

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD 6920**

**Kansas City Southern Railway Company**  
**MidSouth Rail Corporation/South**  
**Rail Corporation**  
  
**and**  
  
**Illinois Central Gulf Federation**  
**Brotherhood of Maintenance Way**  
**Employees Division, International**  
**Brotherhood of Teamsters**

**Case No.** 21  
**Award No.** 21

**STATEMENT OF CLAIM:**

1. Carrier violated the January 6, 1994 Agreement between the Kansas City Southern Railway Company-MidSouth Rail Corporation/South Rail Corporation and its employees represented by the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters when, on February 6, 2012, it dismissed Claimant R. Riley from service.
2. As a consequence of the violation referred to in Part 1 above, Claimant should be immediately returned to service and reimbursed for all wage loss sustained and his record cleared of all charges.

### **Findings:**

Public Law Board 6920, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employees within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute and (3) the parties to this dispute were accorded due notice of the hearing.

On January 3, 2012, the Roadmaster informed the Division Engineer that Claimant may have been arrested on December 27, 2011, for driving under the influence (DUI). After consulting with Human Resources, the Division Engineer removed Claimant from service the next day (January 4) pending investigation of the alleged arrest and DUI.

As part of its inquiry into December 27, 2011, the Carrier requested an investigative background report from HireRight, a vendor providing employment screening services to the Carrier. The report (dated January 18, 2012) did not confirm Claimant's arrest and DUI but it identified a legal proceeding on April 6, 2005, where Claimant pled guilty to two (2) counts of criminal conduct referenced in the report as a felony and misdemeanor.

After receipt of HireRight's report, the Carrier requested its police to obtain a copy of the court record or minutes on Claimant's guilty plea. Once it obtained the minutes the Carrier reviewed Claimant's application for employment of July 18, 2007, and observed that he responded "No" to the question whether he ever had pled guilty to a felony or misdemeanor.

Based on the report, minutes and application, the Carrier issued a notice of investigative hearing on January 20, 2012. The notice stated that the hearing's purpose was "to ascertain the facts and determine your responsibility, if any, in connection with your alleged falsification of your application for employment with the [Carrier]. Carrier's first knowledge of incident was January 18, 2012."

The hearing convened on January 27, 2012. Claimant testified that when his application was considered in July 2007 he submitted a court-certified document to HireRight's predecessor - - Sterling - - showing that the felony had been reduced to a misdemeanor. As for marking "No" on his application about a felony or misdemeanor, Claimant testified he misunderstood or misread the question in his rush to complete the application. The Organization requested that the Carrier refrain from issuing a decision until it received a copy of the document that Claimant provided to Sterling in July 2007.

Also at hearing the Organization noted that HireRight's report of January 18, 2012, did not confirm the alleged arrest and DUI yet the Carrier continued to withhold Claimant from service. BMW argued a violation of Rule 33(b) which it recites as "[a]n employee charged with an offense will be furnished with a letter stating precise charge or charges against him" and "[n]o charge should be made that involves any matter which the employing officer has had knowledge fifteen days or more."

Instead of restoring Claimant to service on January 18, 2012, BMW states that the Carrier initiated another investigation on that date, without notice to Claimant, based on its concern that he falsified his application in July 2007 when Claimant answered "No" to whether he ever had pled guilty to a felony or misdemeanor when he had pled guilty to a misdemeanor in April 2005. This matter or discrepancy had been considered by Sterling during the employment review process of Claimant's application and, having considered it, the Carrier proceeded to hire the Claimant on July 23, 2007.

During the investigative hearing, the Carrier stated that it no longer uses vendor Sterling for employment screening services and noted Claimant's acknowledgement that he did not state "Yes" on his application to having pled guilty.

After completion of the investigative hearing and review of the record, the Assistant Vice President (Southeast Division) notified Claimant on February 6, 2012, that he had "violated [the Carrier's] General Code of Operating Rules 1.6 – Conduct" and was dismissed from service. In this regard, Rule 1.6 - Conduct, states that an employee "must not be" dishonest.

