

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE

and

Case No. 12
Claim of W. C. Anderson
Dismissal - Dishonest
Conduct for Failing to
Disclose Pertinent
Medical Information

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION

STATEMENT OF CLAIM: Claim on behalf of Trackman-Truck Driver W. C. Anderson, Jr., requesting reinstatement, restoration of seniority intact, restoration of fringe benefits and payment for all time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Maintenance of Way crafts. The Board makes the following additional findings.

Claimant has been employed by the Carrier since July 11, 2005. In 2004, Claimant had elbow surgery for medial epicondylitis, commonly known as "golfer's elbow," while he was previously employed by United Parcel Service. Claimant completed the Carrier's on-line Pre-Employment Medical Questionnaire in June 2005, but made no mention of this surgery or any other surgery, nor did it mention that he had arm, elbow, wrist or hand pain that had interfered with his work tasks or daily activities, weakness in his arms, hands, legs or feet, difficulty fully moving his arms or legs, or difficulty pushing, pulling or carrying more than 25 pounds.

The Questionnaire that Claimant filed contains all of Claimant's answers to the questions put to him. It does not have any directions such as "please fill out the questionnaire as completely and honestly as you can," does not warn the applicant of disciplinary consequences for omissions or false statements and does not contain a signature. Claimant answered "no" to every medical question that pertains to arms, elbows and surgeries. In the Questionnaire included in the record, most of Claimant's other yes/no answers are blacked out.

Subsequent to Claimant's employment by the Carrier, Claims Manager Chris Hawk received Claimant's Personal Injury Claim that an injury had occurred while he was on duty for the Carrier. As part of the claim investigation, Mr. Hawk received information from the Kansas Workers' Compensation Department that Claimant had surgery for a similar injury (described above) in the course of his prior employment.

Claimant appears to reject the idea that his elbow problems that resulted in elbow surgery in 2004 was the result of an "injury" and was therefore reportable. He purports to believe that the elbow problem that led to his surgery was an "illness" or a "condition" and he therefore did not have to report it.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of MWOR 1.6 (Conduct) and dismissed him from service.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an expedited basis, up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that, although Claimant stated on the medical questionnaire that he had no previous injuries or surgeries, his medical records, which were based on Claimant's statements to the attending physician, show that he had chronic medial epicondylitis and previous surgery. BNSF points out that Claimant did not report his previous injury on his Pre-Employment Medical Questionnaire, notwithstanding what it contends is a clear obligation to do so.

BNSF maintains that, when there is conflicting testimony, as in this case, it is the Conducting Officer who makes determinations concerning credibility. It contends that the Conducting Officer found the testimony of other witnesses and exhibits to be credible and Claimant's testimony not to be so.

As to the Organization's arguments - that Claimant's dismissal under PEPA is not appropriate, that BNSF failed to comply with Rule 13 and Appendix 11 and that the Conducting Officer failed to sequester witnesses - the Carrier contends that they are without merit. It asserts that dishonesty, including falsification or

misrepresentation of an injury, is a stand-alone dismissible violation. The Carrier points out that leniency is not in the Board's jurisdiction, but is, instead, the exclusive prerogative of the Carrier.

The Carrier maintains, in addition, that Claimant was afforded a fair and impartial investigation, the Notice of Investigation was timely issued and contained enough information for the Organization to prepare his defense, and the discipline was issued timely. Finally, the Carrier contends that the issue of sequestration of witnesses was addressed properly during the hearing. It asserts that the sequestering of witnesses during the investigation had no relevance to whether Claimant received a fair and impartial hearing.

The Carrier urges that the claim be denied as without merit.

The Organization argues that the Carrier failed to meet its burden to prove Claimant's guilt by substantial evidence. It contends that the Conducting Officer failed to sequester all witnesses, both physically and electronically. It asserts that, without electronic sequestering, there is no guarantee that Carrier witnesses were not communicating. BMWE also objected to Mr. Hawk attempting to enter into evidence a document that contained no proof of any injury to Claimant, since there was no Social Security number on the document, only an employee identification number. It maintains that the Conducting Officer failed to rule on its objection with respect to the telephonic testimony of Dr. Jarrard, who could not be otherwise identified.

BMWE further argues that Dr. Jarrard acknowledged that Claimant's condition could be considered a "condition" as well as an injury. It points out that Claimant testified that, during his employment with UPS, he missed work due to an illness but not as a result of injury.

The Organization argues that the Carrier failed to provide any evidence that Claimant did not follow Rule 1.6 related to reporting injuries. It contends that the discipline is extreme, unwarranted, unsubstantiated and unjustified.

The Organization urges that the Claim be sustained, that Claimant be reinstated to service with his seniority unimpaired and that he be made whole for all fringe benefits and payment for all time lost.

DISCUSSION AND ANALYSIS: GCOR 1.6 prohibits employees from being dishonest. Claimant's Pre-Employment Medical Questionnaire

contains the information he supplied on-line to the Carrier. As indicated, it does not contain the instructions provided to applicants that they are expected to provide full and truthful responses, or something to that effect. Nor does it contain a signature line. Nonetheless, the Board is persuaded that Claimant had a obligation, as set forth in the cited Rule, to be truthful in filling out the form. However, the evidence clearly establishes that Claimant's answers to the Questionnaire were untruthful. Despite Claimant's protestations and the Union's suggestions to the contrary, the evidentiary record makes clear that Claimant suffered an elbow surgery in 2004, while he was still employed by UPS, and a year before he began his employment with the Carrier. In his answers to the Medical Questionnaire, Claimant did not disclose either the elbow surgery which followed that injury, nor did he disclose that he had arm, elbow, wrist or hand pain that had interfered with his work tasks. Moreover, Claimant acknowledged that he missed work as a result of the problem with his elbow during his previous employment with UPS, which he also failed to state in his responses to the Questionnaire.

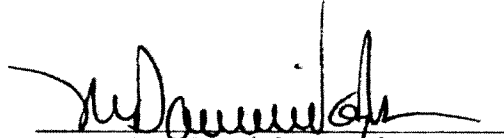
Claimant's self-serving testimony - that he missed work due to an "illness" but not as a result of an "injury," and his assertion that his elbow problem was merely an "illness" or a "condition," which he was not required to report, rather than the result of an "injury" - is neither credible nor consequential. Claimant was obligated to be honest and to disclose any medical problems, such as his elbow problem, his surgery and his lost time from work that could affect his ability to perform his duties for the Carrier. The various characterizations of the condition which led to his surgery do not excuse his reporting obligations.

The Carrier was entitled to have an advance opportunity to evaluate Claimant's suitability for employment, with full disclosure of his prior medical record. Claimant's false responses to the Pre-Employment Medical Questionnaire constitute a material breach of his obligation to provide that information. Similarly, Dr. Jarrard's acknowledgment that Claimant's elbow problem could be considered a "condition" as well as an "injury" is a distinction without a difference. Claimant had an obligation to report his elbow problem, including his 2004 surgery; he failed to do so.


Given the nature and circumstances of Claimant's violation, the Board concludes that the penalty of termination was within the range of reasonableness. The Award so reflects.

AWARD: The claim is denied. The Carrier met its burdens to prove Claimant guilty of the charges and to prove his termination to have been an appropriate penalty.

Dated this 27 day of March, 2013.


M. David Vaughn,
Neutral Member


Carrier Member
Ms. Samantha Rogers


Employee Member
Mr. David Tanner