

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14189
Docket No. 14072
17-2-NRAB-00002-150046**

The Second Division consisted of the regular members and in addition Referee Joseph M. Fagnani when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(BNSF Railway Company)

STATEMENT OF CLAIM:

- “1. That in violation of the governing Agreement, Rule 40 and Rule 39, in particular, the BNSF Railway Company arbitrarily, unjustly and excessively disciplined Topeka, Kansas, Mechanical Department Electrician Kristoffer Dickinson as a result of an unfair investigation conducted on May 16, 2014. Electrician Kristoffer Dickinson was assessed the ultimate penalty of dismissal from the Carrier’s service on May 22, 2014.**
- 2. That accordingly, and as a result of the unwarranted, arbitrary, unjust and excessive discipline assessed Mechanical Department Electrician Kristoffer Dickinson, the BNSF Railway Company be ordered to return Electrician Kristoffer Dickinson to service immediately, to compensate Electrician Dickinson for all lost wages, rights, benefits and privileges which have been adversely affected as a result of the dismissal, and further, remove all record of this matter and the discipline assessed from Mechanical Department Electrician Kristoffer Dickinson’s personal record.”**

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was dismissed from the Carrier's service following a formal Investigation in connection with the following:

“....your alleged untruthfulness that was discovered on your medical questionnaire about disclosing the known medical condition that you had prior to completing the application and being offered employment with BNSF. This was discovered from evidence that was presented in investigation SYS-TOP-2014-00105 held on April 17, 2014.”

Prior to discussing the merits of the case, the Board will address the Organization's contention that the formal investigation that was scheduled and convened on May 16, 2014, was beyond the time limits set forth in Rule 40(c) of the controlling Agreement, which reads, in pertinent part, as follows:

“Formal investigations, when accorded within the provisions of this rule, must be convened within 20 calendar days (30 such days if the employee(s) is not suspended) from the date on which the Company has factual knowledge of the occurrence to be investigated. . . .”

The Organization states that the Claimant supplied medical documentation to Rick Folley, Regional Director of the Carrier's Medical Department on April 7, 2014, and posits that the formal investigation held on May 16, 2014, was convened 39 days after Mr. Folley had factual knowledge of the occurrence and was therefore, in violation of Rule 40(c). The Organization has cited Awards in support of its position.

Contrariwise, the Carrier has refuted the Organization's contention on two grounds. First, the Carrier states that while Mr. Folley did receive some medical

information from the Claimant on April 7th, Mr. Folley's final review of the matter did not conclude until he was able to examine the evidence presented at the prior investigation of the Claimant on April 17, 2014. In addition, the Carrier states that the time limits do not toll until "factual knowledge" is received by an officer of the Carrier who has authority to charge an employee. The Carrier asserts that such officer of the Carrier with charging authority did not have factual knowledge until the April 17th Investigation. Under either scenario, the Carrier asserts that the Investigation was timely convened as required by Rule 40(c). The Carrier has also cited Awards in support of its position.

Upon its review of the entire record, including the Awards cited by both parties, the Board finds that the May 16, 2014 Investigation was held within 30 days of the Carrier's actual knowledge of the occurrence to be Investigation. Accordingly, the Board will dispose of this case on the basis of its merits.

The testimony of Regional Director Foley indicates that on July 2, 2012, as part of the pre-employment process, the Claimant completed a medical questionnaire¹ and answered "No" to the following question:

"Have you ever had any of the following conditions....sleep apnea, excessive snoring, or other sleep disorders."

Mr. Folley testified that based on the medical documentation that the Claimant had supplied him and in light of the evidence obtained at the April 17th investigation, the Claimant's answer was untruthful since the Claimant had been diagnosed with "obstructive sleep apnea" and had issues with sleep apnea since 2009, three years prior to the Claimant's answer on the medical questionnaire.

When the Claimant testified at the investigation, he acknowledged that he had answered "No" to the sleep apnea question and also admitted to the fact that he had been diagnosed in the past with "acute, acute sleep apnea." The Claimant stated that the reason he had answered the question in the negative was that he was not taking any

¹ The Organization has taken exception to the fact that the medical questionnaire was not made an exhibit at the investigation; however, Mr. Folley testified that under HIPAA he could not include such document unless the Claimant gave his permission to do so and that the Claimant refused such permission. However, the document was shown to the Claimant at the investigation and the Claimant acknowledged its accuracy.

medication at the time he filled out the questionnaire and he thought he “was cured of sleep apnea.”

The Board finds that the evidence of record contains substantial evidence of a credible nature that the Claimant was dishonest when he filled out the medical questionnaire prior to being hired by the Carrier. The Claimant’s defense that he was no longer under medication for sleep apnea and that he thought he was cured of this condition in no way mitigates his guilt. The medical questionnaire inquires whether the Claimant “ever” had sleep apnea and the Claimant answered in the negative, fully aware that this was not a truthful answer. Accordingly, the Board finds that the Carrier sustained its burden of proving the Claimant’s guilt of the charged offense.

Relative to the discipline assessed in this case, the Carrier notes that the Claimant was dishonest in a job-related matter and that such violation constituted a “Stand-Alone Dismissible” offense under its Policy for Employee Performance Accountability (PEPA). The Carrier has cited Awards upholding the principle that dismissal is proper in cases of proven dishonesty. The Organization argues that the discipline assessed was arbitrary, capricious and unjust.

Based upon its review of the record, the Board finds that the discipline assessed was in accordance with the Carrier’s PEPA and was not excessive or arbitrary in light of the recognized seriousness of the Claimant’s offense. Accordingly, the Board will not disturb the discipline of dismissal assessed in the present case.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 15th day of December 2017.