

PUBLIC LAW BOARD NO. 6394

AWARD NO. 41

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
(CONSOLIDATED AND PENNSYLVANIA FEDERATIONS)**

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of P. J. Kolcan for reinstatement to service with seniority and all other rights unimpaired and to be made whole for all lost wages as a result of his dismissal from service following a formal investigations held on January 30, 2009, for conduct unbecoming an employee concerning the omission or falsification of information on his December 30, 2008 MED-15 Form during his return to work physical.

(Carrier File MW-DEAR-09-03-BB-003)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement and has jurisdiction of the parties and subject matter.

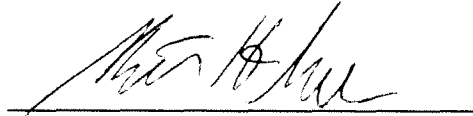
This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

Claim disposed of as follows:

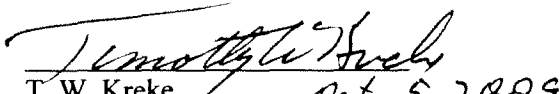
On December 30, 2008, as part of the process of returning to work following a 90-day suspension, Claimant completed a return to work medical examination. As part of this process, Claimant completed Section E of Carrier's Form MED-15, Authorization/Report of Medical Examination. Section E provided, in relevant part, "If the purpose of your examination is Return to work: Please respond to 'For the time period in which you were absent from work, have you had or do you now have any of the following?' by checking every item in the chart below with 'Yes' or 'No' or write 'Don't Know'." Claimant checked every item as, "no," including item 6, "Back injury/pain."

Claimant had had a back condition for a considerable time prior to his suspension. When he would experience an episode of back pain, he would take a few days off of work until the pain dissipated. The evidence reflects that during the period he was on suspension, Claimant experienced a similar episode, visited the doctor and was prescribed medication for the pain. It is clear that Claimant should have revealed this episode on the Form MED-15 and that he failed to do so. Accordingly, Carrier proved the charge by substantial evidence.

However, we find that Carrier failed to prove that Claimant intentionally falsified the form. It appears that Claimant believed that he did not have to disclose the episode of back pain because it did not represent a change in his overall medical condition. Indeed, on the day he returned to work, he openly discussed the back pain he experienced while he was off with his supervisors. The misrepresentation appears as likely to have been the result of confusion as to have been the result of deliberate falsehood. Although Claimant must shoulder some of the responsibility for the misrepresentation, in the absence of proof of deliberate falsehood, we find that the penalty of dismissal is excessive. Carrier shall reinstate Claimant to service with seniority unimpaired but without compensation for time out of service.

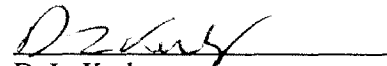


M. H. Malin
Chairman and Neutral Member



T. W. Kreke
Organization Member

Oct. 5, 2009



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on September 24, 2009