

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13546

Docket No. 13470

00-2-99-2-66

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(National Conference of Firemen & Oilers

PARTIES TO DISPUTE: (

(Soo Line Railroad Company

STATEMENT OF CLAIM:

- “1. That in violation of the current Agreement, Mr. M. McGurn, Laborer, Chicago, Illinois, was unfairly dismissed from service of the Soo Line Railroad Company effective October 1, 1998.
2. That accordingly, the Soo Line Railroad Company be ordered to make Mr. McGurn whole by restoring him to service with seniority rights, vacation rights, and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 6% annual interest; with reimbursement of all losses sustained on account of loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service; and the mark removed from his 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 had served as a laborer with the Carrier for approximately five years at the time of his dismissal effective October 1, 1998 for falsification of his application for employment. The record reflects that in filling out his Physical History and Examination Form in the course of pre-employment screening on November 12, 1993, the Claimant failed to disclose a prior neck injury resulting in disability compensation, although there is disagreement over whether the Claimant or his examining physician was responsible for the misrepresentation. The discrepancy came to light when the Claimant on April 14, 1997 acknowledged to a Claim Agent in the course of documenting a back injury sustained while throwing a switch on September 1, 1995 that he had been injured previously while working for American Airlines in 1989 and had undergone cervical surgery in 1990 as a result.

In this claim, the Organization argues that the Claimant's discharge was not for cause inasmuch as he had fully informed his examining physician in 1993 of his prior surgery, which left a visible scar, and that he had been released for unrestricted duty with no after effects. Everything beyond the first quarter of the medical questionnaire had then been filled in by that doctor, after which he signed it. Moreover, the back injury incurred in 1995 was unrelated to the 1989 neck surgery. There having been no intent on the Claimant's part to conceal anything, the Carrier has failed to prove purposeful wrongdoing.

The Carrier takes the position that the Claimant's signature on the pre-employment medical form constituted his certification of the accuracy of the information presented and, in accordance with well established authority, should result in his disqualification if found to be false.

It is undisputed that following his termination and while this dispute was pending hearing before the Board on May 8, 2000, the Claimant concluded settlement of his injury claim against the Soo Line. Although its date is not a matter of record here, in that connection the parties stipulate that he executed in the presence of witnesses in calendar year 2000 a 2-page document styled "Release of All Claims," pursuant to which, in consideration for receipt of ongoing payments for time lost and other factors, the Claimant waived all rights now asserted in this claim. That release reads in pertinent part as follows:

"In consideration of the payment to me receipt and apportionment of which is hereby acknowledged and agreed upon as indicated below, I,

Michael J. McGurn, hereby release and discharge the Soo Line Railroad Company . . . and all other persons, firms or corporations liable or who may be liable for any of the claims listed in this release . . . from all liability for all claims for injury, damage or loss of every kind and nature resulting from damage to property and injuries to my person, whether temporary or permanent, including presently known injuries as well as injures that may be unknown at this time and which may be discovered subsequently, including the consequences and effects of all such injuries, whether known and expected, or unknown and unexpected, or temporary or permanent, received on or about September 1, 1995 at or near Canadian Pacific's Bensenville Yard, Franklin Park, Illinois, while employed as a laborer . . . and I hereby fully release and discharge the parties above named from all claims of every kind whatsoever which I now have or may hereafter have on account of the matter described, and from all claims of every kind and nature, however arising, and I hereby acknowledge full satisfaction thereof.

[Monetary apportionment schedule omitted.]

It is understood and agreed that in consideration of the above, I, Michael J. McGurn, will never attempt to return to duty or seek employment of any kind with the parties released and discharged above and will never attempt to exercise any seniority rights I may have to return to duty or employment of any kind with the Soo Line Railroad Company and/or Canadian Pacific Railway Company.

It is further understood and agreed that in consideration of the above, I Michael J. McGurn, hereby fully release, dismiss and waive any labor claims, employment claims, discrimination claims under the Americans with Disabilities Act (ADA), or similar federal or state acts and any and all claims for libel, slander, emotional distress, retaliatory discharge which I many now have or hereafter have against the parties released herein.

I do hereby relinquish and surrender any rights and seniority that I may have under any agreement or contract or in any other capacity on the railroad. I understand and agree that I am not entitled or eligible to claim any separation allowance, buyouts or labor protective benefits, and I

hereby agree I cannot and will not make or present any claim for same. . . .”

The Board concludes that the terms of the foregoing release cover the issue before us and, accordingly, the Claim must be dismissed.

AWARD

Claim dismissed.

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 25th day of September, 2000.