On February 28, 2012, the Organization filed a claim over Claimant's dismissal. BMW argues that Claimant's four (4) plus years of service contains no entries in his record yet the Carrier did not exercise any measure of progressive discipline. In addition to his satisfactory employment record, the Organization asserts that Claimant's misreading of the application in July 2007 and misdemeanor guilty plea in April 2005 were considered prior to the Carrier's hiring Claimant on July 23, 2007. Almost five (5) years after Claimant's entry on duty, the Carrier conducts another review of his application and initiates another background investigation over this examined matter.

On May 3, 2012, the Carrier denied the claim. Its customary course of action when investigating an allegation of criminal conduct involves obtaining a background investigative report and / or deploying railroad police to ascertain whether the employee reported the criminal conduct to the Carrier. The court's minutes of the legal proceeding confirm Claimant's guilty plea. Whether a singular count or both counts of criminal conduct were reduced from a felony to a misdemeanor is not material as both involve criminal conduct that Claimant, when questioned about such conduct on his application, denied.

As worded on the application, an affirmative response to the question whether an applicant ever pled guilty to a misdemeanor or felony "does not necessarily disqualify" the applicant from hire "but an untruthful response does." Under Terms of Employment on the application, item (4) states that "employment ... is dependent upon the truthfulness of the statements contained herein" and any false or misleading statement results in dismissal. Item (11) reads that an applicant represents "all information given on this form and on any other forms completed at the time of employment to be true" and "any misrepresentation or concealment of information will be sufficient reason for dismissal." Claimant falsified his application which is a dishonest act and violates Rule 1.6 Conduct.

Following the usual and customary manner for processing a claim on-property, the parties met in conference on July 11, 2012. With no resolution at conference, the claim is presented to the Board for final adjudication.

As a matter of clarity, the record contains the Assistant District Attorney's letter of January 2012 that confirms Claimant's testimony he pled guilty to misdemeanors in April 2005. Claimant never pled guilty to a felony. The Carrier's assertion during the investigative hearing purports to establish a felony plea; however, that is a mistaken assertion.

Notwithstanding the discrepancy between Claimant's "No" response in July 2007 to the question whether he ever pled guilty to a misdemeanor while having done so in April 2005, the vendor Sterling (acting as the Carrier's apparent agent) considered that discrepancy along with Claimant's application in July 2007. The apparent agent's knowledge of the discrepancy is imputed knowledge to the principal - - the Carrier. That is, the apparent agent's findings and considerations within the scope of its authority is chargeable to the principal because the findings and considerations were open or available for the principal's discovery in the context of the apparent agent's work. With imputed knowledge of the considerations surrounding Claimant's application, the Carrier hired the Claimant effective July 23, 2007. Thus, the "Carrier's first knowledge of incident" was July 2007 and not January 18, 2012 as stated in the notice of investigative hearing.

In view of the agent - principal nexus establishing knowledge and consideration of the discrepancy and the resulting decision by the Carrier to hire Claimant, the Board finds that the Carrier abused its discretion when it dismissed the Claimant on February 6, 2012, for a matter examined by the principal's apparent agent 5 years prior. When there is an abuse of discretion, Board review of the penalty imposed is appropriate.

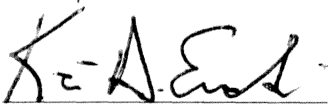
The penalty imposed - - dismissal - - is harsh and punitive. Consequently, the Board finds that the appropriate remedy is worded in Part 2 of the Statement of Claim. Specifically, Claimant is "immediately returned to service and reimbursed for all wage loss sustained and his record cleared of all charges."

**Award:**

The claim is sustained and the remedy in Part 2 of the Statement of Claim is granted.

Patrick Halter /s/

Patrick Halter  
Neutral Member  
PLB 6920 Case No. 21



Kevin D. Evanski  
Organization Member



Tammy Hardge Stephenson  
Carrier Member

Dated this 23rd day  
of August, 2013