

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 28389
Docket No. 48257
16-1-NRAB-00001-140287**

The First Division consisted of the regular members and in addition Referee David Vaughn when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Locomotive Engineers and Trainmen**
(**(BNSF Railway Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Locomotive Engineers and Trainmen on the BNSF Railway Company:

It is hereby requested that Engineer D. R. Baine 's discipline be reversed with seniority unimpaired, requesting pay for all lost time, with no offset for outside earnings, including the day(s) for investigation with restoration of full benefits and that the notation of Dismissal be removed from his personal record, resulting from the investigation held on July 9, 2013.”

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant began employment with BNSF as a Trainman in 2001. He became an Engineer in May of 2003 and was working in such capacity at the time of the incident at issue.

The Claimant had serious medical issues. He had been approved for FMLA leave for several previous years. On May 16, 2013, he sent from the fax machine of his personal trucking business to the Carrier an application for FMLA coverage. Proper procedure would be for a health care provider to send such an application. The application listed the certifying health care professional as Dr. Michel Mendler and the Doctor's association as Loma Linda Medical Center.

When the Carrier's Benefits Coordinator attempted to reach Dr. Mendler, she discovered that neither the telephone number provided nor the institution with which the application said Dr. Mendler was affiliated were correct. When she located Dr. Mendler on the internet and reached him, he stated that he had not worked at Loma Linda Medical Center since August of 2011, had not seen the Claimant on the dates indicated in the application and provided a letter indicating that the signature on the application was a forgery. Dr. Mendler confirmed that he personally signs every FMLA application under his name, but that neither he nor anyone in his office signed the 2013 application. The Carrier had been provided a previous, 2011 FMLA application, which also purported to be from Dr. Mendler, but that form used a different name and signature.

The Claimant testified that he went to Loma Linda in 2013 as he had done in previous years and gave the paperwork to a nurse, who had it completed and signed and returned a copy to him. He testified further that in order to ensure that BNSF received the forms, he faxed a copy to the Carrier, as he had done without objection in prior years. The Claimant testified that he had submitted applications for approximately five previous years; each time the applications had been approved. Had there been a problem, maintained the Claimant, he could simply have submitted the application to some other doctor whom he had previously seen. The Organization concedes that the Doctor did not sign the 2013 application, but contends that it cannot be determined who did.

An Investigation was convened to ascertain the Claimant's responsibility, if any, in connection with the alleged falsification of the FMLA application. At that investigatory Hearing, the above evidence was adduced. Following the Hearing, and based on the record, the Carrier dismissed the Claimant from service for violation of GCOR 1.6 (Conduct, Dishonesty), an action which the Organization protested. The Carrier denied the Claim, which was then progressed in the usual manner through and including the Carrier's highest designated official, but without resolution. The dispute was assigned to this Board for Hearing and decision.

The positions of the Parties were set forth in their written submissions and at hearing. They are summarized as follows:

The Carrier argues that it met its burden to prove by substantial evidence considered on the record as a whole that the Claimant was dishonest when he submitted the 2013 FMLA application, thereby violating GCOR Rule 1.6. It maintains, on that basis, that he was properly dismissed from employment. The Carrier contends that the Claimant's contrary testimony is blatantly incredible, breaking the trust to which it is entitled in dealing with employees, and rendering his dismissal appropriate.

The Carrier argues that the Organization's argument that the Claimant's explanation is not proven to be dishonest because the nurse could have filled out the application, listing the same doctor as he had seen previously. However, points out the Carrier, Dr. Mendler had not worked at Loma Linda since 2011 and there is no plausible reason why a nurse would attribute the application to a doctor who had not worked there for almost two years. The Carrier points out that FMLA applications are serious and not likely to be the subject of such sloppy procedures. It also points to the Claimant's use of his family's business fax machine as establishing an improper and implausible method of transmission. It urges that substantial evidence supports the conclusion that the Claimant falsified the application.

The Carrier also rejects the Organization's argument that dismissal is harsh and excessive, pointing to the seriousness of the violation. It points out that the investigation did not seek to challenge the Claimant's medical condition, which he was free to support by appropriate and truthful documentation, but instead focused on his forged application.

As to the discipline assessed, the Carrier points out that dismissal is the specific stand-alone penalty for job-related dishonesty. It points out that PEPA specifically so provides.

The Carrier urges that the Claim be denied and the Claimant's dismissal upheld.

The Organization argues that the Carrier failed to meet its burden of proof because it failed to establish the required element of fraudulent intent. It asserts that the Claimant had an undisputed serious medical condition and so had neither reason to falsify an application in support of leave for such condition nor any gain from doing so. It points that no harm was done to the Carrier by any such action and that the Claimant was and would have remained eligible for FMLA. The Organization points out that, had the Carrier investigated the Claimant's assertion that someone else at Loma Linda, had completed the paperwork, the entire scenario might have been avoided.

The Organization asserts that the Carrier failed to prove just cause for its action and urges that the Claim be sustained as written.

It was the burden of the Carrier to establish, by substantial evidence considered on the record as a whole, that Claimant submitted a fraudulent FMLA document, thereby violating the prohibition against dishonesty found in GCOR Rule 1.6. The evidence includes sufficient evidence to meet that burden. The Claimant submitted to the Carrier a document purporting to have been certified by Dr. Mendler, who denied having done so and described a procedure he used which was inconsistent with the way the document was prepared, signed and submitted. He directly contradicted the Claimant's testimony that he had gone to Loma Linda and had been provided with the paperwork by a nurse there.

The evidence establishes that the Claimant then submitted the application through his own fax machine, rather than having the health care provider do so, as was the proper procedure. None of the elements of the Claimant's explanation are plausible, let alone convincing. His assertion that we simply do not know who might have filled out the form is also not credible. The Claimant had the form and

submitted it through a fax machine that he alone controlled as legitimate. It was clearly the Claimant's misrepresentation, for which he is directly responsible.

The fact that the Claimant had a serious medical condition is not disputed. Whether he was entitled to FMLA for the condition is a matter which could not be determined in the absence of a properly certified FMLA application. The fact that he had been previously certified and might have been certified for the period covered by the forged application does not excuse his falsification.

Regardless of the amount of harm suffered by the Carrier as a result of the Claimant's misrepresentation, the Carrier lost any basis to trust the Claimant. The maintenance of such trust is a material element of the employment relationship. That loss placed the Claimant's dismissal within the range of reasonable penalties for his violation. The Award so reflects.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 4th day of October 2016.