

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5332**

Parties to Dispute:

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS**

-and-

**NORFOLK SOUTHERN RAILWAY
COMPANY**

AWARD

Case No. 160

Claimant T. E. O'Brien

STATEMENT OF CLAIM:

“Claim on behalf of Electrician T. E. O'Brien in Chicago, Illinois, for reinstatement with seniority rights unimpaired and made whole for all losses sustained. These begin the date removed from service, continue to the present date and include, but are not limited to, lost wages, vacation rights, health and welfare and insurance benefits, pension benefits such as Railroad Retirement and Unemployment Insurance, and any other benefits that would have been earned during the time Electrician T. E. O'Brien is unjustly withheld from Carrier's service. We also request his personal record be cleared of the matter.”

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

Claimant O'Brien, who entered service with Norfolk Southern on April 3, 2003, was charged on August 6, 2015, with conduct unbecoming an employee in connection with an injury to his leg reported on July 28, 2015, while he was working at Carrier's Calumet Locomotive Shop in Chicago, IL. Following formal investigation held on October 20, 2015, Carrier determined that its charges had been established, and by letter of November 19, 2015, it terminated his employment as an Electrician. This claim submitted by the Organization on his behalf challenging the discharge followed. It has been addressed at all appropriate levels in claim handling on the property and is now properly before the Board for final adjudication.

The record developed on the property establishes that on July 28, 2015, after being instructed to drop a blue flag into the pit, Claimant failed to do so, reporting to both a co-worker and to his General Foreman shortly thereafter that he had fallen through a crossover board serving as a temporary bridge between the shop platform and the walkway of locomotive NS 7140, had been injured in the fall and could not move.

The matter thereafter became the subject of a comprehensive investigation by supervision. The facts attending the alleged fall are hotly contested. They are, accordingly, at the center of this dispute in which the Organization on Claimant's behalf raises the question of whether the record evidence developed in claim handling, including at Claimant's formal investigation on October 20, 2015, establish just cause for dismissal.

According to Carrier, and as reflected in the testimony of Mechanical Superintendent H. T. Comer, at approximately 10:15 a.m. on July 28, 2015, Comer took a call from Shop General Foreman Raul Huerta, who was not on duty at the time. Huerta indicated that Claimant had reported an injury requiring medical assistance and stated that General Foreman Mike Arana, the on-duty Foreman, had been alerted and was available to assist with handling the incident. Comer states that Arana arrived on the scene at approximately 10:16 a.m., saw Claimant sitting on the front entry steps and asked him what had happened. Claimant stated that he had fallen "while attempting to cross over onto a crossover board onto the main platform of a locomotive but caught himself with his hands on the handrail prior to descending any further."

With help of Arana and another employee, Claimant was transported to Advocate Trinity Hospital in Chicago, arriving at 10:47 a.m.. Upon reaching the hospital at 11:12 a.m., Arana put a series of questions to him in the Emergency Room in an effort to learn how the mishap had occurred. Succinctly summarized, Claimant stated that his left foot hurt and his toes were numb; that the accident had occurred around 10:00 a.m. as he stepped onto the crossover platform and his entire body plunged down; that he had not inspected the board prior to stepping onto it; that he did not know if he had used three points of contact in making his move; that the board had not broken; that he had broken his fall by grabbing onto the adjacent handrails; that he did not recall striking anything when he fell; that the board had fallen to the shop floor; that he did not know if anyone had

retrieved the platform and put in back in place; and that he felt a slight pain in his left foot after the incident but attempted to walk it off before going to the rest room shortly thereafter. There, he stated, he received a call for assistance, but when he stood up from the toilet, “that’s when the pain hit me and I couldn’t move.”

According to Mr. Arana, after approximately 15 minutes of discussion with Claimant he asked him how his left foot was feeling now. In response, he states, Claimant stated, “You keep talking about my left foot, man my left leg is hurting, my left thigh is burning, my left side hurts,” and that he had pain in his neck behind his left ear. Claimant was asked to complete an Employee Personal Injury Report in which he named five co-workers as witnesses to his accident, employees Burtner, Maciejewski, Chambers, Kearney and Moore. He was then examined by attending physicians. All tests for injury were negative, no injury was diagnosed and Claimant was directed to consult with his personal doctor in one to two days.

