

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38152
Docket No. MW-39390
07-3-06-3-41

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent dismissal on April 28, 2005) imposed upon Mr. C. Reyes, Jr. on charges of allegedly falsified hiring (medical) documents on February 28, 2004 was arbitrary, capricious on the basis of unproven charges and in violation of the Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Reyes, Jr. shall now ‘. . . be compensated all wages, credits (vacation, holidays, personal days, etc.) and benefits (health & welfare, dental, etc.) and all benefits in accordance with Article VIII – OFF TRACK VEHICLE ACCIDENT BENEFITS commencing December 14, 2004 and continuing until this matter is resolved.’”

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.

At the time of his dismissal, Claimant C. Reyes was employed by the Carrier within the Maintenance of Way Department. The incident precipitating his dismissal occurred on December 13, 2004. On that date, the Claimant was a passenger in the back seat of a Carrier vehicle that was hit broadside by a vehicle driven by a private citizen. Local police determined that the accident was the fault of the private citizen and issued the driver a ticket for running a red light. The Claimant was wearing his seatbelt, but was injured in the accident – he suffered a back injury that required medical attention and subsequent treatment. He was not cited by the Carrier for any safety or other violation in connection with the accident.

When it received the Claimant's medical documentation related to his injury, the Carrier concluded that the Claimant had falsified his application for employment – specifically the medical documents he had filled out during his pre-employment physical on February 28, 2004. On February 28, 2005, the Claimant was notified by the Carrier to appear for an Investigation

“ . . . to determine the facts and your responsibility, if any, in connection with your alleged falsification of hiring (medical) documents on February 28, 2004 at the Concentra Medical Center, Hammond, Indiana, ...during your DOT pre-hire exam.”

The Hearing was held on April 20, 2005. By letter of April 28, 2005, the Carrier notified the Claimant that he had been found guilty of the charges and was dismissed from the Carrier's service. The Claimant's dismissal was appealed and subsequently progressed in the usual manner. It is, therefore, properly before the Board for resolution.

The Carrier contends that, because the Claimant had two previous accidents resulting in back injuries, one two years before his employment and one about ten years before his employment, he was obliged to reveal that fact to the Carrier's medical personnel during his pre-employment physical examination. In particular, the Carrier noted that the first injury required the Claimant to undergo follow-up treatment for six weeks and the latter injury for one month. It points out that the

Claimant signed the affirmation at the bottom of his application attesting to the alleged truthfulness of his application and medical statements. The Carrier contends that such falsification of application documents had been condemned by this and other Boards, and maintains that it was well within its rights to dismiss the Claimant for his misrepresentation of his medical history.

The Board concurs with the Carrier that willful misrepresentation of medical or other important information in an employee's application can be reasonable cause for discipline or discharge. However, in this case, there is no indication that the Claimant intentionally falsified his medical documentation, or in any way tried to conceal his prior injuries. The Board read carefully the Claimant's medical application. We note that he checked "no" in the category "spinal injury" on the first page of the medical document. Nothing in this record suggests that his two previous back injuries involved his spine. Moreover the shortness of the treatment for each of those, one month and six weeks respectively, supports the Claimant's contention that they were muscular, not spinal.

On that same document, the Claimant left the question regarding general injury within the last five years blank. The Claimant testified that he was unsure of when the more serious back injury occurred, and so left the item unchecked. There is no evidence in this record that, despite such an anomaly in his application, the Carrier's medical officer questioned him about the unanswered item. Furthermore, on the medical history he filled out for the pre-hire vision examination, he circled "yes" for the category "back pain." Again, the Claimant was not asked to explain his answer. Nor is there any indication he was consequently restricted in any way from all the physical aspects of his work as a Maintenance of Way employee.

In short, there is no indication in either the testimonial or documentary evidence in this record that the Claimant intentionally falsified the medical portion of his application for employment. Accordingly the instant claim is sustained. The Claimant shall be put back to work with all rights and privileges intact. The Carrier shall notify the Claimant within 30 days of receipt of this Award to report for his return-to-work physical. If the Claimant passes his return to work physical and reports for work as soon as possible thereafter, he shall be reimbursed for wages lost, less any outside earnings, up to the time he resumes employment with the Carrier.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of April 2007.