

PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

UNION PACIFIC RAILROAD COMPANY

Case No. 18

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

This claim is being appealed because of the Carrier's violation of the provisions of the current Agreement, particularly, but not restricted to Rules 1 and 45, when the Carrier, in letter dated September 13, 2002... notified [Mr. Farrell] to the effect that he was dishonest while filling out the original hiring application C.S. 2946, the Medical History and Examination Record dated August 8, 1996 and the Union Pacific Physical Examination Form 93003 dated April 8, 2000, and for reasons thereof, he was assessed a Level 5 Discipline and dismissed from the service of the Company.

In view of the Carrier's action... without according [Mr. Farrell] his contractual rights to due process, we respectfully request that Claimant be reinstated to the service of the Carrier to his former position with seniority and all other rights restored unimpaired, compensated for net wage and benefit loss suffered by him, including, but not limited to, medical and/or insurance premium costs for the Claimant and his family beginning on the date the Claimant was dismissed and continuing and the alleged charges be expunged from his personal record.

Background

During the course of an investigation, it was discovered that in 1996, Claimant C.P. Farrell had falsified his employment application in responding to a question as to whether he had ever had a back injury. He checked "no" on the medical questionnaire when, in fact, at age 19 he had a motorcycle accident that resulted in a broken collarbone and four broken vertebrae. In 2000, he again answered in the negative when asked about prior injuries to his spine on a physical examination form for a DOT certificate. Claimant's

medical history came to light in a doctor's report, and as a consequence, the Carrier initiated an investigation, which was held on August 7, 2002. Following that investigation, Claimant was found to have violated Rule 1.6 by not honestly reporting his back injury at the time of hire. He was assessed Level 5 discipline and dismissed from service. The Organization appealed, and the matter ultimately was submitted to this Board for determination.

Findings

Claimant did not deny the injuries he sustained to his collarbone and back. Rather, he claimed that he (1) did not tell Dr. Varzos about them, as she had reported, and (2) could not remember these injuries at the time he filled out his job application and DOT certification form. Claimant's story, however, is not believable.

First, Claimant could not say how Dr. Varzos would have known about his spinal and neck injuries if he had not told her about them. There is no proof that she came by the information dishonestly or had any motive to fabricate the story. Second, one does not forget an injury that results in a fractured collarbone and four broken vertebrae – regardless of when it occurs. The more plausible conclusion, based on the evidence in the Record, is that Claimant elected not to disclose his prior injuries because he feared that if the Carrier knew about them, he would not have been hired. As Manager Strickland testified, given the heavy lifting performed by employees in the Bridge Department, he would not have ever hired an individual with a history of broken vertebrae.

There is clear case law which has recognized the employer's right to discharge

an employee who furnishes false information on an employment application. For example, in Third Division Award 20507, Referee Robert A. Franden upheld a discharge between the BMW and the Norfolk and Western wherein he stated:

The Claimant obtained his employment by fraudulently representing himself. The Carrier was fully within its rights in terminating his contract. The mitigating circumstances argued by the organization cannot overcome the well established precedent of this Board that obtaining employment by false pretenses is grounds for dismissal.

Similarly, in Award No. 545 of Special Board of Adjustment 279, it was stated:

The Board finds the dismissal to be consistent with Article XI – Application for Employment of the National Agreement of October 30, 1978....The nature of the information withheld from the Carrier was such that if Claimant had furnished same it would have in all probability, not employed Claimant. Dismissal is an appropriate penalty for falsification of employment application....

In the instant case, Claimant admitted that the information that the Carrier discovered concerning Claimant's medical history was factual. Given Claimant's failure to disclose that information on two occasions when he was specifically asked about it, the Carrier was within its rights in finding Claimant guilty of violating Rule 1.6 and in assessing Level 5 discipline.

Award

The claim is denied.


JOAN PARKER, Neutral Member


CARRIER MEMBER

DATED: 12-11-03


ORGANIZATION MEMBER

DATED: 12-11-03