Upon return to Calumet Yard, Arana interviewed Claimant’s co-workers on duty at the time who were named as witnesses to his fall. Each provided a written statement with respect to his knowledge of the accident reported. All have been carefully reviewed by the Board. There is no useful purpose served in recounting in detail that input, but broadly summarized, no fellow worker observed the incident reported by Claimant. Succinctly, Mr. Burtner recounted that Claimant had asked for a minute of time after being asked to drop the flag and was then seen sitting down “on the bottom of the steps.” According to Burtner, he had heard a sound around 7:45 a.m. that “sounded like someone dropping one of the crossover boards in place.” Mr. Kearney stated that he had also “heard a thunk,” around the time he and Claimant had reported for work and had later walked by Claimant and observed him working in the cab and walking around for approximately one hour “without any issues.” Employee Moore stated that he had seen Claimant at around 8:20 a.m. and “Tom didn’t show any signs of distress.” At 9:45 a.m. he then observed Claimant standing on the lower stairs “holding on the hand rails.” When asked if he was OK, Claimant said he was. Around 10:00 a.m. he then observed Claimant still sitting down, asked him if he needed anything and upon being told that he couldn’t move Moore called

General Foreman Huerta around 10:10 a.m. Employee Justin Warren did not witness anything related to a possible accident or injury.

Based upon his interviews and the statements of Claimant's fellows employees, Carrier officials were concerned about the reliability of his report: at no time around 10:00 a.m. had anyone seen either seen or heard the crossover board fall to the ground or Claimant fall and catch himself; no one had observed Claimant in any apparent distress or discomfort; and he had not informed anyone that he had been injured. Taking account of those factors, in consideration of Claimant's prior service record, and in light of the seriousness of the alleged offense, Carrier concluded that Claimant had falsified important information relative to his alleged injury and determined that dismissal was the appropriate response.

Without question, there is a lot going on here. The record demonstrates a number of representations made by Claimant that are both internally inconsistent and difficult to square with the statements of the co-workers he identified as witnesses. Claimant, for example, informed Superintendent that he had fallen at approximately 10:00 a.m. and recorded that time on his Employee Injury Report. As indicated, however, Working Gang Leader Burtner reported hearing a loud bang around 7:45 a.m., after which he saw Claimant on the locomotive walkway. According to Burtner, only about a minute elapsed after he heard the sound and then looked up to see Claimant on the walkway of the locomotive, plainly insufficient time for him to have fallen, recovered and returned to his position on the walkway. In any event, according to Burtner, he would have observed any fall. Electrician Kearney's recollection of hearing the loud noise around the same time was similar. Claimant, however, is on record here as stating both that he stepped on the platform at 7:45 a.m. as he reported for work; and that he fell approximately 30 minutes prior to arriving at the hospital. At another point he states that he did not inform Mr. Burtner that he had fallen, but did inform him the his knee was tight. Burtner denied any such reference to a knee problem.

Carrier argues, and the Board is forced to concur, that the evidence on timelines offers circles that cannot be squared. In similar fashion, the exact nature of the injury alleged are concerning. Significantly, his initial complaint to Mr. Arana centered exclusively on his left

foot, which he maintained was numb and immovable. Claimant asserts at various times that he had immediate pain in his knee and that the pain first manifested itself while he was in the toilet over two hours later. The injury later evolves into description of pain in other areas, including back and neck, although all pain was diagnosed as subjective by examining physicians. He concedes that both Messrs. Kearney, Maciejewski and Warren spoke to him between 7:45 a.m. and 9:15-9:30 a.m. and that he did not mention any injury to any of those employees.


Conclusive proof of a negative often poses special difficulties for the party asserting it. In this instance, Carrier relies upon conflicting reports made by Claimant with respect to the time of his accident; inconsistencies with respect to the exact nature of the injuries sustained; statements of fellow employees that cannot be reconciled with Claimant's narrative; and the absence of any medical confirmation of supposedly disabling pain and disability. As with cutting boards, the harmful material in disputes of this type is often found in the gaps and cracks. In making its credibility determination, beyond its first-hand observation of both Claimant and the other witnesses appearing at the October 18 hearing, Carrier's Hearing Officer concluded that the most reliable evidence was encountered in the numerous discrepancies presented all working against Claimant render his narrative somewhere between improbable and impossible.

The Board's obligations as a matter of law in matters of discipline are not to solve complicated riddles but to ascertain whether there is sufficient record evidence to sustain the Carrier's actions. The record evidence suggests there was nothing arbitrary or capricious about that judgment. Buttressing that conclusion, in reaching its conclusions, Carrier gave account to Claimant's Career Service Record. That record included references to a Rule G violation in 2006 resulting in a separation from service of approximately 7 months, with reinstatement under the DARS Program; a START (Serious) offense of making false and conflicting statements in the reporting of an injury resulting in a 15-day deferred suspension; and two subsequent citations for rule violations resulting in damage to vehicles and failure to document inspections.

Because Carrier had ample evidence to conclude that the Claimant had not been forthright in the reporting of an alleged injury, the Board must deny the claim.

A W A R D

The Claim is denied.



James E. Conway
Chairman and Neutral Member

Tom Owens
Employee Member

Christopher Decker
Carrier Member

Dated: November 21, 2017