

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 73

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

BNSF RAILWAY

BNSF FILE NO. 10-18-0051

BMWE FILE NO. C-18-D070-3

Claimant: J. Kiser

STATEMENT OF CLAIM

Consider this an appeal in accordance with Rule 42, on behalf of employee, John Wayne Kiser, Employee Number 0296954 for reinstatement to service with seniority unimpaired and for all lost wages, including but not limited to all straight time hours, overtime hours, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, and any and all other benefits to which entitled, but lost as a result of Carrier's arbitrary, capricious, and excessive discipline in dismissing claimant from service. In other words, this appeal seeks to make claimant whole and expunge his record the same as if he was never affected by this discipline. A simple joint inspection of Carrier's records can determine the extent of loss.

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

Public Law Board 7602 has jurisdiction over the parties and the dispute involved herein.

In the instant matter, Claimant received a letter dated August 25, 2017 advising him to attend a formal investigation:

An investigation has been scheduled at 0900 hours, Monday, September 4, 2017, at the Holiday Inn Express, 3600 N. Village Drive, St. Joseph, MO 64506, for the purpose of ascertaining the facts and determining your responsibility, if any, in

connection with your alleged dishonesty during the hiring process. The date BNSF received first knowledge of this alleged violation is August 21, 2017.

Following postponements, a hearing was held. Claimant was notified of the results of the investigation on November 3, 2017:

As a result of investigation held on Monday, October 9, 2017, at Holiday Inn Express, 3600 N. Village Drive, St. Joseph, MO 64506 you are hereby dismissed effective immediately from employment with the BNSF Railway Company for dishonesty during the hiring process.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 1.6 Conduct.

In assessing discipline, consideration was given to your discipline record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA).

Enclosed are copies of the investigation transcript and exhibits entered during the investigation. Copies of these documents have been sent to your Representative.

The Carrier argues that it complied with the time limits for initiating the investigation. The Carrier did not discover the undisclosed convictions until it was able to compare Claimant's criminal history to his employment application. The notice of investigation timely followed the discovery. The Carrier continues that Claimant was not fired for having misdemeanor convictions, rather, Claimant was fired for not disclosing the prior convictions on the clearly worded employment application.

The Organization counters that agreement time limits were not followed. The Carrier knew of the violation on August 15 or 16 and set the investigation for a date after the expiration of the Agreement term. On the merits, Claimant clearly testified that he followed the recommendation of the Carrier recruiter regarding disclosure of a prior convictions. According to the Organization, Claimant was honest with the recruiter regarding ten year old convictions. The recruiter told Claimant that seven years was the operative time limit and there was no need to disclose older convictions. The Organization casts this evidence as unrebutted. The Organization continues that the conversations with the recruiter were never about lying, they were about what was required to be disclosed. Further, the person who conducted the interview was not a witness. The Claim must be granted.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

Here, the Organization asserts a procedural defect that renders void the discipline. According to the Organization, the Carrier was aware of the infraction on August 15 or August 16 and scheduled an investigation for a date that exceeded the timelines. The initial call to the BNSF Hotline was regarding Claimant performing activities in violation of his medical leave restrictions. There was presumably no need to obtain his employment application when the investigation began. Part of that investigation included running a criminal history. An examination of the evidence shows that the Carrier became aware of the prior convictions on August 15 or August 16. However, that is when the Carrier learned of the prior convictions from a third party provider. It was not until Carrier obtained a copy of the archived employment application that a comparison was made. The employment application was received by the investigating Carrier personnel on August 21. The notice was timely issued following that date. On the facts presented in the instant matter, the evidence establishes that the Carrier officials conducting the hotline investigation learned of the prior convictions and then ordered the employment application. Based on the facts of the instant matter, the time period began when the employment application was obtained.

On the merits, the Organization asserts that Claimant followed the advice of the recruiter and did not disclose his prior misdemeanor convictions. His testimony about the initial telephone call from the recruiter follows:

CLAIMANT: So he sent me a an email let me back up here. Before before we continued on with the conversation I said to him, I said yeah I would be interested in the job but I need to let you know that I have I have some convictions on my record. And he says, you know he says well how old are they and at that time I believe they were 10 years old. And he told me that don't even

worry about it. He said they only go back seven years, just mark no. I said okay. So I went home, filled out the application, put in the no response, um [inaudible 0:46:21.2] should be no arrests. I mean passed the diagram [phonetic] showing I passed that aptitude test and I went on with my career and here we are.

RUSSELL SWEET: So who was this guy that that told you to mark no on the application then?

CLAIMANT: He said he said his name was Samuel McKeever. He was a BNSF Recruiter he identified himself as.

RUSSELL SWEET: He actually worked for BNSF?

CLAIMANT: He had a BNSF Railway email address.

RUSSELL SWEET: And he specifically told you that you did not have to list all convictions on the application?

CLAIMANT: He said as long as they were more than seven years old not to worry about it.

RUSSELL SWEET: Specifically?

CLAIMANT: Specifically.

RUSSELL SWEET: Did he did he say that about concern about seven years previous or anything other than seven years previous or or didn't have to list them.

CLAIMANT: He worded it exactly like I just said, that I stated earlier.

RUSSELL SWEET: So he

CLAIMANT: Mark no. He said if they're seven years old, don't even worry about it dude, mark no. I would say it was probably more off the record but I took it as fact.

RUSSELL SWEET: Okay. So look back at Exhibits go to Exhibit 6 is the employment application. That is your employment application and you did put no on the conviction response?

