**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 142**

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of D. K. Johnson 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 November 7, 2003, March 12, 2004, and May 21, 2004, in connection with his violation of Rule N for failure to properly report an injury that allegedly occurred on July 10, 2003, and making false and conflicting statements in connection with this alleged injury.

(Carrier File MW-SOMR-03-13-SG-275)

## FINDINGS

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.

## OPINION

Claimant D. K. Johnson began working for the Carrier as a track laborer on February 2, 1999. On July10, 2003, he was assigned as a laborer on a timber and surfacing gang (T&S 8), loading spikes on a spiking machine. At that time, T&S 8 worked four ten hour days, Monday through Thursday. July 10, 2003, was a Thursday, and at 5 p.m. the employees assigned to T&S 8 were preparing to travel home for the weekend. They were in the process of clearing the machines from the main track and placing them in a siding when there was a collision involving the spiking machine on which Claimant was working.

According the Claimant, he was still on the machine when the collision occurred, and although he did not feel he was injured at the time, he contends that he told the assistant supervisor on the scene that he was on the machine at the time of the collision. Claimant then rode the bus from the job site to the camp site, where he promptly washed up and left for home in his personal automobile.

While driving home, Claimant says he began to feel pain in his back and neck, which he at first contributed to driving fatigue. But when he woke up experiencing pain the next morning (July 11, 2003), Claimant called to make an appointment with his doctor and attributed the pain to the collision. The doctor's office told him he needed a workmen's compensation claim number because Claimant was seeking medical attention due to an on-duty injury, so Claimant called his supervisor in order to get the necessary information.

According to the Claimant, during that conversation he told his supervisor that he was injured as a result of the accident the day before. Claimant further contends that the supervisor kept avoiding his responsibility to fill out an injury report for the next six weeks, despite the fact that they rode to work together the Sunday after the collision and had frequent conversations regarding Claimant's medical treatment for back and neck pain. According to Claimant, his supervisor told him to use his medical insurance to pay for treatment, and also recommended a chiropractor. Claimant continued to work from July 14, 2003, until some time around August 17, 2004.

Subsequently, on or about August 21, 2003, Claimant contacted the medical department in order to get assistance in his attempt to obtain treatment for his back pain, and the medical department transferred his call to a claims agent. After talking to Claimant, the claims agent called Claimant's supervisor regarding the injury claim. On August 22, 2003, the supervisor spoke to Claimant, who confirmed that he was claiming an on-duty injury as a result of the collision on July 10, 2003. Arrangements were then made for Claimant to complete a written report of the injury in the presence of the general division engineer on August 25, 2003.

Thereafter, by letter dated September 4, 2003, the Claimant was notified to attend a formal investigation on September 19, 2003, in connection with violation of Rule N for failing to properly report an alleged injury and for making false and conflicting statements in connection with the alleged injury. After one postponement, the investigation commenced on November 7, 2003. It was continued twice, concluding with the presentation of the Organization's final exhibit dated July 2, 2004. Thereafter, Claimant was dismissed from service by letter dated July 9, 2004.

Before addressing the Carrier's position and the relative merits of this case, a couple of procedural matters must be resolved. Claimant contends that on July 11th he advised his supervisor he was injured, and that the September 4th letter of charges scheduling the formal investigation for September 19th was well beyond the 30 day time limit in the discipline rule in effect between the parties. This objection is without merit because, no matter what the Claimant may or may not have said to his supervisor on July 11th, there is

no doubt that he did not actually submit a completed injury report to the Carrier until August 25th. Even if he told his supervisor about the injury on July 11th, mere verbal report of the injury would not have started the 30 day period because at that point there was no basis for charging the Claimant. The time limits for holding the investigation could not start until a completed report was filed and the Carrier became aware that Claimant may have failed to comply with Rule N and may have made false and conflicting statements in connection with the alleged injury. The 30 day time limit started when the completed report was filed, and the investigation was clearly scheduled to be held within 30 days of the Carrier's first knowledge of the reason for the investigation.

