

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	Case No. 146
)	
and)	
)	Award No. 146
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)	
NORFOLK & WESTERN RAILWAY COMPANY))	

Richard K. Hanft, Chairman and Neutral Member
Scott M. Goodspeed, Carrier Member
Adam N. Gilmour, Organization Member

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

1. The Carrier’s discipline (dismissal) of Mr. W. Brown, by letter dated July 22, 2022, in connection with his alleged conduct unbecoming an employee and omission and falsification of information in that he failed to disclosed information and/or failed to accurately answer questions related to his medical history on medical history questionnaire(s), as well as medical examination report form(s) for commercial driver medical certification, on multiple dates including, but not limited to, March 5 and 10, 2021 and March 4 and 31, 2022, was capricious, excessive, harsh and unwarranted (Carrier’s File MW-ATLA-22-15-BB-270 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant W. Brown shall now be reinstated to service and be cleared of the charges, with all rights and back pay restored.”

FINDINGS:

Upon the whole record and all of 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 under Public Law 89-456 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.

After thoroughly reviewing and considering the record and the parties’ presentations. The Board finds that the claim should be disposed of as follows:

Claimant in this matter had been employed by the Carrier for eighteen (18) years at the time giving rise to this dispute and had but one disciplinary suspension pursuant to a waiver agreement on his career service record.

According to evidence on this record, Claimant submitted to a test for and was diagnosed with sleep apnea in 2020. While filling out the forms for renewal of his Commercial Driver’s Medical Certification in 2020, Claimant made a notation off to the side of the box requiring a yes or no answer, that he had undergone testing and was awaiting the results. On March 10, 2021 and March 4 and 30, 2022, Claimant answered the same question on the same forms with “no”. That answer on those forms was not truthful and Claimant admitted that on this record.

The record reveals that Claimant was working with Carrier's Medical Department in 2022 to try to come within compliance with requirements for the Commercial Driver's License. After discussion with the Carrier's Chief Medical Officer ("CMO") on April 25, 2022 where Claimant acknowledged that he had been tested for and was diagnosed with a sleeping disorder but was unable to comply with the recommended treatment, the Claimant was removed from service on medical leave.

On May 10, 2022, the CMO sent the Charging Officer in this matter a memorandum and event summary explaining what had transpired and why Claimant was being held out of service on medical leave. The CMO reported potential misconduct and violations of Carrier's policies and/or procedures. Upon review of the CMO's memorandum, the charging officer issued charges and summoned Claimant to an investigation on the property that was held on July 7, 2022. Upon review of the record developed on the property the Hearing Officer in this matter determined that Claimant was responsible for failure to disclose medical information and failure to accurately answer questions related to his medical history. Claimant was apprised that he was being dismissed from service by letter dated July 22, 2022.

The Organization appealed the decision made on the property through the normal procedure and the appeal was managed in accord with the parties' Agreement, but the parties were unable to resolve the dispute on the property and the matter is now properly before this Board for final adjudication.

The Board, after careful consideration of the evidence on this record and the parties' arguments, finds that the procedural due process violations that the Organization contends invalidate the findings on the property are without merit.

While the Organization argues that Carrier had first knowledge of Claimant's untrue answers to the questions on the Commercial Driver's Medical Certification ("CDMC") forms when the CMO had a discussion with Claimant on April 25, 2022, the CMO did not apprise the Carrier Officer with authority to dispense discipline until May 10, 2022 of potential rules violations. Charges were filed on May 17, 2022, well within thirty (30) days following notification of the officer within the chain of command with authority to dispense discipline. While the Organization argues that the CMO is an agent of the Carrier and therefore the Carrier had first knowledge of the violation suspected, numerous Awards hold that the time limits in the parties' Agreement do not start running until an officer in the Claimant's direct chain of command with authority to dispense discipline is apprised of the alleged violation.

Moreover, the Board finds that the Carrier met its burden to prove the charges by clear and convincing evidence. It cannot be argued that Claimant did not sign and date the forms affirmatively attesting that the answers on the Commercial Driver's Medical Certification forms were truthful but testified that he answered "no" to the two questions on the CDMC forms that asked about any sleep disorders or whether he had ever been tested for sleep disorders. Claimant then admitted on this record that those answers were not truthful.

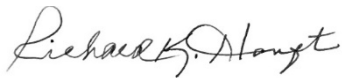
Digging a little deeper however, the Board takes note that Claimant was actively working with Carrier's Medical Department trying to come into compliance with requirements and was not trying to keep anything from the Carrier and contends that the mistakes he made in filling out the CDMC forms were unintentional.

The Charging Officer in this matter testified that Claimant is honest, intelligent and courteous and that if a mistake was unintentionally made that there should be some leniency shown. It is not within the Board's purview to offer leniency where Claimant has admitted his guilt, albeit unintentional, that privilege is reserved for the Carrier. However, after review of Claimant's long and nearly unblemished Career Service Record showing no previous dishonesty and in light of the Claimant's steadfast declaration that while he may have made a mistake in filling out the CDMC forms, that the mistake was unintentional, the Board finds that the discipline of dismissal given the particular facts in this matter was excessive and unwarranted.

The Board therefore orders that Claimant be returned to service, subject to a fitness for duty evaluation and without compensation for time out of service. The remedy herein shall be executed within thirty (30) days after issuance of the Award.

Award:

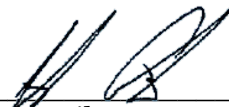
Claim sustained in accordance with the findings.



Richard K. Hanft, Chairman



Scott M. Goodspeed, Carrier Member



Adam N. Gilmour, Employee Member

Dated at Chicago, Illinois, February 1, 2024.