CLAIMANT: I don't yeah I don't know. This is just typed out. I mean I don't know, it's been four years. But I mean I mean I put no. Yes I did put no. I mean as a fact, yes sir, under the understanding that anything over seven years didn't count.

RUSSELL SWEET: Okay. And then this Exhibit 7, is that that actually your

CLAIMANT: Um, it looks accurate, yes sir.

RUSSELL SWEET: Okay. So Exhibit 8 we went through the employment process. Did the BNSF HR Representative review the slides?

CLAIMANT: There were slides. I mean it's been four years ago, I don't remember this one specifically. I do know that anything regarding this at all was not a even in my mind when it came to anything because I was under the understanding that anything over seven years didn't count.

CLAIMANT: So I was when I if I would have been shown this at the time, in my mindset I would have been like okay if it's within seven years then I need to put it down. If it's after seven years then I'm good to go.

RUSSELL SWEET: And at this point how old are these convictions which

CLAIMANT: Um.

RUSSELL SWEET: So say how old was your last conviction?

CLAIMANT: 2004. So this was 2014. Ten years.

RUSSELL SWEET: And then during the interview process you just didn't feel necessary to talk about that at all?

CLAIMANT: He never asked me that. He never asked me. I um I mean it was it was not even, he's saying here that you know he did or whatever, that was never discussed. I remember conversations better than I do slides and I would have remembered that.

Claimant testified to what he was told by the recruiter and that he was repeating is verbatim. Claimant was concerned about his prior interactions with the criminal justice system and whether they barred him from employment. According to Claimant, the recruiter "... said as long as they were more than seven years old not to worry about it." The recruiter was not part of the interviewing or briefing process. Claimant chose not to disclose his prior convictions to the Carrier during the hiring process.

A review of the above testimony indicates that the recruiter told Claimant "not to worry about [his prior convictions]." Not worrying about the implications of the prior convictions is a different piece of advice than not disclosing a prior conviction. There is nothing in the record regarding whether the Carrier would not have hired Claimant had it known of his prior convictions, however, the Carrier had a right to know of those convictions when making the decision to hire.

Claimant agrees that he did not disclose his prior convictions. If the only evidence of his disclosures were contained in the above discussion, then the Organization's position

may nonetheless have some merit. However, the record is not limited to the above testimony. The record also includes the information Claimant provided on his employment application:

In your past 5 years of employment, have you ever been fired, terminated, dismissed, asked to resign, forced to leave a position or quit after being told you would be fired, dismissed or terminated?

If the situation was considered a lay off or job elimination, or you have never been employed, answer

"No."

Termination History

No

In your past 5 years of employment, have you ever received any discipline, written or otherwise, including letters of warning, or ever been suspended?

Disciplinary History

No

CRIMINAL CONVICTION & TRAFFIC HISTORY

A conviction or plea will not automatically bar employment, but will be considered as it relates to your suitability for the job in question. You are not required to disclose arrests, sealed or expunged criminal records, or juvenile offense history. Do not answer the following 4 questions if you live (or are applying to work) in a location in which pre-employment inquiries about an applicant's criminal history are banned, If you live (or are applying to work) in a location in which such inquiries are permissible, you are required to answer the following 4 questions.

Have you ever been convicted of, or pled guilty, or nolo contendere (no contest) to ANY crime (excluding minor traffic violations)?

Conviction Response

No

If yes, provide complete details for each incident, including NAME OF CONVICTION/PLEA, DATE, LOCATION, MISDEMEANOR/FELONY, DATES OF INCARCERATION (if any) and any FINAL DISPOSITION (e.g. suspended sentences, fines, probation, deferred adjudication or similar disposition),

Conviction Details

In the last 7 years, have you been convicted of or pled guilty or nolo contendere (no contest) to any traffic violations?

Traffic Violation Response

No

If yes, state the DATE and CITY, STATE of the conviction or plea, nature of the violation (e.g., speeding), and final disposition for each incident (e.g., probation, fine).

I UNDERSTAND THAT ANY MISREPRESENTATION OR OMISSION IN ANY REQUIRED ANSWER IS GROUNDS FOR REJECTION OF MY APPLICATION, WITHDRAWAL OF ANY PENDING OFFER OF EMPLOYMENT, OR TERMINATION OF MY EMPLOYMENT AT ANY TIME, REGARDLESS OF WHEN SUCH MISREPRESENTATION OR OMISSION IS DISCOVERED. STATEMENTS IN THIS EMPLOYMENT APPLICATION DO NOT CREATE A CONTRACT OF EMPLOYMENT.


(emphasis in original)

Here, the questions on the employment application were clear. Contrary to what the recruiter may have told Claimant, there is no limit for non-traffic code convictions on the application. When Claimant read the questions regarding prior convictions, he was on notice that all prior convictions were required to be disclosed. If there was any lingering doubt in Claimant's mind about the seven years, then those issues were resolved when Claimant got to the question about traffic code violations. The employment application had a seven year look back question for traffic offenses. When Claimant got to the traffic code question, he was aware that the seven year time limit applied only to traffic violations and not other convictions. He could have asked a Carrier employee in the hiring process whether his prior convictions should be disclosed. He chose not to inquire and continued to assert that he had no criminal record.

Claimant was on notice that all convictions must be disclosed as part of the hiring process. His reliance on the suggestion of a recruiter who was not part of the interviewing and briefing process defies logic.

Award:

Claim denied.



Carrier Member



Organization Member

Brian Clauss

Neutral Member

Dated: July 18, 2019