

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees  
and  
Burlington Northern Santa Fe Railway  
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on June 5, 2001, when it dismissed the Claimant, Mr. T. Rucker III, for allegedly falsifying his employment application.
2. As a result of the violation referred to in part (1), the Carrier shall restore the Claimant to service with back pay and all rights unimpaired and remove the discipline mark from his personnel record." [Carrier's File 14-01-0131. Organization's File 130-13A3-011.CLM.]

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Mr. Therry Rucker, III, was hired by the Carrier on October 2, 1995, and was working as a Trackman at the time he was removed from service on May 16, 2001, pending investigation. On May 25, 2001, the Carrier's Director of Administration addressed a letter to the Claimant, reading as follows, in pertinent part:

"Attend investigation in the Burlington Northern Santa Fe, North Yard Office Conference Room, 83 S. Pierce Street, Amarillo, TX., on Tuesday, June 5, 2001, at 10:00 a.m., with your representative and witness(es) if desired, for formal investigation to develop all facts and place responsibility, if any, in connection with your alleged falsification of employment application."

The investigation was held at the appointed time. The Claimant was present with his representative, the Organization's Assistant General Chairman. There was only one witness called, Mr. William Hanna, the Carrier's Senior Special Agent, appearing as directed by the Carrier.

Mr. Hanna testified that when the Claimant applied for employment by the Carrier, he filled out an application form, presented in evidence, which contained this question:

"Other than traffic violations, have you ever been convicted of a crime?"

Following this question, there were two boxes captioned "Yes" and "No." The Claimant had checked the "No" box.

At the end of the employment application form, there is a section entitled "Applicant Statement." Within that section these printed words appear:

"I have answered all questions to the best of my ability. If employed, I realize false information will be grounds for dismissal at any time, regardless when such information is discovered. I authorize any necessary inquiries as to my character, reputation, and ability . . .

"I also understand that any employment relationship I may have with Santa Fe will be solely on an 'at will' basis, and that I may terminate any employment relationship with Santa Fe, or Santa Fe may terminate any employment relationship with me, at any time for any reason or no reason at all."

Below these statements there is a signature line, on which the Claimant's written signature appears. The application is dated September 14, 1995.

Mr. Hanna further testified that his examination of public records disclosed that the Claimant had been convicted of four misdemeanor offenses, one on January 20, 1993, and three on July 21, 1995. He submitted documents obtained from the Potter County, Texas, court system, as supporting evidence. These convictions all pre-date the Claimant's application for employment with the former ATSF Railway, a component of the merged Burlington Northern Santa Fe Railway.

The Claimant did not contest the accuracy of these court records. In his defense, he asserted that when he filled out the application for employment, he was told the Carrier would only be concerned with felony convictions. The essence of his defense is summarized in the following series of questions and answers:

"47. Q. Mr. Rucker, I'm assuming in 1995, whenever you was applying for a job on the Santa Fe, at that time that was pre-merger, you had to make out a resume and you went through human resources to be hired?

A. Yes, sir.

48. Q. Did they give you the application form or do you recall if the persons who interviewed you did you fill out the application then or what...?

A. I filled out the application and I sent a, I sent a resume to human resource and I filled out the application here in Amarillo.

49. Q. Okay. Was there local personnel?  
A. Yes.
50. Q. Who, who might that be?  
A. It was, the lady that gave us the application, I don't remember her name but I was interviewed by Jeff Wilken and Bryan Calhoun.
51. Q. Okay. And in your conversations with Mr. Calhoun or Mr. Wilken, I'm assuming, or guessing that when you filled out this application this topic did come up about the crime?  
A. Yes. I was, I had talked to several 30 years employees and 20 years employee that I was talking to about getting on the railroad. And I was telling them I'm, I'm excited about getting on the BNSF Railroad. I always wanted to be on the railroad ever since I was child. And the first thing they told me, make sure you don't have any felonies so when I was interviewed I got the assumption that, that felonies is what they was talking about."

*Black's Law Dictionary, Sixth Edition* (1990) defines "misdemeanor" and "felony" in these terms:

**"Misdemeanor.** Offenses lower than felonies and generally those punishable by fine, penalty, forfeiture or imprisonment otherwise than in penitentiary. Under federal law, and most state laws, any offense other than a felony is classified as a misdemeanor."