Another procedural objection was made in August 6, 2004 letter appealing the discipline, in which the Organization alleged it did not receive a copy of the transcript with their copy of the dismissal letter. Thereafter, Carrier provided the Organization with a copy of the transcript on August 12, 2004. Nevertheless, the Organization contends that the Carrier's failure to provide a transcript with the dismissal letter is a fatal error requiring that this claim be sustained. At hearing, the Organization Member contended that providing the transcript is a continuation of the investigation, and must be accomplished in order for it to be fair and impartial. After thorough review, the Board concurs with the majority of awards holding that there is no absolute requirement that a copy of the transcript accompany a copy of the dismissal letter to the Organization, and we note that the Carrier immediately corrected the problem when brought to its attention by sending a copy of the transcript to the General Chairman. Therefore, this objection is also found to be without merit.

Regarding the merits of this case, the Claimant's position has been summarized above. The Carrier's position is that it is likely that the Claimant did not sustain an on-duty injury; rather, according to Carrier, it is more likely that Claimant saw the collision as an opportunity to transfer liability for an injury he probably sustained in a July 2003 automobile accident to the Carrier. Further, Carrier contends Claimant made false and conflicting statements to discredit his supervisors in order to cover up his own dishonesty.

Carrier speculates that the Claimant may not have even been on the spiking machine when the collision occurred, and contends that he certainly did not report an injury to any supervisor in compliance with Rule N, despite innumerable chances over a six week period. In this regard, Carrier notes that Claimant did not remain at the camp to give a statement after the collision, and that both the assistant supervisor and the supervisor testified that when they spoke to Claimant on July 11, 2003, regarding his attempt to seek medical attention, he never explicitly told them he was injured in the collision. Instead, Carrier contends, the supervisors ". . . understood the Claimant to deny any injury in connection with the equipment collision." The supervisors testified that Claimant merely complained of being "sore," and the Carrier points to testimony from other witnesses to the effect that Claimant always complained about being sore, and about having various aches and pains, prior to the July 10, 2003 collision.

Further, Carrier contends that the Claimant offered a dramatically different version of the events than his supervisors and co-workers, and that considerable weight must be given to the hearing officer's determination regarding the credibility of the witnesses, citing well-accepted authority regarding that principle. The Organization, on the other hand, argues that this case is not so much a matter of credibility as it is a failure of the Carrier to prove the charges against Claimant.

Careful review of the testimony of all of the witnesses reveals that there is little conflict in testimony regarding what happened or when it happened. Indeed, the only legitimate dispute in this case is whether Claimant reported an injury when he spoke to both his supervisor and assistant supervisor on July 11, 2003. As noted previously, the supervisor and his assistant testified that the Claimant only told them he was "sore" when they spoke to him at home on July 11, 2003, and that they "understood" him to deny any injury. However, as the assistant supervisor testified on page 126 of the transcript, he did not want to hear that the Claimant was injured as a result of the collision, so "there wasn't no since [sic] in me asking a whole lot of questions."

In this regard, the Board turns its attention to a tape recording Claimant made of telephone conversations between him and his supervisor, the assistant supervisor, and the general division engineer. They did not know they were being recorded as they spoke to Claimant. During the interim between the March 12, 2004 hearing proceeding and the May 21, 2004 proceeding, the general division engineer took a copy of the tape recording and had it analyzed for authenticity. Claimant's representative objected to this handling of the tape, noting that although it was not in evidence, it was being reviewed by the witnesses and others outside of the investigation. The Board finds that objection without merit because it is common for witnesses or experts to analyze evidence outside of an investigation.

What was unusual, and improper, is that the person who analyzed the tape for authenticity was not made available for cross examination during the formal investigation. In the Board's opinion, however, that error was corrected by the submission of an opinion from an expert chosen by the Organization regarding the authenticity of the tape. Therefore, the tape recordings will be considered as a reasonable, although not perfect, representation of the conversations recorded. That determination is also made based on the fact that everything said in those conversations was acknowledged by the Carrier's witnesses during the investigation. Indeed, their main objection to the tape is that some of the conversations were allegedly omitted, but under the circumstances explained above, the Board will not base its decision on what may or may not have been omitted from the tape.

