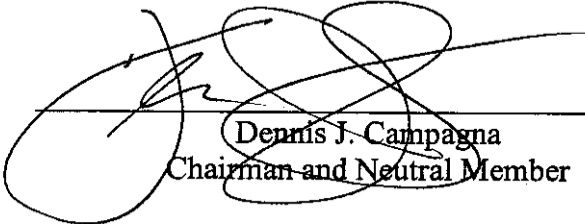
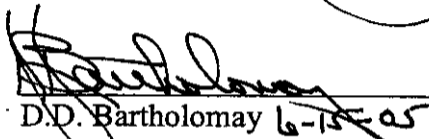
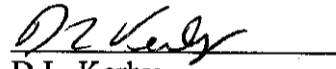
Turning now to the discipline sought to be imposed, it is well established arbitration precedent that the penalty sought to be imposed by an Employer will not be disturbed so long as it is not arbitrary, capricious or discriminatory. In the instant matter, the record evidence reveals that the Claimant provided dedicated service to the Carrier for over 27 years. The record also reveals that until the instant matter, the Claimant enjoyed an unblemished work record.

In seeking guidance as to the appropriate penalty, the Board had the opportunity to review numerous past decisions based on similar facts. While these decisions are not precedent setting, they do offer insightful guidance as to how past Boards dealt with cases of this nature.

We have found that under substantially identical circumstances, the "common thread" underlying the Board's decisions to reinstate was based upon long and unblemished service, together with the lack of proof as to any fraudulent intent.

CONCLUSION

The Investigation revealed and the Hearing Officer concluded that the Claimant's inactions violated Rule N, an extremely serious offense. It is critically important that employees promptly report all injuries, even those sustained off the job, where such injuries could impede their ability to perform their jobs in a safe and efficient manner. However, given the Carrier's failure to prove that the Claimant's inactions were based on a fraudulent intent, and recognizing the Claimant's 27 years of dedicated and unblemished service, the Board finds, under the specific facts of this case, that the penalty of dismissal was excessive. Accordingly, upon proof of fitness for duty as established by a return to duty physical conducted by a Medical Professional, selected and paid for by the Carrier, the Claimant shall be reinstated to service with seniority unimpaired, but without compensation for the time he was held out of service.


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 25, 2005, Buffalo, New York