

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 147

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-FTW-04-048-LM-243)

Statement of Claim:

Claim on behalf of J.J Bainter for pay for all time lost as a result of his 30-day actual suspension from service following a formal investigation on October 8, 2004, in connection with his violation of Rule N concerning his alleged on-duty injury that was reported on September 15, 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.

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. J. Bainter, the Claimant herein, entered the Carrier's service on September 15, 1976 as a Laborer, and in September, 2004¹, the month of the incident giving rise to his 30-day suspension, was assigned as a Backhoe Machine Operator on the Carrier's Lake operating division. 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 Friday September 10th, the Claimant completed his duties as a Backhoe Machine Operator and went home for his rest days. He returned to work on Monday September 13th, completed his daily assignment and went home. The Claimant also worked on Tuesday September 14th, and completed his duties without incident. However, on Wednesday September 15th at about 7:30 a.m., the Claimant notified his supervisor that he had sustained an injury on September 10th. It is undisputed that until the morning of September 15th, the Claimant had not made any mention of or given any indication of sustaining an injury prior to his leaving the property on September 10th. The Claimant completed Carrier Personal Injury Report Form 22 on September 15th, noting as follows:

Driving backhoe from stone pile (Huckleys St Muntself) to Willard St (CF Dist). Backhoe started bouncing while driving on Willard St. between Huckley and Madison ST. I felt a catch in lower back. Upon arrival at Willard St. crossing I did some back stretches and felt better. Waking up on 9/13/04 and 9/14/04 noticed pain and stiffness in left hip. Again after doing stretches felt ok on 9/13/04 and 9/14/04. Waking 9/15/04 had the same stiffness and soreness and numbness in three toes on left foot.

It is undisputed that the Claimant had not reported an on-duty injury with the filing of a Form 22 prior to leaving the property on Sept 10th.

On September 20th, the Claimant was directed to attend a formal investigation, which was held on October 8th in connection with his alleged violation of Rule N. By letter dated October 22nd 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, and advised the Claimant that he was assessed a 30-day actual suspension. 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.

Following a careful review of the record evidence, the Board finds the existence of substantial evidence to support the Hearing Officer's decision and conclusion. The Hearing Officer concluded that the Claimant failed to promptly and properly report his injury prior to leaving the property on September 10th pursuant to Rule N. The Claimant's own testimony and report supports the Hearing Officer's conclusion. In this regard, as noted in the completed Form 22 above, the Claimant noted that on September 10th, he "felt a catch in his lower back". The Claimant also noted that on September 13th and 14th, he "noticed pain and stiffness" in his left hip and that on September 14th, "the stiffness and soreness remained most of the day." To a reasonable employee in the shoes of the Claimant, his symptoms, beginning with those noted on September 10th, would have signaled the need to complete a Form 22. While the Organization asserts that the Hearing Officer's conclusion is unwarranted, respectfully for the reasons that follow, such assertion is unconvincing.

The Organization maintains that the Claimant was under the impression that there was no need to file an injury report unless such injury is significant enough to warrant medical attention. This claim runs counter to the clear language of Rule N, which mandates the filing of a written report of the incident giving rise to any injury "[b]efore leaving company premises." Moreover, the Organization did not produce evidence or testimony from any unbiased witness to support this assertion.

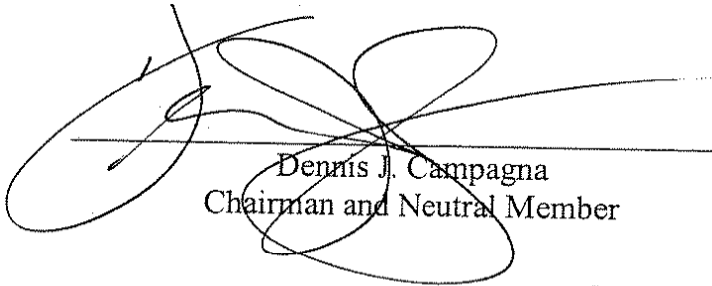
The Organization offers the testimony of witnesses J. Crossland and J. Melton in support of the Claimant's case noting that each witness performed work similar in nature to that performed by the Claimant, and they also experienced symptoms at a later date. However, neither Mr. Crossland nor Mr. Melton testified that they failed to make a timely report of any such injury sustained while on duty.

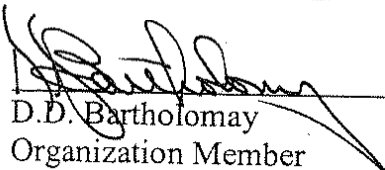
Turning now to the discipline sought to be imposed, it is well established arbitration precedent that the penalty sought to be imposed by an Employer will not be disturbed so long as it is not arbitrary, capricious or discriminatory. In the instant matter, while the Claimant's actions warrant some form of disciplinary action, the Board finds that the penalty of a 30-day actual suspension is too harsh. In reaching this conclusion, a review of the cases cited by the Carrier reveal that a harsh penalty is reserved for those cases where the Claimants waited one-year from the event to file an Injury Report, and that he had "virtually disappeared from sight for approximately seven months", (PLB

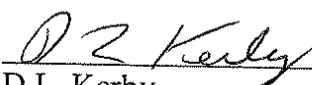
1838, Awd. 70, BMW vs. NSW (Van Wart, 1984), for the falsification of a personal injury, (3 NRAB, Awd. 25133, BMW vs. CRC (Vaughn, 1984), or where the Board found that the Claimant could have, but failed to report an injury within 5 days of its occurrence, but instead waited 18 days to report his injury (3 NRAB, Awd. 19298, BMW vs. ATSF (Killum 1972). While the Claimant's failure to abide by Rule N is a serious event, his actions did not arise to egregious conduct such as that demonstrated by these cases.

CONCLUSION

While the Investigation revealed that the Claimant engaged in an action that warrants disciplinary action, the Board finds and concludes that under the facts of this case, a 15-day actual suspension represents a more appropriate penalty. However, let this decision serve as formal notice to the Claimant that if he has any hopes of continuing his employment with this Carrier, he is duty bound to follow all Rules, Regulations and Procedures promulgated by the Carrier for the efficient and safe operation of its business as well as the general welfare of all its employees. In this regard, Rule N requires a prompt reporting of all injuries, whether real or suspected as a means of providing the Carrier with notice of a potential safety threat as well as a means of providing treatment to a valued employee as soon as possible.


Dennis J. Campagna
Chairman and Neutral Member


D.D. Bartholomay
Organization Member


D.L. Kerby
Carrier Member

July 24, 2006
Dated