

PUBLIC LAW BOARD NO. 3241

In the Matter of:)	National Mediation Board
)	Administrator
)	
BROTHERHOOD OF MAINTENANCE OF)	
WAY EMPLOYEES,)	
)	
Organization,)	
and)	
)	
UNION PACIFIC RAILROAD)	Case No. 37
COMPANY,)	Award No. 37
)	
Carrier.)	
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Hearing Date: June 4, 1992
Hearing Location: Sacramento, California
Date of Award: April 16, 1993

MEMBERS OF THE BOARD

Employees' Member: C. F. Foose
Carrier Member: D. A. Ring
Neutral Member: John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That the Carrier's decision to dismiss Laborer T. Barbone was without just and sufficient cause and in violation of the current Agreement.
2. Claimant will now be restored to his former position with seniority and all other rights restored and compensated for all wage loss suffered and all charges be expunged from his record.

OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted by an Agreement dated July 23, 1982; and that all parties were given due notice of the hearing held on this matter.

Pursuant to written notice dated February 5, 1991, the Carrier charged Claimant, a Laborer, with allegedly falsifying an accident report which he completed on February 4, 1991 and with providing false information on his application for employment with the Carrier. The Carrier predicated the second charge on information which first came to its attention on February 4, 1991. The Carrier withheld Claimant from service pending an investigation. Following the investigation held on February 11, 1991, the Carrier determined that Claimant was guilty of both charged offenses and it dismissed him from service.

On July 31, 1990, Claimant answered written questions about his medical history as part of his application for employment. On the medical history form, Claimant checked "no" next to the following two questions:

- (1) Have you ever had, or do you have a back injury or back X-ray?
- (2) Have you had, or do you now have back trouble, lumbago or sciatica?

Claimant passed the new employee physical examination and the Carrier hired Claimant on August 14, 1990.

From the end of November, 1990 until February 4, 1991, Claimant was furloughed.

As Claimant was preparing to begin his first day back to work, the Track Supervisor asked him how he felt. Claimant replied that he was doing fine. At 5:30 p.m., Claimant reported to the

Track Supervisor that he hurt his lower back while swinging a sledgehammer to hit high spikes. Claimant further told the Supervisor that he had originally injured his back while working for a construction firm back in the summer of 1990. Also, Claimant now asserted that his back was bothering him when he reported to work earlier in the day.

Claimant wrote on the accident report that his back started hurting while he was striking spikes. Claimant also noted on the report that, when he was doing construction work a year ago, he hurt his back and it has been bothering him ever since the injury. Apparently, Claimant never sought medical treatment for his back injury. However, the Carrier transported him to the hospital for treatment on February 4, 1991.

The next day, Claimant told the Track Maintenance Engineer and the Track Maintenance Supervisor that he did not hurt himself on the job on February 4, 1991. When the Engineer asked Claimant if the accident report should be changed to reflect that the injury occurred off duty, Claimant responded that he did not know.

At the investigation, Claimant insisted that he had experienced a real sharp back pain after using the sledgehammer all day long to hit high spikes. He was unable to walk for two or three minutes. Claimant further testified that the Engineer's question concerning changing the information on the personal injury form confused him and so his response was guarded and non-committal. More notably, Claimant disavowed knowing the difference between an on-duty and an off-duty injury. With regard to his employment application, Claimant testified that he could not recall filling out the medical history form.

After carefully perusing the record, this Board finds that the Carrier presented substantial evidence that Claimant deliberately concealed the pre-existing back injury from the Carrier when he completed his medical history as part of his employment application. If, as Claimant asserted, his back was constantly bothering him, he could hardly have mistakenly answered the questions on the medical history form or have forgotten about his back injury. Claimant realized that he was being considered for a job involving heavy physical labor and thus, the inference arises that he falsely responded to the back problem questions to avoid being disqualified for employment. The Hearing Officer could discount the credibility of Claimant's self-serving testimony that he could not recall filling out the medical history form. His responses were false and, as discussed above, the Board may infer Claimant's wrongful intent (to lie), based on the facts of record.

Falsifying information on an employment application constitutes dishonesty. When it is considering individuals for employment, the Carrier has a right to know their physical status. Had the Carrier known Claimant's pre-existing back injury, it may not have hired him or, even if it hired him, it may have placed him on light duty until he recovered from his back ailment.

With regard to the second charge, Claimant made contradictory statements concerning whether or not he was actually hurt during his tour of duty on February 4, 1991. The next day, Claimant unequivocally told two supervisors that he suffered the back injury while off-duty. At the investigation, Claimant denied that he conveyed this information to the Track Supervisor and the Track Maintenance Engineer. If Claimant's February 5, 1991 representation was true, then Claimant falsified the personal injury report. Alternatively, if Claimant truly suffered a back injury on February 4, 1991, or if he aggravated a prior injury, Claimant lied to his supervisors the

following day. Furthermore, at the investigation, Claimant implausibly contended that he did not know the difference between an on-duty and off-duty injury. This incredible testimony, coupled with Claimant's prior inconsistent statements, reasonably led the Hearing Officer to disbelieve Claimant's denial.

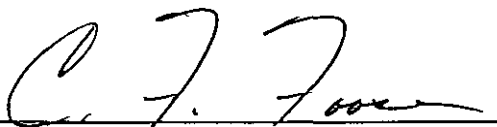
Inasmuch as Claimant told his supervisors that he did not suffer an on-duty injury on February 4 and he did not withdraw the accident report, the Carrier proffered sufficient evidence to prove that Claimant falsified the facts and/or misrepresented the facts surrounding his alleged back injury.

Dishonesty is a serious offense warranting severe punishment. Since the Carrier proved that Claimant committed two dishonest acts, this Board finds no justification for reducing the assessed penalty.

AWARD AND ORDER

Claim denied.

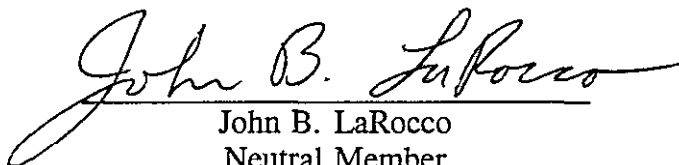
Dated: April 16, 1993



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