The Board finds that the Carrier failed to prove that the Claimant was not on the machine when the collision occurred, or that he intentionally left the property before making a statement about the collision. Witnesses Ramsey and Jones both testified that they were not asked to make a statement until after they had returned on the bus from the job site to the camp, and that only the machine operators were required to make statements. As noted previously, Claimant was not an operator, he was a laborer, so Claimant's

explanation for leaving the property before making a statement is quite credible. So too is his explanation that he did not realize he was injured until some time after he started driving home. In fact, Claimant's testimony over a period of more than seven months on three different dates is remarkably consistent. He told the same story with little if any variation, almost verbatim, time after time. For example, he repeated his experience with people involved in accidents who did not realize they had broken legs and such due to the adrenaline rush, and that his supervisors told him they did not want to deal with an injury report due to having "12 pages of paperwork."

Carrier's theory that the Claimant was not injured on July 10, 2003, and was dishonest in an attempt to transfer liability for injuries that allegedly occurred in a previous driving accident, is pure speculation. In fact, there was no evidence that Claimant was injured in the driving accident four months prior to the July 10, 2003 incident. He apparently complained of aches and pains, but did not miss work as a result of the driving accident. Likewise, Carrier's attempt to connect this incident with complaints of headaches two years prior is both speculative and unconvincing.

Considering the evidence, the Board finds that the supervisors' testimony must be viewed as self-serving because they failed in their responsibility to file a report of an injury when Claimant told them he was in the collision on July 10th and was hurting as a result of it on July 11, 2003. While it may be true that Claimant complained excessively of soreness on the job, his supervisor admitted that Claimant had never before called him at home on a rest day to tell him he was in a collision the day before, he was sore, and he needed a worker's compensation claim number because he was trying to make an appointment with his doctor. It is not common knowledge outside the railroad industry that railroad workers are not subject to state workmen's compensation laws. Nonetheless, the only reason a doctor's office would ask for a workman's compensation claim number is because the employee claimed he was injured at work. The testimony and evidence in this case lead to the inexorable conclusion that on July 11, 2003, Claimant told his supervisor that was seeking medical attention because he was involved in the collision on July 10, 2003.

Notwithstanding the foregoing, Claimant bears some responsibility in the failure to properly report an injury under the explicit terms of Rule N. As noted here and by Carrier, Claimant spoke to two supervisors on July 11, 2003, had opportunities to speak to the general division engineer during the week of July 21, 2003, and had multiple opportunities to clarify his position and insist that his supervisors file an injury report during the six weeks between the incident and August 25, 2003.

It is the conclusion of this Board that the Claimant received a fair and impartial investigation, during which the hearing officer allowed all relevant testimony, responded promptly and correctly to all objections raised, and the Claimant and his representatives were afforded every opportunity to present evidence and cross examine witnesses. The Board also concludes that Claimant was guilty of violating Rule N. However, there is no evidence in the record to conclude that Claimant was dishonest about sustaining an injury as a result of the collision on July 10, 2003.

Despite Claimant's reasonably short tenure as an employee with the Carrier, his failure to fully comply with Rule N does not justify permanent dismissal, especially considering the cavalier conduct of the supervisor and assistant supervisor in this matter. The Board also notes Claimant's clear record and no previous injuries, so it is appropriate to strike a compromise here. Therefore, Claimant shall be reinstated to service with seniority and benefits restored, but without pay for time lost.

**AWARD**

After thoroughly reviewing and considering the transcript and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The claim shall be sustained in accordance with the Opinion. The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board sign this award.

Mark D. Selbert
Chairman and Neutral Member

D. D. Bartholomay
Organization Member

D. L. Kerby
Carrier Member

Issued at Saint Augustine, Florida on January 17, 2005