

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 185

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of J. L. McKenzie 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 January 10, 2008, concerning violation of General Conduct Rule N in that he did not properly report an on-duty injury alleged to have occurred on December 6, 2007, and with making false and conflicting statements in connection with this alleged on-duty injury.

(Carrier File MW-DECR-07-58-LM-460)

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

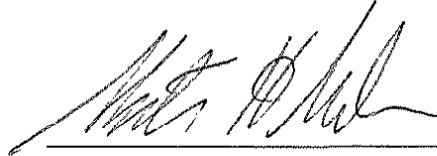
After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The record reflects that Claimant advised the Division Engineer during the evening of December 10, 2007, that he had sustained an injury to his back on December 6, 2007. On December 11, 2007, Claimant completed the required Form 22 and indicated that he had injured his back while lifting a track jack. Rule N requires employees to report all on-duty personal injuries to their immediate supervisors "before leaving Company premises." There is no question that Claimant failed to report the injury prior to leaving the premises on December 6. Carrier clearly proved the charge of violating Rule N by substantial evidence.

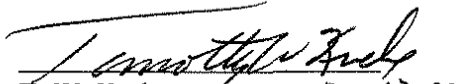
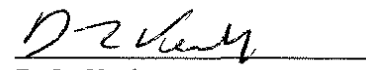
The record further reflects that on December 7, Claimant mentioned discomfort in his back to his supervisor while they were patrolling track, but did not relate it to the lifting of the track jack the prior day. In the morning on December 10, Claimant called the supervisor to mark off to go to the doctor and expressly stated that the back issue was not a work-related injury. We conclude that Carrier proved the charge of making conflicting statements by substantial evidence.

However, considering all of the surrounding facts and circumstances, and without setting a precedent for future cases, we find that the penalty of dismissal was excessive. The record further reflects that

Claimant mentioned his back pain to his foreman, who was also his father, on the way home from work on December 6. On the record before us, we cannot find that Carrier proved by substantial evidence that Claimant intended to defraud Carrier by reporting as an on-duty injury what he knew was not one. Accordingly, Carrier shall reinstate Claimant to service but without compensation for time out of service.



M. H. Malin
Chairman and Neutral Member


T. W. Kreke 12-17-08
Organization Member
D. L. Kerby 12-17-08
Carrier Member

Issued at Chicago, Illinois on November 30, 2008