

PUBLIC LAW BOARD NO. 5850

---

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

vs.

**BNSF RAILWAY**

---

Case No. 453 – Award No. 453 – Claimant: Harvey  
Carrier File No. 14-13-0275  
Organization File No. 150-SF13D2-132

---

**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 29, 2013, when Claimant, Calvin Harvey (1765718), was dismissed, for his alleged dishonesty while completing his BNSF application for employment concerning his failure to disclose his prior criminal record as stated and required on the employment application completed on-line with a second chance given to him in person on January 28, 2008 during the hiring session. (BNSF first knowledge of this dishonesty was January 3, 2013). The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this dismissal and he be reinstated, if applicable, with seniority, vacation, all rights unimpaired and wage loss commencing May 29, 2013, and continuing forward and/or otherwise made whole.

**FINDINGS:**

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, C. Harvey, had been employed by the Carrier since 2008. On January 9, 2013, the Carrier notified Claimant to attend an investigation for the purpose of

ascertaining the facts and determining his responsibility, if any, in connection with his alleged dishonest conduct due to his failure to disclose his prior criminal record as stated and required on his employment application completed on-line and with a second chance in person on January 28, 2008, during the hiring session. The Carrier claimed first knowledge on January 3, 2013. Following the investigation, on March 29, 2013, the Carrier determined that Claimant had committed the misconduct alleged, in violation of MOWOR Rule 1.6 Conduct, and dismissed him from employment.

The applicable Carrier Rules provide, in relevant part:

**MOWOR 1.6 Conduct**, provides, in relevant part:

Employees must not be:

4. Dishonest

\*

\*

\*

Any act of hostility, misconduct, willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

Hermalinda Guardiola, Carrier Director of Human Resources, Southwest Division, testified at the investigation that she is responsible for screening applicants for employment, reviewing employment applications, scheduling hiring events and other aspects of the application and hiring process.

Ms. Guardiola explained that all Carrier employment begins with the completion of an on-line application for posted vacancies. The most qualified applicants are then invited to an in-person event, where they are tested and interviewed.

Carrier records received into evidence at the investigation show that Claimant completed an on-line application on or about January 13, 2008, and attended a hiring event on January 28, 2008. At that time, he also signed two release forms authorizing the Carrier to conduct background and medical checks if he was conditionally selected for hire.

The application includes the following question, "Have you ever been convicted of, or plead guilty or nolo contendere to, any crime (excluding minor traffic violations)? Note: A criminal record will not necessarily disqualify you from consideration. In Illinois, applicants are not obligated to disclose sealed or expunged records of conviction or arrest." Claimant entered "no" following these statements.

The application also states, "I understand that misrepresentation or omission of any fact called for herein . . . will be sufficient cause for cancellation of this employment application or grounds for dismissal at any time regardless of when such information is discovered."

A State of New Mexico criminal record entered into evidence shows that in 1997 Claimant pleaded guilty/nolo contendere to aggravated assault with a deadly weapon and negligent use of a deadly weapon. The record further shows that Claimant received a suspended sentence of 181 days and 181 days of supervised probation. Ms. Guardiola stated that she had requested and obtained this information in connection with an unrelated manner.

Ms. Guardiola maintained that the Carrier would not have offered Claimant a position had she known of his criminal conviction. She explained that although a criminal conviction would not necessarily disqualify an applicant, the crimes Claimant pled guilty to in 1997 were of a violent nature and the Carrier treats workplace violence very seriously.

Claimant, a machine operator, testified at the investigation that in 1997 he pled guilty to a petty misdemeanor involving negligent use of a deadly weapon. He was 23 years old at the time, and, at the investigation, gave a detailed account of how the charges arose from youthful indiscretions rather than actual criminal activity. He maintained that when he completed his probation, and the complaining witness dropped the case on the basis that the incident was accidental and not intentional, it was his understanding from his conversations with his attorney that the matter had been eliminated. He acknowledged that he did not provide any information concerning this matter in his employment application, but maintained he believed he no longer had any criminal record still on file in New Mexico. Claimant testified that he was named Southwest Division Employee of the Year in 2011.

The Carrier's Policy for Employee Performance Accountability (PEPA) sets forth, in Appendix B, a non-exhaustive list of Stand Alone Dismissible violations which may result in immediate dismissal. Appendix B includes, "Dishonesty about any job-related subject." Claimant's personal record shows a 30-day Level S suspension, with a 36-month review period, assessed on October 9, 2012 for failure to have proper flagging equipment.

The Carrier first states that there is no merit to the Organization's procedural arguments, as the investigation notice was issued within the required time period following the Carrier's first knowledge that Claimant had a felony conviction, the notice included sufficient information for Claimant and his representative to prepare a response, Claimant received a fair and impartial investigation, and the discipline was issued within the specified time period thereafter.

On the merits, the Carrier asserts that the case is not complicated. On Claimant's employment application, dated January 13, 2008, he answered "no" to the question whether he had ever been convicted of, or plead guilty or nolo contendere to, any crime, excluding minor traffic violations. The employment application, which Claimant signed, specifically stated that any misrepresentation or factual omission would be grounds for dismissal at any time, regardless of when the information was discovered.

The Carrier points to Ms. Guardiola's testimony that Claimant would not have hired Claimant had he disclosed his criminal history. Further, the Carrier notes, although a conviction would not necessarily disqualify an individual from being employed by the Carrier, Claimant's criminal activity involved violence, a matter the Carrier takes very seriously.

Moreover, the Carrier states, Claimant had the opportunity to correct his application when he attended the in-person hiring event on January 28, 2008, and he did make some handwritten changes at that time. However, he did not reveal his previous felony conviction.