**"Felony.** A crime of a graver or more serious nature than those designated as misdemeanors; e.g., aggravated assault (felony) as contrasted with simple assault (misdemeanor). Under many state statutes, any offense punishable by death or imprisonment for a term exceeding one year."

On June 15, 2001, the Carrier's Division Superintendent addressed a letter to the Claimant, reading as follows, in part:

"This letter will confirm that, as a result of formal investigation on June 5, 2001, concerning your falsification of employment application, you are dismissed from employment."

Following receipt of that letter, the Organization progressed its appeal of the Carrier's disciplinary decision to the highest officer of the Carrier designated to handle such appeals, whose final decision is now before this Board.

The Organization's appeal features two defenses. First, it argues, the Carrier has not shown that it would not have hired the Claimant if it had known of his conviction on these misdemeanor offenses.

Second, the Carrier presented no evidence to refute the Claimant's assertion that he was told he need only make the Carrier aware of felony convictions. The Organization posits that if the Carrier has other instructions given potential employees, it should have witnesses present to so attest.

These defenses are not persuasive. When the Carrier presented evidence that the Claimant had been convicted of crimes, albeit they were misdemeanors, and the Claimant admits to the accuracy of the evidence, the Carrier has made a prima facie case to support the charge, falsification of the employment application. In its two-fold defensive posture, the Organization is submitting an affirmative defense, with its shifting burden of proof.

If, as the Organization argues, the Claimant was given oral instructions which supersede the written instructions and affirmations contained in the employment application, it was the Claimant's right to request that those who gave such instructions be present. The investigation might have been recessed to obtain the presence of other witnesses to support the Claimant's position. No such recess was requested, nor the presence of any additional witnesses.

The Board has carefully read all the testimony presented by the Claimant. It may well be true that he was told that the Carrier was principally concerned about felony convictions, but at no point is found a clear statement that he was told to answer the question about crimes in the negative, nor did the Claimant say that he informed anyone of his misdemeanor convictions, coupled with a clear question whether he should still check the "No" box.

The Claimant, therefore, is clearly guilty of the offense of falsifying his application for employment, as charged.

During the course of the investigation, the Claimant's representative objected to the Claimant's removal from service pending the investigation, and objected to the clarity of the notice of charges. These objections were not further pursued on appeal, and the Board therefore concludes that these issues have been abandoned.

On page 2 of this Award, a paragraph in the employment application is quoted, which pertains to "at will" employment of applicants. Notwithstanding its acceptance by an applicant who affixes his or her signature thereunder, this provision is subordinate to the Carrier's collective bargaining agreements. The Parties' Agreement, Discipline Rule 13 in particular, sets forth procedural limitations which supersede this "at will" condition.

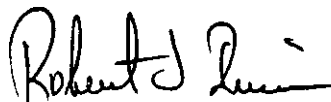
The Claimant also acknowledged, in his employment application, understanding that false information would be grounds for dismissal at any time. The Carrier did not violate the Parties' Agreement when it dismissed the Claimant for falsifying information with regard to criminal convictions.

Notwithstanding the above comments, the Board notes that the Claimant's personal record is clear of any disciplinary entries from the time of his employment in 1995 until his dismissal in 2001. The Board further notes the commendatory comments on the Claimant's work ethic submitted by one of his former supervisors, Manager of Roadway Planning R. R. Walker. Mr. Walker, presumably, was not aware of the Claimant's falsification of his application, but his endorsement goes to his personal knowledge of the Claimant's personal qualities in work situation.

For these reasons, the Board believes that the Claimant should be returned to service, having proven his worth as an employee, other than the falsification of his employment application. Because his offense was proven, he shall not be awarded any back pay, but his other rights shall be unimpaired. Because the offense involved dishonesty, an act of moral turpitude, the Claimant should regard his return to service as a last chance opportunity to prove his honesty.

#### AWARD

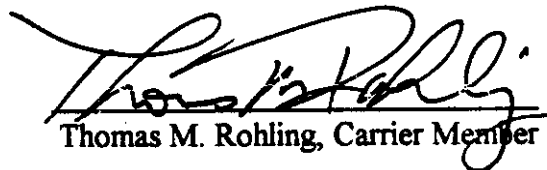
Claim sustained in accordance with the Opinion, above. The Carrier shall comply with the Board's decision no later than thirty (30) days from the date of this Award.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

July 22, 2002  
Date