SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 195

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of T. Youngblood that he be paid for all time lost as a result of his dismissal following a formal investigation on November 13, 2008, concerning his conduct unbecoming an employee for making false and conflicting statements regarding allegedly slipping and falling off the top of the tool box mounted on a Spike Puller machine while adding hydraulic fluid on October 9, 2008, in the vicinity of Dendron, North Carolina.

(Carrier File MW-GNLV-08-34-SG-594)

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 on October 9, 2008, Claimant was assigned as a Spike Puller Operator. Two coworkers heard what one described as a noise that sounded like a hard hat hitting the ground and immediately went to Claimant's machine where they found him lying on the ground in the ballast on the north side of his machine. Claimant told them that we was hurt and the coworkers radioed for help. Claimant was lifted on a make-shift stretcher by six or seven employees into a hi-rail pickup truck and brought to the crossing where he was met by an ambulance.

Later that day, Claimant completed a personal injury report Form 22, on which he reported that he had stepped on the top of the machine's toolbox to pour hydraulic oil into the tank, went to dispose of the empty can when his feet slipped and he fell on the north side of the ballast on his buttocks, flipped over and tried to stand up but was unable to do so. Testimony from two Rail Supervisors attributed the charge to the following: there was no reason for Claimant to add hydraulic oil as the tank already was full; the fall could not have happened the way Claimant described it as he would have had to have fallen into the machine behind him or toward the south side, or if he fell toward the north side he would have ended up in the weeds rather than in the ballast; that the ballast did not show any indentation or other sign that Claimant had fallen there; and that two mechanics subsequently approached the Supervisors and advised that two weeks prior to the incident, Claimant had stated that he had been injured four or five times before and received compensation each time and figured it was time for another check.

Much of the rationale behind the charge did not hold up under scrutiny at the investigation. Claimant testified plausibly that he added the hydraulic oil to the tank because the can was only partially full and he did not want to throw it away or return it to the fuel truck. Claimant's testimony was actually corroborated by the Supervisors who testified that the tank was overfilled as they withdrew about five gallons from it and it still read that it was full. Claimant was charged with making false and conflicting statements, not with improperly over-filling the hydraulic tank. There is no evidence that Claimant's statement that he emptied the partially-filled can of hydraulic oil into the tank was false or conflicting.

Similarly, no inference can be drawn from the condition of the ballast. The record is clear that before the condition of the ballast was inspected, six or seven employees manipulated a make-shift stretcher under Claimant and carried him to the main track for a hi-rail pickup truck to transport him to the crossing where he was met by an ambulance. In so doing, they disturbed the condition of the ballast so that when the ballast was inspected, it did not necessarily reflect the condition it was in when Claimant first impacted it.

However, the evidence is strong that the incident could not have occurred as Claimant described it on the Form 22. Although one of the Rail Supervisors completed the Form 22, he did so by recording the information as Claimant told it to him and Claimant reviewed the form and signed it. Indeed, at the investigation, Claimant abandoned his claim that he landed in the ballast and was unable to stand up, but instead testified that he ended up in the weeds and then scooted his way up to the ballast beside the side track where his machine was. Based on this evidence, we conclude that Carrier proved the charge that Claimant made conflicting statements.

However, we conclude that Carrier did not prove that Claimant falsified his claim of an on-duty injury. The only evidence of this was testimony from the two Repairmen that two weeks earlier, in a conversation with them and other unidentified employees, Claimant stated that he had prior injuries for which he had received payment and it was about time for another check. The Repairmen were unable to provide any foundational details about the alleged conversation, such as the date on which it occurred or the specific other individuals who were present or the context of the discussion. Claimant denied ever making such a statement. Furthermore, the Repairmen did not report the statement to supervision at the time, believing it not to be significant.

Balanced against this vague contested testimony of a flippant remark is the undisputed evidence that Claimant was found on the ground, unable to move and that about 30 second before he was found, two coworkers heard a noise that made them fear someone had fallen. Furthermore, the one coworker who testified testified that Claimant appeared to be in pain. We conclude that Carrier failed to prove by substantial evidence that Claimant faked an injury or otherwise attempted to defraud Carrier.

For the charge that was proven, making conflicting statements with respect to the details of how the accident occurred, we find that the penalty of dismissal is excessive. Carrier shall reinstate Claimant to service, with seniority unimpaired, but without compensation for time out of service.

M. H. Malin
Chairman and Neutral Member

T. W. Kreke
Organization Member
Oct. 5, 2009

D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on September 24, 2009