The Carrier asserts that the facts demonstrate clearly that Claimant was dishonest, in violation of MOWOR 1.6. Moreover, while the Organization attempts to downplay Claimant's dishonesty, the fact remains that at the time he applied for employment with the Carrier he had been convicted of a felony and was untruthful. The Carrier concludes that it has proven Claimant's guilt by substantial evidence.

As for the penalty, the Carrier states that arbitral precedent has long held that dishonesty is a dismissible offense. Dismissal, the Carrier concludes, was warranted, was consistent with clear Carrier policy, and cannot be considered extreme or unjustified. The Carrier urges that the claim be denied.

The Organization contends that this is the Carrier's third attempt to dismiss Claimant since he suffered an on-duty injury in November 2012, and its actions are clear retaliation for reporting that injury. The Organization points out that the Carrier initiated a background check into Claimant shortly after his injury occurred, and charged him, in addition to the instant case, with two separate dismissible events arising out of that injury. The Organization notes that Claimant was named Employee of the Year in 2011, but, as soon as he was injured on the job, his status dropped to zero.

The Organization argues that Claimant did not lie to the Carrier, either in his on-line employment application in January 2008 or when he met with Carrier representatives face-to-face a month later. The Organization states that the New Mexico criminal records the Carrier relies upon herein are critically flawed, as they are factually inaccurate and include a serious clerical error. Further, the Organization asserts, the Carrier appears to have performed no review of Claimant's background at the time he was hired, and seems to have hired him based solely upon the information he provided.

The Organization adds that Claimant is 46 years old, and the criminal incident in question took place 23 years before. The Organization stresses that he was never involved in another such incident, and there is nothing to support the Carrier's assertion that he posed a potential violence threat.

The Organization states that Claimant never tried to deny or excuse what happened, but did attempt, at the investigation, to carefully explain events, including why he answered the question on the employment application as he did. The Organization

also notes Claimant's understanding that the charge at issue was dismissed following his probation.

The Organization asserts that Claimant is a dedicated professional who has conducted himself in an exemplary manner throughout his five-year history with the Carrier, and the Carrier has failed to meet its burden of proving him guilty of these charges.

Moreover, the Organization stresses, the Carrier has deliberately ignored numerous factors that should have been considered in determining whether discipline, especially at this level, was appropriate. The Organization concludes that dismissal was not only unwarranted, but amounts to harassment and intimidation to cover the fact that a Carrier Officer failed to perform a valid pre-employment check. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety, and find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. The Organization attempts to place the blame on the Carrier, arguing that had the Carrier performed an appropriate background check at the time Claimant was hired it would have discovered his criminal conviction, so Claimant should not now be held accountable for his failure to disclose it. But the question in this case is not whether the Carrier could, or should, have discovered the criminal history on its own, or how it came to the Carrier's attention recently, unless the evidence showed that the latter was some sort of prohibited retaliation against Claimant. That assertion was not proven on this record.

Rather, the simple question is whether, as the Carrier asserts, Claimant was dishonest at the time he was hired, and whether that dishonesty now justifies his discharge. Plainly he was dishonest. He answered "no" to the question whether he had ever been convicted of, or pled guilty to, *any* crime other than a minor traffic violation, when he had in fact done so. It is not entirely clear on this record whether his plea was to a felony or a misdemeanor, but the employment application made no distinction between them.

Further, Claimant's explanation that he believed the matter had been expunged from his record, essentially no longer existed and did not need to be disclosed apparently did not convince the Hearing Officer, and it does not convince this Board. His reason for why he believed that to be the case was weak, simply that he had completed his probation. Completing one's sentence does not generally erase the conviction.<sup>1</sup>

As for the nature of the offense, his young age at the time, and his subsequent and lengthy clean record, Claimant presented compelling testimony at the investigation. This situation presented is unfortunate, as it does appear that Claimant has never had

---

<sup>1</sup> The Board also notes that the employment application specifically states that in Illinois an individual is not required to disclose an expunged record, which should have indicated to Claimant that even if he truly believed his record had been expunged he was still required to disclose the conviction, since his guilty plea took place in New Mexico.

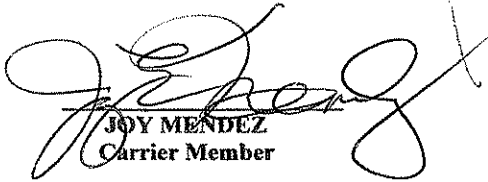
subsequent criminal problems and has been a very good employee. The problem is, even discounting Ms. Guardiola's testimony that the Carrier would not have hired Claimant had he disclosed his record, by failing to disclose the matter on his employment application Claimant deprived the Carrier of the opportunity to evaluate his situation and, perhaps, decide that it did not preclude his hire. It is not for this Board to make that determination now, five years after the fact.<sup>2</sup>

We conclude that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. As the Carrier asserts, it is well-established that dishonesty on an employment application is the sort of misconduct for which an employee may be discharged, even as a first offense. While the Organization argues that this investigation was motivated by retaliation against Claimant for an on-duty injury, on this record, that is simply an assertion. The Organization has not presented evidence to establish that this is a case of retaliation. Absent such evidence, we cannot conclude that the Carrier's decision to dismiss represents an unfair or arbitrary exercise of the Carrier's discretion.

#### AWARD

Claim denied.

  
DAN NIELSEN  
Neutral Member

  
JOY MENDEZ  
Carrier Member

  
DAVID SCOVILLE  
Organization Member

Dated this 31<sup>st</sup> day of October, 2014.

<sup>2</sup> This Board expresses no opinion about whether or how long a period of good service might eventually overcome a false employment application.