

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 28509
Docket No. 48258
16-1-NRAB-00001-140288**

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

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

STATEMENT OF CLAIM:

“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 September 5, 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 was first employed by the Carrier on September 10, 2001. He began as a Trainman. He became an Engineer in May 2003, and was employed in such service at the time of the incident at issue herein.

On May 16, 2013, the Carrier's Benefits Team began processing the Claimant's Family Medical Leave Act (FMLA) application, submitted from a personal fax machine through Baine Trucking Company, *i.e.*, not a physician's office. The Benefits Coordinator tried to contact the Doctor who was listed on the FMLA application, but the phone number listed was incorrect and her call went to a personal voicemail box instead. The FMLA application noted that Dr. Michel H. Mendler was associated with Loma Linda Medical Center; however, when the Benefits Coordinator contacted the hospital, it did not have a Dr. Mendler in its system. Eventually the Benefits Coordinator looked up Dr. Mendler on the internet and reached him. He told her that he had not worked at Loma Linda Medical Center since August 2011, and supplied a letter indicating that he did not complete the form or sign it, stating that "[t]he signature is a forgery, that no staff member at the clinic completed or signed the form on his behalf and that the dates of supposed visits to the clinic in 2012 were "fallacious." After investigating the Claimant's 2013 application, the Benefits Coordinator investigated his 2012 FMLA application. She concluded that the 2012 application also contained the signature that Dr. Mendler stated was forged.

The Carrier scheduled an Investigation at which the foregoing evidence was adduced and, based thereon, found the Claimant in violation of Rule 1.6 (Conduct) and dismissed him from service. The Organization protested the discipline, which the Carrier denied. The Organization appealed the discipline in the usual manner, up through and including the Carrier's highest designated official, but without resolution. The dispute was referred to the Board.

The Carrier argues that it met its burden to prove the Claimant's falsification of FMLA paperwork for Calendar year 2012 submitted to the Carrier with date of first knowledge on July 4, 2013. It contends that lying on an FMLA application is definitely dishonest and, therefore, is prohibited under the personal conduct provisions of Rule 1.6. In support, the Carrier points to the letter from Dr. Mendler in which he called his signature a forgery and stated that no one at the clinic signed his signature. It asserts, as well, that the Claimant admitted that he faxed the paperwork when it was supposed to have been completed by the hospital. The Carrier maintains that the Claimant's testimony contradicts what Dr. Mendler reported and that there is no possible explanation for Dr. Mendler's signature on the document other than the Claimant forged it. It contends that any trust that existed with the Claimant has been

irrevocably broken as a result of his falsified FMLA application and it cannot be expected to continue to employ him.

As to the Organization's arguments that the Claimant did not falsify his paperwork and is entitled to FMLA, that Dr. Mendler did not appear as a witness, and the level of discipline is harsh the Carrier contends that they are without merit. It points out that the Organization does not contest that the Claimant improperly faxed in the paperwork but merely alleges that someone else at the clinic may have signed on behalf of Dr. Mendler and that it was possible that the nurse filling out the application listed the same doctor because he was unavailable. It points out that Dr. Mendler had not worked at the Loma Linda Medical Center since 2012 and simply could not have been the authorizing physician for the submitted paperwork. The Carrier maintains that it had no ability to subpoena Dr. Mendler to testify and that in any case, his letter stating that he did not sign the FMLA paperwork was sufficient.

The Carrier contends that the Claimant is not entitled to FMLA and that it was the Organization's burden to prove that he was which it failed to do. It asserts that the Investigation and discipline relate to Claimant's falsification of his FMLA application and that, because of his dishonesty, his *actual* medical condition is of no consequence. Finally, the Carrier maintains, citing prior awards, that dismissal is not harsh considering the seriousness of the Claimant's Rules violation.

The Carrier urges that the Claim be denied.

The Organization argues as an initial matter that the Carrier failed to meet its obligation to provide Claimant a fair and impartial Investigation. It maintains that Dr. Mendler treated him for a serious health condition, that he brought the FMLA paperwork to Loma Linda and gave it to a Nurse for completion. The Organization contends that the Carrier's refusal to make Dr. Mendler and the nurse available at the hearing is a fatal flaw. It asserts that, since the Carrier's case rests upon its contention that the Claimant forged the Doctor's name on the paperwork, it was incumbent on the Carrier to seek out the Nurse who handled the paperwork and ask her who signed the document.

As to the merits of the Claims, the Organization maintains that the Carrier failed to present substantial evidence that Claimant forged the paperwork. It points

out that, during the Investigation, the Claimant stated that he took the paperwork to Loma Linda Hospital, as he had done in previous years, that he gave the paperwork to a Nurse and that he presumed that the Nurse completed it and obtained the necessary signature. It maintains that, when the paperwork was returned to the Claimant, he took the forms home and, to make sure that the Carrier received the forms, he faxed it a copy. The Organization contends that it is undisputed that the Claimant has a serious health condition which entitles him to FML leave, that he has been deemed eligible for approximately five years and that he suffers from a “lifetime” ailment. It concedes that Dr. Mendler did not sign the document, but asserts that it is entirely possible that the Nurse, or someone else on the staff, signed the document with his name because he was unavailable and had approved the form in the past. It maintains that the Carrier’s allegation of the Claimant’s misconduct is entirely speculative.

Finally, as to the level of discipline, the Organization argues that the intent of discipline is to warn an employee that a wrongdoing will lead to dismissal. It contends that dismissing him again for an identical offense – the Claimant has already been dismissed for falsifying the 2013 application – has no value except to pile on charges in an effort to make it more difficult to resolve the dispute.

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 the rules in question were violated to prove that dismissal was an appropriate penalty and to establish, when challenged, that it provided the Claimant with due process and a fair Investigation. For the reasons which follow, the Board holds that the Carrier met its burdens and denies the Claim.

The Board is not persuaded that the Carrier committed procedural error by failing to produce the Doctor who stated his signature was fraudulent or the nurse who allegedly completed the Claimant’s application. The Carrier has no ability to obtain their presence, and the written statement from the Doctor constituted substantial evidence to establish false representation.

The Carrier met its burdens to provide substantial evidence of the Claimant’s guilt. The evidence is that the Doctor was not working where the Claimant placed him

at the time the Claimant alleges he was seen and did not see the Claimant or sign the application. That is confirmed by the Doctor's specific denial of having done so. The Claimant's description of what happened is inconsistent with the remaining evidence and is implausible.

The Claimant's forgery and non-credible explanation constitute material dishonesty. Had the dishonesty not been discovered, the Claimant would have received benefits, in the form of FMLA leave, to which he might not otherwise have been entitled. Whether the Claimant had a chronic and qualifying condition under FMLA is a question of fact – which the Claimant did not prove. However, the Claimant's falsification of the form and misrepresentation of what happened violated his obligation to his employer and constituted a violation of Rule 1.6, without regard to his underlying medical status.

As to the appropriate penalty, the Carrier is entitled to trustworthy employees and to dismiss those who prove themselves to be dishonest. The record establishes the Claimant's material misrepresentations. Indeed, the Claimant had been previously dismissed for a similar misconduct. The Board is not persuaded that the penalty of dismissal was arbitrary or excessive. 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 12th day of January 2017.