

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37885
Docket No. SG-38430
06-3-04-3-363

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe:

Claim on behalf of B. A. Reisenauer for immediate reinstatement and compensation for all lost wages, including skill pay with all rights and benefits unimpaired and his personal record cleared of this incident, account Carrier violated the current Signalman's Agreement, particularly Rule 54, when it failed to provide a fair and impartial investigation and wrongfully and inappropriately issued the harsh and excessive discipline of dismissal against the Claimant without first meeting the burden of proving its charges as a result of an investigation held on April 3, 2003; Carrier compounded its violation of Rule 54 when it violated the time limits requirements. Carrier's File No. 35 03 0069. General Chairman's File No. 03-062-BNSF-154-TC. BRS File Case No. 12899-BNSF.”

FINDINGS:

The Third 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.

As background, the Claimant completed a Medical History Questionnaire on October 25, 1999. Additionally, on March 2, 2001, the Claimant completed a Post Offer Questionnaire. On March 4, 2003, while working as a member of a Signal Crew, the Claimant experienced an upper thoracic muscle injury while reaching for wire. It was this injury that brought falsification charges ultimately before the Board.

The Claimant was notified by letter dated March 13, 2003 to attend an Investigation over alleged falsification of the Carrier's Medical History questionnaire and BNSF Post Offer Questionnaire. Following postponements, the Investigation was held on April 3, 2003. Subsequently, the Carrier found the Claimant guilty and notified him on April 25, 2003 that he was dismissed from the Carrier's service.

The Organization argues that the Carrier had first knowledge of this incident long before it charged the Claimant, thereby violating the time limits of Rule 54. The Claimant included on his Post Offer Questionnaire information dated March 2, 2001 that he had a back problem, two years prior to the Carrier's allegation of first knowledge. Further, not only did this violate the procedural requirements of the Agreement, but the merits were unproven. The Carrier introduced unverified and partial records to substantiate that the Claimant misled the Carrier. In fact, the Claimant had not engaged in any wrongdoing when he applied for employment. He not only properly responded to requests for information, but also had no preexisting condition that resulted in his March 4, 2003 injury.

The Carrier maintains that its first knowledge of the issue occurred on March 7, 2003 when the Manager of General Claims received information inconsistent with

the information that the Claimant had provided on either the Medical History Questionnaire or the Post Offer Questionnaire. That inconsistency is what triggered the Investigation. It was timely and the results of the testimony and evidence were sufficient to prove that the Claimant had falsified his applications for employment. The Carrier holds that it acted properly, proved its allegation, and its discipline should not be disturbed.

Considering the procedural issue, Rule 54A mandates that an Investigation, "... shall be set promptly to be held not later than fifteen (15) calendar days from the date of the occurrence." The question that must be determined is the "date of the occurrence" from which the Investigation must be set. There is nothing in the full text of this record to undermine the Carrier's position that it was Manager of General Claims W. Renney who first determined the contradiction between what the Claimant had indicated, and what existed on Workman Compensation records. There is no evidence to undermine the Carrier's statement that Renney first determined that the information differed on March 7, 2003. Renney testified that he received the index of all prior claims that the Claimant had on March 7, 2003. The Board holds that this is the date of the occurrence, because this is the date when the Carrier had knowledge in the hands of its proper official to move forward with action under the Agreement. As stated in Public Law Board No. 6540, Award 41:

"It is well settled in this industry that time limit rules based on first knowledge do not begin running until knowledge is acquired by a Carrier official in the affected employee's chain of supervision who has authority to initiate an investigation."

The Investigation was set for March 20, 2003, within the time limits of Rule 54A. Finding no procedural issues, the Board turned to consideration of the merits.

Our review of the evidence indicates that the Claimant was asked on his Medical History Questionnaire if he had ever been told of a "head or spinal injury," experienced back trouble or "seen a physician . . . for any reason during the past two years?" Additionally, on his Post Offer Questionnaire he was asked if he had medical problems, including if he had "ever had a back injury" for which he responded that, yes: "Don't recall the date, but I think it was in 1990 or 1991 pulled muscle."

The evidence documents that when Renney obtained the information it indicated nine previous Workman Compensation claims. These claims do not go back to 1990 or 1991, but to dates in 1994, 1995, and 1996 and on April 12, 1999, listing an "injury to thoracic spine." The facts are that the Claimant indicated that he had never been told of any problems and had not had any problem for the past two years. The Claimant testified that he had sought medical attention for all nine injuries. When asked why he did not list these previous medical problems, the Claimant testified that when he answered the questionnaires, "I didn't feel I had any problem at all."

There is sufficient probative evidence in this record to find that the Carrier proved falsification by the Claimant of his application for employment. Accordingly, the Board must find that the Carrier's actions are fully supported. Dismissal has long been held justifiable for any subsequent determination by the Carrier of an employee who conceals facts to obtain employment (Third Division Award 22562). The claim is denied.

AWARD

Claim denied.

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 Third Division

Dated at Chicago, Illinois, this 1st day of August 2006.