

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 133**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

Statement of Claim:

Claim on behalf of J. R. McAboy for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for time lost as a result of his dismissal from service following a formal investigation held on June 26, 2002 in connection with his violation of General Rule N of the Carrier's Safety and General Conduct Rules in that on June 10, 2002, he reported an injury alleged to have occurred on-duty on May 31, 2002, and providing false and conflicting statements concerning this alleged on-duty injury.

(File MW-BHAM-02-08-LM-126)

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' presentations, the Board finds that the claim should be disposed of as follows:

Carrier clearly proved the charge by substantial evidence. There is no dispute that Claimant alleged that his injury occurred on May 31, 2002, but that Claimant failed to complete a formal report until June 10, 2002, in clear violation of Rule N. Furthermore, the record reflects that on June 10, 2002, Claimant asked to see the doctor and the Track Supervisor inquired as to whether the knee condition for which Claimant was seeking medical attention was work-related. Claimant initially told the Assistant Track Supervisor that he did not know how he had injured his knee. He subsequently told the Track Supervisor and Assistant Track Supervisor that he believed he injured the knee entering and exiting a high rail truck. Thereafter, Claimant stated that he injured the knee on May 31, 2002 at 1:00 p.m., while tightening bolts at McGregor, Alabama, milepost 267.

The critical question is whether dismissal was an arbitrary, capricious or excessive penalty. We note initially that Claimant had more than 25 years of service at the time of the incident. There is no evidence of any prior disciplinary history. Under these circumstances, whether Claimant falsified the claim of on-duty injury itself is a highly significant factor in determining whether the penalty was excessive.

Claimant testified that on May 31, while tightening the bolts at McGregor, he felt a pop in his knee and reported such to the Assistant Track Supervisor. Claimant further testified that during the following week, he felt stiffness in the knee and so advised two coworkers, one of whom was his brother. Throughout vigorous cross-examination, Claimant maintained that he injured the knee while tightening bolts at McGregor on May 31, 2002, but did not report it officially until June 10 when it became swollen.

The Assistant Track Supervisor corroborated Claimant's testimony. Generally, we would find such corroboration by a supervisor highly significant. However, the instant case presents highly unusual circumstances. The FRA Inspection Reports completed by the Assistant Track Supervisor showed no work performed at milepost 267 at McGregor on May 31, 2002. The track warrants obtained by the Assistant Track Supervisor showed that he and Claimant cleared Meridian, Mississippi at 12:59 p.m. on May 31, 2002, and could not have been tightening bolts at McGregor at 1:00 p.m. Furthermore, the Assistant Division Engineer and the Track Supervisor observed two bolts out at McGregor on June 5, 2002, and these bolts were replaced by Claimant and the Assistant Track Supervisor on June 6. Claimant maintained that they were the same bolts that he had replaced on May 31, but the Assistant Division Engineer testified that the bolts that were out on June 5 were old and rusty and could not have been replaced five days previously.

When confronted with his own FRA inspection reports, the Assistant Track Supervisor conceded that they reflected no work done at milepost 267 on May 31 but still maintained that he and Claimant had tightened and replaced bolts there. He stated that he did not record the work on the reports because bolts were always coming out at McGregor. Furthermore, although the Assistant Track Supervisor testified that Claimant reported the work-related injury to him on May 31 and discussed the knee's condition with him three or four more times prior to June 10, the Assistant Track Supervisor made a deliberate decision not to report it because he wanted to give Claimant the benefit of seeing if the knee would improve and if he would not have to have an injury on his record. In other words, the Assistant Track Supervisor admitted to two very serious transgressions of his own responsibilities in connection with this incident. Furthermore, we note that at the time of the investigation, the Assistant Track Supervisor had been dismissed, although the basis for the dismissal does not appear in the transcript.

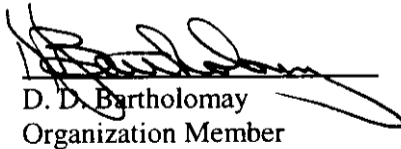
Additionally, the Assistant Division Engineer and the Track Supervisor interviewed other members of Claimant's gang, including Claimant's brother, and none reported any reports by Claimant of the injury or anything unusual about Claimant's physical behavior between May 31 and June 10. Although the Assistant Track Supervisor testified that two of the coworkers had remarked about Claimant's condition, when the hearing officer offered to bring the coworkers in as witnesses, the Vice Chairman, as Claimant's representative, declined the offer. The Vice Chairman did suggest that he might seek to supplement the record with written statements from the coworkers but the record contains no such statements. The clear inference is that if called as witnesses, the two coworkers would have corroborated the Assistant Division Engineer and Track Supervisor.

On the property, Carrier did not credit the testimony of Claimant or of the Assistant Track Supervisor. In light of the Assistant Track Supervisor's admission of willful neglect of duty, if not outright dishonesty, and in light of the clear conflicts between the Assistant Track Supervisor's and Claimant's testimony and the objective physical evidence, we see no reason to deny the credibility determinations made on the property the deference to which they are usually entitled. Accordingly, we conclude that Carrier proved Claimant's active and willful dishonesty with respect to the claimed on-duty injury by substantial evidence. Considering the serious nature of the dishonesty, even in light of Claimant's lengthy service,

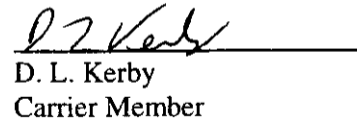
we cannot say that the penalty of dismissal was arbitrary, capricious or excessive. The claim is denied.



M. H. Malin  
Chairman and Neutral Member



D. D. Bartholomay  
Organization Member



D. L. Kerby  
Carrier Member

Issued at Chicago, Illinois on December 29, 2003