

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 209

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 Railway) of Mr. T Milgrim issued by letter dated July 30, 2012 in connection with his alleged conduct unbecoming an employee in that he omitted or falsified information on his employment application when on his November 5, 2009 MED-15 Form he did not indicate that he had ever had 'back injury/pain' and other injuries and affirmatively stated that he did not ever have such conditions at any time prior to his employment application, but subsequently submitted medical information to the Carrier's Medical Department confirming that he had a history of significant back pain prior to November 5, 2009 and reported that he had suffered a serious crash injury in 2004 was arbitrary, capricious, unreasonable and in violation of the Agreement (Carrier's File MW-BLUE-12-10-SG-248).
2. As a consequence of the violation referred to in Part 1 above, Mr. Milgrim shall receive the remedy prescribed under Rule 30(d) of the Agreement."

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 November 26, 2007 as a Trackman. The Carrier utilizes a form, MED-15, as part of its routine pre-employment procedures. The MED-15 form requires all potential employees to provide their medical background and history, including any current medical conditions. Specific to this case, the form requires potential employees to indicate if they have ever experienced or are currently experiencing any “back injury/pain.” The Claimant completed his MED-15 form during the pre-employment screening process and checked “no” in response to this question. The Claimant was on medical leave and received treatment for a medical problem on May 3, 2012. Upon his return to work the Claimant provided medical records to the Carrier documenting his condition – a routine part of the Carrier’s return to work process. The paperwork provided to the Carrier indicated that the Claimant had told his treating physician that he had back pain due to being pinned down by a weight in 2004 – a time period in which he was not employed with the Carrier. The Claimant also disclosed to his treating physician that the pain was significant enough to receive a steroid injection on at least one occasion. The Claimant alleges to have forgotten about the cracked ribs at the time he was filling out the MED-15 form over three years after the 2004 incident.

The Carrier’s Medical Department determined that, had it been aware of these conditions at the time of the Claimant’s employment application, it would have medically disqualified him from employment. Due to these findings, the Carrier charged the Claimant with conduct unbecoming an employee due to his omission of medical history on the MED-15 form. A formal investigation was conducted including a hearing on July 18, 2012. The Carrier concluded that the Claimant was guilty of the charges and dismissed him from service via letter on July 30, 2012.

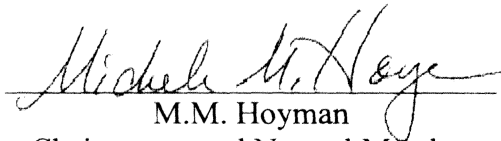
The Carrier’s argument in this case is that the facts are not in dispute: the Claimant clearly failed to disclose crucial medical information. It dismisses the Organization’s argument that the Claimant simply did not remember the issue by pointing out that the 2004 injury was of such a serious nature that it could not simply be forgotten when he was being asked questions about a history of back pain (see Carrier Brief, page 7). Furthermore, the Carrier notes that the employee certification on the MED-15 form emphasizes the importance of accurate information and notes that employees may be terminated for failing to disclose their full medical history. The Carrier concludes the dismissal was appropriate because the failure to disclose the information constitutes an action of “blatant dishonesty.” It notes the arbitral precedent is well settled that the Carrier has no obligation to retain dishonest employees (see Carrier Brief, page 14).

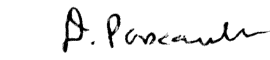
The Organization notes that, as this case involves an allegation of dishonesty, the Carrier’s burden of proof is heightened beyond the normal “substantial evidence” standard. It argues the Carrier’s determination of the Claimant’s guilt is based on hearsay, as there were no witnesses that testified first-hand regarding the evidence. It also alleges the Carrier’s Medical Department incorrectly states several case facts in its reports, suggesting that its credibility is questionable (see Organization Brief, page 5). It is the Organization’s position that, as testified to by the Claimant, the failure to disclose was minor in nature and there was no intention to be dishonest. The Organization concludes

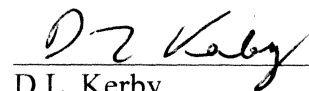
that the Carrier failed to meet its heightened burden of proof because all evidence against the claimant (like the medical documents) was third-hand information and mere speculation. Finally, the Organization notes that even if the alleged misconduct is true, there is arbitral precedent to support the notion that a large passage of time with a satisfactory service record can render the original misconduct as being moot (see Organization Brief, page 10).

As the Claimant in the instant case appears to have a satisfactory work record of over 4 years between the original hire date and the discovery of the alleged misconduct, dismissal would be unwarranted. We find that the omission does not rise to a level which warrants dismissal, although we also note that the MED-15 form is of paramount importance and that the Claimant should not have omitted the information. The Claimant is to be reinstated, but without back pay.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member


D. Pascarella
Employee Member


D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on June 20, 2013.