

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 173

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of A. O. Arciga for reinstatement with seniority, vacation and all other rights unimpaired and be made whole for all lost wages, as a result of his dismissal from service following a formal investigation on February 20, 2008, concerning his conduct unbecoming an employee in 1) omitting and falsifying information on his August 28, 2007 Employment Application, MED-15 Form, and 2) providing false information on his October 19, 2007 Medical Examination Report for Commercial Driver Fitness Determination.

(Carrier File MW-FTW-08-03-LM-059)

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.

AWARD

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

On his August 28, 2007 Employment Application, MED-15 Form, Claimant checked "no" in response to questions whether he had ever had "head/brain injury, disorder or illness," "loss of consciousness," or "other injuries or illnesses." On his October 19, 2007 Medical Examination Report for Commercial Driver Fitness Determination, he checked "no" in response to questions whether he had had "any illness or injury in the last 5 years," "head/brain injuries, disorders or illnesses," or "loss of consciousness." Claimant was dismissed for allegedly falsifying these documents. At issue is whether Carrier violated the Agreement's timelines for bringing charges and conducting the hearing and whether Carrier proved the charges by substantial evidence.

Rul 30(a) requires that the investigation "be held within 30 days of first knowledge of the offense." The Organization contends that Carrier's first knowledge occurred on November 27, 2007, when Claimant contacted the Assistant Track Supervisor and advised that he needed to have medical tests completed and had his doctor speak with the Assistant Track Supervisor. The doctor advised that Claimant had sustained a head injury while serving in the military prior to entering Carrier's service. However, there is no indication that, as of November 27, 2007, a Carrier officer with authority to assess discipline had knowledge of the offense. The offense was falsifying the employment application and CDL application. As of November 27, no relevant Carrier officer had knowledge of the alleged falsification. Rather, as a result of the conversation on November 27, 2007, Claimant was placed on medical hold. Thereafter,

Carrier's Medical Department requested additional medical documentation from Claimant. When that documentation was received and reviewed, the Medical Department determined that Claimant had failed to disclose a head injury that he sustained in the service on his application and CDL medical form. Carrier's Associate Medical Director communicated findings to the Division Engineer on January 24, 2008. Accordingly, we conclude that the first knowledge of the offense occurred on January 24, 2008, and that the investigation held on February 20, 2008, was timely.

At the investigation, Claimant denied ever having suffered a brain or head injury as a result of an explosion during his military service. He maintained that medical records reporting such an injury were inaccurate. Carrier did not credit Claimant's denial. As an appellate body, we defer to credibility determinations made on the property as long as they are reasonable. Considering the record as a whole, we find Carrier's refusal to credit Claimant's denials to be reasonable.

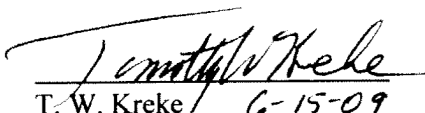
The evidence included a February 27, 2007, neurologist consultation report on Claimant's migraine headaches which indicated that Claimant suffered the headaches on average three to four times per week. The report further noted that Claimant "states he started having headaches after an explosion in the service."

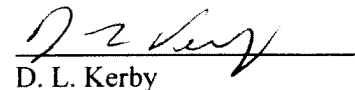
The evidence also included a report of an MRI of the brain, dated March 11, 2007, which listed, "Indication: Head injury in 2004. Headaches since explosion while in the military." An October 1, 2007 neurological consultation progress note related that Claimant had been experiencing headaches and cognitive difficulties since an IED explosion in 2004 where he lost consciousness for five to six seconds. A January 3, 2008, letter from an ear, nose and throat specialist also related that Claimant had been "suffering from chronic headaches since a traumatic explosion in 2004." A December 6, 2007, letter from a doctor with the Department of Veterans Affairs, released Claimant to return to work but described him as having been "involved in an attack during July 2005 in his Hummer in Iraq."

We find it highly unlikely that so many different medical records would be inaccurate. Moreover, the record also contained an article from the *Ft. Wayne Journal Gazette*, reporting an interview with Claimant in which he discussed an explosion that destroyed the Humvee in which he was riding and killed three other soldiers. We conclude that Carrier proved the charges by substantial evidence.

Falsification of an employment application is a very serious charge and usually results in dismissal. In the instant case, we find no mitigating evidence that would lead us to conclude that the penalty was arbitrary, capricious or excessive. Accordingly, the claim is denied.


M. H. Malin
Chairman and Neutral Member


T. W. Kreke 6-15-09
Organization Member


D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on May 30, 2009