

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 6402
AWARD NO. 148, (Case No. 169)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION - IBT RAIL CONFERENCE**

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

**William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member**

Hearing Date: August 18, 2010

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The discipline (removed and withheld from service beginning November 23, 2009 and subsequent Level 5 - dismissal by letter dated December 15, 2009) imposed upon Mr. L. Smith for alleged violation of Rule 1.6 of the General Code of Operating Rules in connection with the charge of being dishonest in completing his employment application was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File UP-230-WF-09/1525257D).
2. As a consequence of the violation referred to in Part 1 above, Claimant L. Smith shall now have the aforesaid discipline removed from his record and he shall be reinstated to service with all rights unimpaired and compensated for all time lost beginning on November 23, 2009 and continuing until he is returned to service."

FINDINGS:

Public Law Board No. 6402, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On November 23, 2009, Carrier notified Claimant to appear for a formal Investigation on December 4, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place your responsibility, if any, in connection with the charge that you allegedly were dishonest when you completed your employment

application.

This is a possible violation of Rule 1.6(4) of the Union Pacific General Code of Operating Rules. If it is determined that the charges are correct, you will be assessed a Level 5 and dismissed from the Company."

On December 15, 2009, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 5 and he was dismissed from service.

The undisputed facts are that Claimant entered the service of the Carrier on August 23, 2005, as a Trackman on a Division Track Gang. On November 9, 2009, a faxed letter from the Veteran's Administration (VA) to the Claimant was found on a Carrier printer/copier. The letter of November 6, 2009, contained the VA's denial regarding the Claimant's medical condition and became the basis for the aforementioned charges formulated by the Carrier.

It is the Organization's position that when the Claimant was discharged from the military he was physically fit and the VA form found by the Carrier was simply a list of items that every person leaving the military is asked and was not a list of particular conditions associated with the Claimant. It further argued that even assuming for the sake of argument that the Claimant was guilty of anything (which he wasn't) the discipline was excessive since he had been a good employee. It concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the position of the Carrier that the November 6th letter from the VA indicated that prior to his employment with the Carrier, Claimant had or believed he had multiple medical conditions such as hypertension, residuals left ankle sprain, hernia bilateral, lumps on his right wrist, knuckles, left hand lockup and intermittent low back pain with X-Ray evidence of Spandylolysis. It argued that based on that information if an applicant listed those maladies on its employment application they would not have been hired. Because of that the Carrier reviewed the Claimant's employment application and according to it discovered that he was not honest when he filled out that document. It argued that the formal Investigation substantiated that Claimant had or believed he had some pre-existing medical conditions which he did not disclose and because of such he was terminated. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and discovered that the Claimant filed a claim with the VA on January 13, 2005, alleging he had the following conditions:

- * Hypertension
- * Residuals Left Ankle Sprain

- * Hernia, Bilateral
- * Lumps, Right Wrist
- * Knuckles, Left Hand, Lock Up
- * Intermittent Low Back Pain with X-Ray evidence of Spandylolysis

Subsequently, the Claimant made application for employment with the Carrier. Claimant filled out the Carrier's Health History Questionnaire on August 23, 2005, wherein he responded, "NO" to the following pertinent questions when asked if he ever had:

- * **Problems, injury, surgery involving the spine neck or back**
- * **problems, ...wrists, hands or fingers**
- * **X-rays, CAT scans ...**
- * **back pain**
- * **pain, stiffness with bending forward or backward at the waist"**

In Claimant's application for employment he did not disclose any of the medical conditions listed in his claim filed with the VA

The Organization argued that the Claimant was forthright regarding his questionnaire responses, and the VA form was simply a list of items that everyone leaving the military is asked and did not mean that he had suffered from any of those medical conditions. The argument is not plausible. If it was a standard list of conditions it would not be so specific such as **"...Residuals Left Ankle Sprain; Hernia, Bilateral; Lumps, Right Wrist; Knuckles, Left Hand, Lock Up;..."** Additionally, it argued that the VA denial form proved that he did not have anything wrong with him. The argument in behalf of the Claimant is innovative, however, it overlooks the fact that the VA did not state that the Claimant did not have any of the conditions while in the military, but instead denied any claim regarding those conditions on the basis it was unable to locate and review his Military Medical Records.

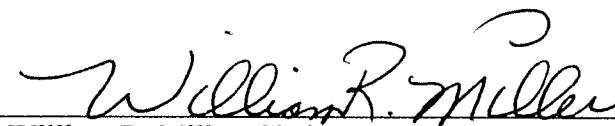
It is clear from the record that the Carrier met its burden of proof with substantial evidence that the Claimant did not disclose any of aforementioned medical conditions on his Health History Questionnaire.

The only issue remaining is whether the discipline was appropriate. Claimant was a relatively short time employee whose dishonesty on his application was a severe offense.

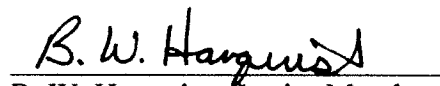
Following the precedent of Award No. 105 of this tribunal the Board finds and holds that the discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

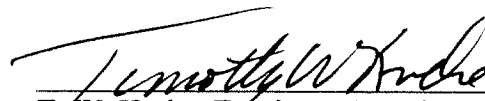
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: Nov 1, 2010