

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 228

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 services with Norfolk Southern Railway Company) of Mr. D.E. Cody, Jr. issued by letter dated August 10, 2012 in connection with his alleged conduct unbecoming an employee in his providing false and misleading or omitting material information during a pre-employment physical when he completed a Form Med-15 on March 31, 2006 and failed to divulge any information regarding his history of knee injury/pain and multiple surgical procedures was arbitrary, capricious, unjust, unreasonable and in violation of the Agreement (Carrier's File MW-CN-12-10-SG-241).
2. As a consequence of the violations referred to in Part 1 above, Mr. D.E. Cody, Jr. 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 in this case entered service for the Carrier on April 24, 2006 as a Track Laborer. 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 “hip or knee injury/pain” and “hospitalization or surgical procedure.” 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 beginning January 12, 2012 and ending on or around June 11, 2012. The Claimant was completing the employer’s normal return to work process. As part of this process, Claimant provided medical records to the Carrier documenting his condition. The paperwork provided to the Carrier indicated that the Claimant had previously undergone several knee surgeries and also included documentation from the Claimant’s treating physician that he had a history of knee pain. The Claimant’s knee pain and surgeries occurred before he began service with the Carrier.

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 26, 2012. The Carrier concluded that the Claimant was guilty of the charges and dismissed him from service via letter on August 10, 2012.

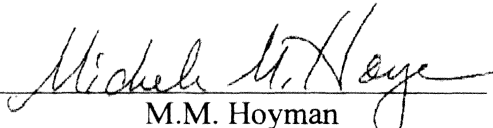
The Carrier’s position is that the Claimant is clearly guilty of falsifying the MED-15 form. The form was filled out in a way that indicated the Claimant had never experienced any knee injuries, pain, or surgeries – which was directly contradicted by the medical history provided by his treating physician when returning from leave (see Carrier Brief, page 5). The Carrier does not find any merit in the Claimant’s explanation that his physician must have misunderstood him and incorrectly documented his medical history. This testimony was not corroborated by any other evidence, and in fact the Claimant testified that he asked his physician to change these notations but she refused “due to ethics or something” (see Transcript, page 37). The Carrier points out it seems highly unlikely that, if the Claimant’s physician had truly made an error, she would not be willing to correct it. In addition, the Claimant actually told two Carrier employees that he had previously undergone knee surgery (see Carrier Brief, page 8). The Carrier considers the omission of the information on the MED-15 form to be equivalent with dishonesty (see Carrier Brief, page 12), and as such argues that dismissal in this case was both warranted and appropriate.

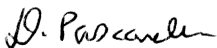
The Organization notes that, as this case involves an allegation of dishonesty, the Carrier’s burden of proof is heightened beyond the normal “substantial evidence” standard (see Organization Brief, page 5). It also argues the Carrier’s determination of the Claimant’s guilt is based on hearsay, as there were no witnesses that testified first-hand regarding the Carrier’s evidence (see Organization Brief, page 7). It is the Organization’s position that, as testified to by the Claimant, the appearance of a failure to disclose key information was actually based on a mistake made by the Claimant’s physician in recording his health history. 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

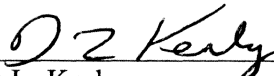
notes, that, even if the alleged misconduct is true, there is arbitral precedent to support the notion that a large passage of time with a satisfactory service record can render the original misconduct as being moot (see Organization Brief, page 8). As the Claimant in the instant case appears to have a satisfactory work record of over 6 years of service, the Organization contends dismissal is inappropriate.

The Board finds sufficient evidence in the case record to suggest the Claimant intentionally falsified the MED-15 form. It seems highly unlikely that the Claimant's doctor would mistakenly document a history of knee surgeries and years of knee pain, and then decline to change those incorrect notations. The level of omission here is material – the Carrier's Medical Director has certified that if the Carrier had been aware of these issues, the Claimant would not have been medically eligible for hire. The Carrier has a reasonable expectation to be notified of these types of medical details before making a hiring decision. In coming to our conclusion, the Board has carefully weighed the Claimant's record of service along with the misconduct in this case. Overall, we find that dismissal was appropriate.

The claim is denied.


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.