

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 139

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of Z. M. Holder for reinstatement to service 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 March 14 and 27, 2003, in connection with his violation of Rule N for failure to properly report a personal injury that allegedly occurred on November 4, 2003, and making false and conflicting statements in connection with this alleged injury.

(Carrier File No. MW-SOMR-03-02-SG-038)

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:

On November 4, 2002, Claimant was operating a walking hammer. There is no dispute that Claimant complained to the Supervisor of T & S 2 about broken spikes on November 4, 2002, and that T & S Supervisor Hunter held a meeting with the spiker operators and told them that too many spikes were being bent. In dispute are whether Claimant told Hunter on November 4, 2002, that he had hurt himself because of the bent spike and whether Hunter told the spiker operators that an employee got hurt because of a bent spike. These disputes are crucial because it was not until February 27, 2003, that Carrier gave Claimant notice to attend an investigation on March 14, 2003. The System Discipline Rule provides, in relevant part, "The investigation shall be held within thirty days of first knowledge of the offense." Hunter testified that his first knowledge that Claimant was claiming to have been injured on November 4, 2002, came on February 25, 2003, when he received a copy of a letter sent by an attorney purporting to represent Claimant in connection with an injury sustained on November 4, 2002. Thus, if Hunter's first knowledge was on February 25, 2003, the charges were timely filed and the investigation was timely held. If, however, Hunter's first knowledge was November 4, 2002, the investigation was not timely held and the discipline cannot stand.

This case, thus, involves a conflict in credibility between Claimant and Hunter. As an appellate body, we do not observe the witnesses and are in a poorer position than the hearing officer to assess witness credibility. Consequently, we generally defer to credibility determinations made on the property. However, those determinations must still be supported by substantial evidence in the record as a whole.

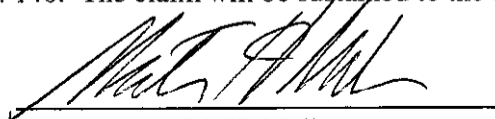
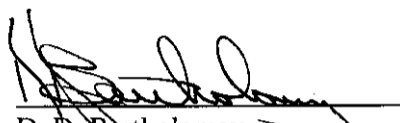
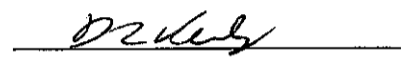
In the instant case, several witnesses corroborated the crucial details of Claimant's version of events on November 4, 2002. Spiker Operator Clements testified that although he could not recall the exact date, toward the end of 2002, Claimant told Hunter that his arm and shoulders were hurt and Hunter called the spiker operators together and told them that Claimant had been hurt and that they had to do a better job and not bend the spikes too far down to the rail. Spiker Operator Berry testified that on a date he could not remember but that was around November 4, 2002, Hunter called a meeting of the spiker operators and told them that a man had been injured that morning. According to Berry, Hunter also told them that they had to stop bending so many spikes.

The other walking hammer operator testified that on a date that he could not recall, Claimant fell down when trying to straighten a bent spike. According to the other walking hammer operator, Claimant complained of the bent spikes and of getting hurt at the safety meeting the next day. The walking hammer operator recalled a meeting at which Hunter told the spiker operators they were bending too many spikes but did not recall Hunter referring to Claimant being injured. The regulator operator testified that he observed Claimant fall to the ground when attempting to straighten a bent spike. He further testified that Claimant complained of being injured at the following day's safety meeting.

Thus, the other walking hammer operator and the regulator operator corroborated Claimant's testimony that he fell while straightening a bent spike. They both testified that Claimant complained of getting hurt because of bent spikes at the following day's safety meeting at which Hunter also was present. Clements testified to witnessing Claimant telling Hunter he was injured straightening a bent spike and Clements and Berry both testified that on the same day, Hunter called a meeting of the spiker operators, told them an employee had been hurt and that they had to stop bending so many spikes. Only the other walking hammer operator could not recall mention of an injury at the meeting at which Hunter told the spiker operators not to bend so many spikes but even he testified that Claimant reported being injured at the following morning's safety meeting.

We recognize that Supervisor Lewis, the Division Engineer and the foreman testified that Claimant did not report an injury to them. However, if Claimant reported the injury to Hunter, there would be no reason for him to report it to other supervision. Viewing the record as a whole. The clear weight of the evidence establishes that Hunter's first knowledge came shortly after the November 4, 2002, incident and not on February 25, 2003. Consequently, the finding made on the property that Carrier's first knowledge came on February 25, 2003, is not supported by substantial evidence. The investigation was not held in a timely manner and the discipline must be vacated.

Normally, we would sustain the claim in its entirety. However, on April 14, 2003, Claimant was notified to report for an investigation on April 24, 2003, concerning his alleged failure to report another injury in accordance with Rule N and his alleged making false and conflicting statements in connection with that alleged injury. He was again withheld from service pending investigation. That investigation also resulted in Claimant's dismissal and we denied the claim challenging that dismissal in Award No. 140, also issued today. In light of our decision in Award No. 140, Claimant is not entitled to reinstatement to service. Rather, his remedy is limited to compensation for time held out of service from February 27, 2003, the date he was initially held out of service until April 14, 2003, the date on which he was held out of service on the charges before this Board in Award No. 140. The claim will be sustained to the extent indicated herein.


M. H. Malin
Chairman and Neutral Member
D. D. Bartholomay
Organization Member
D. L. Kerby
Carrier Member