**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 146**

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-C-04-12-SG-175)

Statement of Claim:

Claim on behalf of J. A. Box for reinstatement with seniority, vacation and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on September 2, 2004, for providing false and misleading information on a Norfolk Southern pre-employment physical completed on February 9, 2004.

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 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.

**AWARD**

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

J. A. Box, the Claimant herein, entered the Carriers' service on February 23, 2004 as a Trackman. The Claimant served in this capacity at all relevant time periods associated with this matter.

The record evidence shows that on July 12, 2004, the Claimant was working as a Laborer on T&S Gang 1 in Sharonville, Ohio, on the Carrier's Central Operating Division. After placing plates on a

switch, the Claimant sat down and complained of pain in his left knee. When questioned by his Supervisor, the Claimant noted that his left knee had given out in a similar fashion to a football injury he had sustained to the same knee in high school during the 2002-03 football season.

Following the incident, the Carrier consulted with the Medical Department regarding the July 12th incident, and discovered that at his time of hire, the Claimant had completed a pre-employment physical on February 9, 2004. As part of this physical, the Claimant was required to complete a medical history section, a portion of which inquired as to whether the Claimant had ever had any hip or knee injury/pain, to which the Claimant checked the box "no". The Claimant also signed a portion of the Medical History form in which he certified to the truthfulness of his entries. This certification section provided:

> If it is determined, through investigation or otherwise at any time, that any answers are untrue or misleading, or material information is omitted, I understand my employment may be terminated . . .

Following review of the foregoing Form, the Carrier's Associate Medical Director sent a letter to the Claimant's Supervisor noting that had the Claimant indicated "yes" to the question as to any prior knee injury/pain, she:

> "[w]ould not have medically qualified him at that time for a position of Laborer. I certainly would have required additional medical information and possibly further evaluation to fully evaluate his ability to safely perform Laborer functions. His lack of disclosure of his prior knee injury clearly prevented me from doing so."[1]

Following receipt of the foregoing letter, the Claimant was notified to attend a formal investigation, which was ultimately held on September 2, 2004. The Claimant attended the investigation, and was represented by the Organization. Following the investigation, the Hearing Officer, following his review of the transcript and related evidence gathered at the investigation, found the Claimant guilty

[1] Given this conclusion, Article XI – Application for Employment, at Section 2, Omission or Falsification of Information, does not save the day for the Claimant in this matter, since it was determined that the Claimant's omission was material in nature.

of the charge of "[p]roviding false and misleading information on a Norfolk Southern pre-employment physical . . . ", and advised the Claimant that he was dismissed from the Carrier's service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

At the investigation, the Claimant proffered the excuse that he "didn't remember" to include the details of his September 2002 football injury, since he was shortly released to continue playing football for the remainder of the 2002-03 season. The Hearing Officer rejected this excuse. Our review of the record evidence reveals that the Claimant's medical records assessed by the Carrier's Associate Medical Director indicated that the treatment of the Claimant's 2002 knee injury required an MRI evaluation, and resulted in the fitting of a hinged knee brace. Given these facts, it is hardly likely that the Claimant could have forgotten the injury, and it is more likely that he was concerned that the inclusion of this prior (2002) knee injury may well have adversely affected the Carrier's decision to hire him. Accordingly, we find that the Hearing Officer's conclusion bears a rational relationship to the record evidence.

Turning now to the discipline sought to be imposed, it is well established arbitration precedent that the penalty sought to be imposed by an Employer will not be disturbed so long as it is not arbitrary, capricious or discriminatory. In the instant matter, the Claimant, in his pre-employment application, stated that he had never sustained a knee injury. Given the facts of this case as contained in the record of investigation, the Board finds that the Claimant intentionally falsified his application in order to conceal his prior knee injury. The Claimant's actions in this regard constitute a clear dishonesty, and misled the Carrier into hiring him. His misrepresentation was material in nature, since absent such misrepresentations, the Carrier may not have hired him. Given this conclusion, we cannot find that the penalty of dismissal is arbitrary, capricious or discriminatory, and accordingly, we will not disturb it.

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CONCLUSION

The instant claim is denied.

Dennis J. Campagna
Chairman and Neutral Member

D.D. Bartholomay 6-16-05
Organization Member

D.L. Kerby 6-20-05
Carrier Member

**Dated** May 16, 2005, Buffalo, New York