

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40531
Docket No. SG-40188
10-3-NRAB-00003-070383
(07-3-383)

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
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of D. M. Harmon, for reinstatement to his former position with compensation for all time lost, including overtime, with seniority and benefits unimpaired and any mention of this matter expunged from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on June 7, 2006. Carrier’s File No. 1449868D. General Chairman’s File No. N 68 625. BRS File Case No. 13734-UP.”

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.

By certified letter dated June 1, 2006, the Claimant was directed to report for an Investigation into alleged failure to properly disclose medical information on his employment application. The Carrier pointed to six specific questions for which it alleged a possible violation of Conduct Rule 1.6, Part 4 (Dishonest) for which the Carrier would not have hired the Claimant if the proper information had been known.

The Investigation was held on June 7, 2006. Subsequently, the Claimant was notified that the Carrier determined that the Rule was violated. The Claimant was dismissed from service for being dishonest on his pre-employment application.

The Organization raised a number of procedural issues. With regard to the misuse of medical records, the Board studied the Claimant's November 16, 2005 letter denying the use of his records and revoking authorization for the Carrier to review or use his records. We examined the Carrier's response. The Board notes that the General Health History was provided to the Carrier when the Claimant applied for employment. It was signed certifying its authenticity and completeness stating that, "I hereby authorize any doctor, hospital or clinic having knowledge of my medical condition(s) to furnish the examiner, and my employer or prospective employer a full and accurate report of my medical history, findings and treatment." The Carrier denies any HIPPA restriction. The Board finds no case history or recognized right of the employee to revoke access under these conditions. The Carrier has the long established right to evaluate the honesty of employment materials. The Board rejects this argument.

The Organization also contends that the time limit of the Agreement was violated. It points to both the date of the charge and appeal. The Board finds no time limit violations. There is no validity to the Organization's argument that the Carrier had this information for years without acting on it. The evidence of record is convincing that Manager of Signal Maintenance Black found out about the

medical information on May 23, 2006. Thereafter, the Carrier acted as per Rule 68, which clearly states within 15 calendar days “from the date the carrier had knowledge of the alleged offense.”

Similarly, the Board considered the Organization’s argument that the Carrier failed to provide a location for the Hearing near the Claimant’s alleged medical incident whereby appropriate individuals and evidence might be obtained. The Board notes no specific names or information that is mentioned or any record of proof that holding the Hearing in Salt Lake City directly disadvantaged the Claimant.

Finding no procedural errors whatsoever, the Board turned to an examination of the merits. The Organization argues that the Claimant was fully honest in his reporting on the employment application. The Organization argues that the interpretations from Black and his beliefs about medical content are neither proof, nor any more relevant than what a nurse puts on a form. The Claimant properly listed his many medical problems and was never shown to have deceived, falsified, or deliberately acted to mislead.

The Carrier found the Claimant guilty of dishonesty in his answers on the Union Pacific General Health History form he completed on August 9, 2002. The Claimant had answered “No” when asked if he “had or ever had” the following six problems:

- “Q 22. Pinched nerves, numbness, paralysis, weakness of any
 body part
- Q 89. Problems, injury, or surgery involving the spine, neck or
 back
- Q 92. X rays, CAT scans, or MRI of the neck, back, knee,
 ankle, shoulder, elbow, or wrist
- Q 98. Weakness/numbness or tingling or your arms, hands,
 legs, feet
- Q 99. Back pain
- Q 102. Limitations in fully moving your head or neck”

In each of the above six questions, the Claimant indicated, "No."

The Board reviewed the testimony of the Claimant and Black. We studied the comparative medical records that the Carrier obtained and reviewed against the above stated "No" on the pre-employment health history form. The comparative medical records obtained indicate that in March 2002, the Claimant was treated for an injury to his head, ear and neck. Further, the Emergency Department noted that the Claimant "complains of numbness to both hands and feeling sleepy." The records indicate that he complained of pain, assessed from ". . . concussion . . . cervical strain . . . abrasion to the right pinna." The Claimant had a CT scan and was approved for Workers' Compensation on the previous job where it had occurred as the result of horseplay.

According to the Claimant's testimony he had fully disclosed his medical conditions as best he could remember them. His testimony is that he was unconscious most of the time and not fully aware of what was happening. As he reports it:

"I do remember that I was going in and out of consciousness. It was hard for me to stay awake. So I understand the feeling sleepy part; as far as complaining of any numbness in both my hands, I do not remember."

The Board's full review of this record finds substantial probative evidence to conclude that the Carrier's finding of guilt must be upheld. The Claimant was proven dishonest on his general application about numbness, injury and CT scan occurring less than six months prior to his completing application for employment. Given the seriousness of the conduct, the Carrier's determination that dismissal is appropriate will not be disturbed (Third Division Award 22695; Public Law Board No. 6621, Case 18).

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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 15th day of June 2010.