

SPECIAL BOARD OF ADJUSTMENT NO. 6394

AWARD NO. 56

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed from all service with Norfolk Southern Corporation) of Mr. N. Bell issued by letter dated April 11, 2012 in connection with alleged conduct unbecoming an employe concerning his omission and falsification of information (related to a previous back or pain) on his employment application, his June 25, 2008 and January 14, 2011 Medical Examination Reports for Commercial Driver Fitness Determination and on his June 7, 2010 and January 14, 2011 MED-15 Forms was unwarranted (Carrier's File MW-DEAR-12-04-LM-044).
2. As a consequence of the violation referred to in Part 1 above, Claimant N. Bell shall be returned to work and compensated for all wages he could have earned."

Upon the whole record and all the evidence, after hearing, the Board finds 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 precedent in any other case.

AWARD

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

The Claimant entered service for the Carrier on September 4, 2007 in the position of Track Laborer. The Claimant was on a medical leave of absence from November 2011 to February 2012. As part of its routine return to work procedure, the Carrier requires employees to furnish medical records related to treatment received. The Claimant provided those records, which were then processed by the Carrier's Associate Medical Director Dr. Paula Lina. On February 21, 2012 Dr. Lina noted the Claimant's submitted

records showed a history of back injury and pain that dated back to the early 1980s (see Carrier Brief, page 7). Specifically, the Claimant's doctor stated "Nathanial Bell...presents to my clinic with off and on severe low back pain and with radiating pain down his left leg since 1980. He has been having recurrent symptoms since the early 1980s...." (see Transcript, page 7).

Part of the Employer's application process is Form MED-15, which requires all potential employees to detail any history of any health issues they may have. The Carrier uses this information to determine whether the applicant is sufficiently fit for work in a railroad environment. Of relevance to the instant case is a question on the MED-15 form which asks "Have you ever had or do you now have any of the following?" and includes a list of medical conditions including back injury and back pain (see Carrier Brief, pages 1-2). The MED-15 form also requires the employee to sign a statement certifying that the information on the form is correct. When the Claimant filled out MED-15 on August 9, 2007 he checked "no" on the form, indicating that he did not have any history of back injury or back pain (see Carrier Brief, Exhibit 11).

Upon its discovery that the Claimant had a history of back problems, Dr. Lina wrote to the Claimant's supervisor. In that letter, Dr. Lina stated that if she had been aware of the Claimant's condition he would not have been recommended for employment. Due to these events, the Carrier charged the Claimant with conduct unbecoming an employee and held a formal investigation including a hearing on April 2, 2012. On April 11, 2012 the Carrier notified the Claimant that he was dismissed from service.

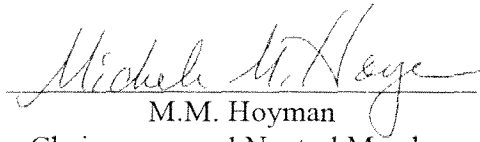
The Carrier argues that there is no dispute that the Claimant failed to indicate any history of back injury or pain on the MED-15 form. Additionally, during the course of the investigation the Claimant admitted he had also omitted this condition on subsequent medical forms (see Transcript, page 11). Claimant also submitted revised information stating that although he had a back injury in the early 1980s there were no recurrent symptoms until on or about November, 4, 2011 (see Carrier Brief, page 8). The Carrier argues this justification has little value because it contained no medical information to confirm the statement and, in any event, the injury in and of itself should have been reported on MED-15. Finally, the Carrier argues via extensive citation of other awards that this level of misconduct rises to such an egregious level that dismissal is appropriate - even if the Claimant did not intend to be dishonest on the forms.

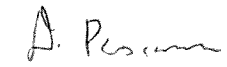
It is the Organization's position that the Carrier must meet a heightened burden of proof, which it contends did not occur, because the case alleges "moral turpitude" on the part of the Claimant (see Organization Brief, pages 5, 7). The Organization argues that the Claimant did not intentionally omit or falsify information, and any appearance of such is from the Carrier's mischaracterization of the records provided by the Claimant's doctors (see Organization Brief, page 4). The Organization also argues that due to the nature of the Claimant's injury, it may indeed cause pain, but not on a "proportionate level" to be considered an injury. Essentially, the Claimant's issues related to his 1980s injury are real but on a relatively minor level, such that they fall into a category of health

issues that if every employee had to report them, no other work would be done (see Organization Brief, page 11). Finally, even if the Claimant is technically guilty, this level of offense, which occurred 4+ years ago, does not warrant dismissal (see Organization Brief, page 15).

The Board finds there is no disagreement that the Claimant incorrectly filled out his MED-15 form and should have notified the Carrier about his history of back pain. Concurrently, the Board does not find any direct intention to maliciously withhold information from the Carrier. The Board also notes that while it seems highly unusual that the Claimant could have sustained a back injury in the early 1980s which had no recurrent symptoms until 2011, this is what the Claimant's doctor submitted on the revised form and we can find no evidence in the record to substantially refute this claim. As such, we find that the punishment of dismissal was not appropriate. The Claimant is to be reinstated, but without back pay.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member

 10/15/12
D. Pascarella
Employee Member

 10/15/12
D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on September 14, 2012.