

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**AWARD NO. 241**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**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) of Mr. T. Fitzpatrick issued by letter dated November 6, 2012 in connection with his alleged omission and/or falsification of information on his employment application was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File FITZPATRICK-T-10-12/MW-CN-12-14-SG-301).
2. As a consequence of the violation referred to in Part 1 above, Claimant Fitzpatrick shall be immediately made whole, exonerated of all charges, restored to the service of the Carrier and paid for all time lost with seniority, qualifications, vacation and all rights unimpaired."

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 January 2, 2007 as a Track Laborer. Part of the Carrier's initial application process is Form MED-15, which requires all potential employees to disclose any history of health issues. The MED-15 form also requires the employee to sign a statement certifying that the information provided on the form is correct to the best of their knowledge. The Carrier uses this information to determine whether the applicant is fit for work in a railroad environment. Of relevance to the instant case is a question on the MED-15 form which asks "Have you ever had or do

you now have any of the following?” and includes a list of medical conditions including “hip or knee injury/pain” and “hospitalization or surgical procedure.” When the Claimant filled out MED-15 on November 19, 2006 he checked “yes” to both of these items on the form, writing in explanation that he had a 2002 knee surgery and was hospitalized as an outpatient as a result of his knee problems. In the initial hiring process the Carrier’s Medical Services department requested and received documentation regarding the disclosed surgery, and made the determination that the Claimant was able to work for the Carrier. On July 18, 2011 the Claimant began a medical leave due to an injury that occurred at home. On July 23, 2013 as the Claimant was preparing to return to work the Carrier requested medical records to determine his fitness to return to duty. This set of medical records noted a previously undisclosed knee surgery that occurred on December 15, 2005. The Carrier’s Medical Department determined that, had the Claimant disclosed the second knee surgery on the MED-15 form, he would not have been judged as being physically capable of working for the Carrier. As a result of these events the Carrier held an investigation including a hearing on October 18, 2012. The Carrier found the Claimant was dishonest by omitting the 2005 surgery and dismissed him from service via letter on November 6, 2012.


The Carrier’s position is that the Claimant clearly failed to disclose a major surgery on the MED-15 form as he admitted during the hearing (see Transcript, pages 32-33). The Carrier notes that its original request for medical records at the time of the Claimant’s employment application included “all records” pertaining to the knee surgery, but what was actually provided completely omitted the 2005 surgery. At the hearing, the Claimant submitted into the record a fax cover sheet that indicated he faxed all applicable records including the 2005 surgery on December 7, 2006— a fax which totaled 27 pages. There is conflicting testimony regarding what the Claimant actually faxed. The Carrier’s records show that when the Claimant faxed his medical records initially that it received only 16 pages of documents and none of them contained a reference to the 2005 surgery. The Carrier argues that the coversheet alone does not demonstrate that all 27 pages were actually faxed since the Claimant could not or would not produce a fax confirmation sheet. The Carrier also notes that even if the fax were sent, the Claimant failed to specifically disclose the 2005 surgery on the MED-15 form and during his pre-placement exam. The Carrier cites 4 NRAB 4475 and PLB 6189, Award 25 as demonstrating that it is up to the Hearing Officer and not this Board to determine credibility.


The Organization argues that since this case involves allegations of “moral turpitude,” the Carrier is under a heightened “clear and convincing” (and not “substantial evidence”) burden of proof. It is the Organization’s position that the carrier has failed to meet this increased standard of evidence. The Organization characterizes the Claimant’s actions as a misunderstanding. The 2005 surgery was a follow-up to the 2001 surgery which was disclosed, so the Claimant believed he had been fully truthful as his comments noted his subsequent outpatient treatment on the MED-15 form. Since the Claimant passed the Carrier’s initial physical exam, which included a consideration of his right knee due to the 2001 surgery, the Claimant was clearly suitable for working in a railroad environment. Even if the Carrier met its burden of proof, the Organization argues that there is significant arbitral precedent which suggests passage of time from an

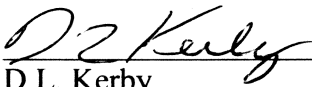
employment application can render any initial dishonesty as moot. In support of this position the Organization cites Norman Brand's (*Discipline and Discharge in Arbitration*, 1998<sup>1</sup>) analysis of *Kraft Foods* (1968). As the Claimant in this case had 6 years of discipline-free service and had no work related injuries to his right knee during that time, the Organization maintains dismissal is unwarranted.

Given the Claimant's disclosure of the 2001 surgery on his MED-15 form and the explanation he wrote at that time concerning his knee surgery, it does not appear that the failure to disclose the 2005 surgery was an intentional omission. Concurrently, the Board notes that at the time of the Claimant's initial application he passed the Carrier's physical exam, which in this case included a specific examination of his right knee given the disclosure of the 2001 surgery on the form. We consider the initial passage of the Carrier's physical and the lack of subsequent work injuries over 6 years to be significant mitigating factors in this case. Overall, the Board concludes that dismissal in this case was not appropriate. The Claimant shall be reinstated to service but without back pay, contingent upon his satisfactory passing of the Carrier's return to work exam.

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 May 9, 2014.

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<sup>1</sup> The Carrier's position on the standard set in *Discipline and Discharge in Arbitration* is that it does not apply here. It argues that the standard does not concern railroad arbitration.