

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**
THE COLORADO AND SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6031) that:

1. Carrier's action in removing Mr. A. P. Velasquez from service on May 11, 1965, was arbitrary, unjust and in violation of the rules of our current Agreement.
2. Mr. A. P. Velasquez shall now be returned to service with seniority and all other rights unimpaired and paid for all time lost from May 11, 1965 until he is restored to service.
3. Mr. A. P. Velasquez shall also be compensated for increased cost of Health and Welfare benefits paid by him while he is withheld from his position.

EMPLOYEES' STATEMENT OF FACTS: Mr. Anthony P. Velasquez was employed by The Colorado and Southern Railway Company on September 22, 1964, and on this date was examined by Dr. McMeel, a Colorado and Southern staff doctor.

The fact that Mr. Velasquez passed this physical examination is shown by his employment by The Colorado and Southern Railway from date of his examination on September 22, 1964 until May 11, 1965.

On May 5, 1965, Mr. Velasquez called Dr. W. J. Longeway, Chief Surgeon for the Carrier and requested Dr. Longeway to send him some medicine for hay fever.

On May 6, 1965, Dr. Longeway wrote Carrier's Superintendent advising that Mr. Velasquez had called him and requested medicine for hay fever and that as a result of this conversation, Dr. Longeway had checked Mr. Velasquez' application for employment and found that Mr. Velasquez had answered "no" to a question "Have you ever had or are you subject to hay fever?"

As a result of Dr. Longeway's letter to the Superintendent, Mr. Velasquez was notified that he was dismissed from service by reason of having given materially false information on his application for employment.

In recognition of said solely because of the material misrepresentation of facts concerning "Hay Fever" which had been made by the claimant at the time he applied for employment and the later statement made to the Chief Surgeon, the Superintendent of the respondent Carrier, as he had, and has, the stipulated right to do under the provisions of Paragraph (b) of Rule 21 of the currently effective agreement with the petitioning labor organization, disapproved of the claimant's application for employment and terminated his employment relationship with the Carrier on May 11, 1965.

Rule 21, captioned "Validating Records," of the controlling agreement reads, in its entirety, as follows:

"RULE 21.

VALIDATING RECORDS

(a) Applications for employment will be approved or disapproved within sixty (60) calendar days after applicant begins work. If application is not disapproved within the sixty (60) day period, the application will be considered as having been approved. Applicants will, within sixty (60) days from date of employment, have returned to them all service cards, letters of recommendation and other papers which have been furnished by them to the Railway, for investigation.

(b) In the event of the applicant giving materially false information, this Rule shall not apply."

Thereafter, although not required to do so by terms of the agreement with the petitioning labor organization, the Carrier representative accorded the claimant a formal investigation whereat the claimant was present, represented by duly authorized agents of the petitioning labor organization, and the claimant was afforded full opportunity to testify. (See Carrier's Exhibit B.)

Under date of June 8, 1965, General Chairman John H. Moberly of the petitioning Clerks' Organization initiated with Local Freight Agent F. O. Burke, Denver, the instant claim in behalf of the claimant and alleged therein that the removal of claimant from service on May 11, 1965, was arbitrary, unjust and in violation of the Clerks' Agreement. (Carrier's Exhibit C.)

Agent Burke replied thereto on July 30, 1965, and, in declining the claim, referred General Chairman Moberly to the provisions of Clerks' Rule 21 (b) in support of the Carrier's proper action in the premises and informed the General Chairman that there was no agreement rule in existence that could be cited in support of the claim he had initiated. (Carrier's Exhibit D.)

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was examined by Carrier's staff doctor, Doctor McMeel on September 22, 1964. He passed the physical examination and became an employe on that date.

The following May 5 (1965), Claimant phoned Carrier's physician, asking him to send him some medicine for hay fever. Carrier checked his application for employment and found he had answered "no" to the question: "Have you ever had or are you subject to hay fever?" There followed the investiga-

tion and he was removed from service for his action as a job applicant a year earlier, "in giving materially false information."

After investigation, Carrier offered to reinstate the Claimant with the understanding that he execute a waiver of the provisions of Rule 33 — Sick Leave — to absences because of hay fever; that he would be restricted from operating a motor vehicle and that he would not be paid for time lost. Claimant refused the offer.

We will sustain this claim for the following six reasons:

1. Carrier's physician did not find any evidence of hay fever when he examined him on September 22, 1964.
2. Carrier's physician did not ask him if he had hay fever on the date of examination.
3. Admittedly he answered the written question: "Have you ever had hay fever" in the negative. He said he did not have it.
4. Consequently, the fact that he might have had hay fever the following May, is not proof that he had it on September 22 of the preceding year.
5. In summary, there is no acceptable evidence in this record to prove the Claimant gave Carrier "materially false information" on September 22, 1964.
6. On the basis of this record, a sustaining Award is required. In so holding we will sustain parts 1 and 2 of the claim as made.

We will sustain Part 3 of the Claim to the extent Claimant may have personally purchased health and welfare insurance coverage for himself and his family, while withheld from his position; or be made whole for any money he was required to spend for medical services or other benefits which would otherwise have been covered under Carrier's insurance program during the period he was withheld from service.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That the Agreement was violated.

AWARD

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of March 1967.

**CARRIER MEMBERS' DISSENT TO AWARD 15409
IN DOCKET CL-16400**

This award is in error, particularly in sustaining Part 3 of the claim. There is no provision in the contract which will support such an allowance. Rule 23 is limited to reinstatement and to wage loss. Neither of these elements contemplates what was claimed. Abundant authority was supplied on this issue.

Furthermore, the record is devoid of any proof that the Claimant sustained any loss under Part 3. There is not a shred of evidence to support that portion of the claim. In fact, Petitioner effectively ignores the entire question, except for three sentences of unsupported comment in the rebuttal. Also, the allowance of the Board in Part 3 exceeded the claim.

For these reasons, we dissent.

**T. F. Strunck
R. E. Black
P. C. Carter
G. L. Naylor
G. C. White**