Award No. 4359

Docket No. 3968

2-CRI&P-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: (1) That under the current agreement, Carman Roy W. Crump was unjustly dismissed from the service on November 25, 1960.

(2) That accordingly, the Carrier be ordered to restore Carman Crump to service with all seniority and service rights unimpaired and compensate him for all time lost retroactive to November 25, 1960.

EMPLOYES' STATEMENT OF FACTS: Carman Roy W. Crump, hereinafter referred to as the claimant, entered the service of the Chicago, Rock Island & Pacific Railroad, hereinafter referred to as the carrier, on June 21, 1954. At Topeka, Kansas.

On November 8, 1960, the claimant was notified to appear for investigation.

The investigation was held as scheduled on November 18, 1960 and the claimant was dismissed on November 25, 1960 for alleged violation of Rule "N", of Form G-147 Revised, which are general rules imposed by the carrier on all employes and are not a portion of any agreement between the organizations comprising System Federation #6 and the carrier.

The employes, on April 12, 1961 wrote Mr. Mallery, Vice President—Personnel, in an attempt to determine just which item in Rule "N" Mr. Crump was alleged to have violated.

The carrier did not reply to this letter and in conference with management on April 18, 1961, they still were unable to inform the employes what Mr. Crump did to justify this severe action on the part of the carrier.

This dispute has been handled with the highest designated officer of the carrier, who has declined to adjust it. The agreement effective October 16, 1948 as subsquently amended, is controlling.

reasons as shown in A-12159 (same parties), because applicant assumed responsibility to make true statements when he signed application and any false statement or misrepresentation was cause for dismissal regardless of when discovered.

1—17162, Referee Douglass (D.R.)

Here a fireman was dismissed in 1950 following admission he had falsified his application for employment dated July 5, 1946, by answering "No" to question "Have you ever been indicted for or convicted of any crime." In denying reinstatement, the Board held: "The carrier was justified in its action, here complained of. The contract of employment was voidable inasmuch as the claimant deliberately misled the carrier and withheld vital information to which the carrier was entitled to have in order to determine if it would hire the claimant."

1—19111, Referee Sembower

In this case a yard brakeman employed on January 10, 1946, was dismissed on February 18, 1957, after it was developed that claimant falsified his application for employment, having replied "No" to the question "Have you ever been convicted of a Crime?", when in fact he had five court appearances on various charges prior to June 12, 1945. Claim for reinstatement and pay for time lost was denied.

Most assuredly the application falsification was of a serious nature because the carrier would not knowingly employ a man with a criminal record such as Crump's.

The responsibility for answering all application questions honestly rests solely with the applicant and he must bear the consequences of any false responses if and when brought to light.

Proven concealment of fact by Mr. Crump upon his entry to service would, in and of itself, be sufficient grounds to terminate the employment relationship at any time.

The investigation of November 18, 1960 having developed the above facts as to Mr. Crump's involvement in the tavern fracas on the night of October 28, his leaving work early on October 29, his unauthorized absence from work on October 30 and his proven falsification of application make Mr. Crump's dismissal mandatory.

The facts are clear that Claimant Crump is not the type of individual that should be retained in the carrier's services. His involvement in a shooting, his disregard for carrier's rules and instructions concerning protection of his job, his unwillingness to properly seek to lay off or even tell his supervisors of his request to do so, is symptomatic of the attitude which he showed the first day of employment when he falsified his employment application.

Carrier respectfully requests your Honorable Board to uphold carrier's dismissal and denial of employe's claim for reinstatement and pay for time lost since date of his dismissal.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On December 10, 1951, the Claimant Roy W. Crump applied to the Carrier for employment as a laborer at Topeka, Kansas. He completed and signed an application form. Question 10 thereof reads: "Have you ever been convicted of a crime?" The Claimant answered "No". He was hired by the Carrier as a laborer as of the date of application but was a carman at the time here relevant.

At about 11:00 P. M., October 28, 1960, he wa involved in a shooting incident in a tavern and was shot in the right side. He called the police who took him to a hospital where he received medical treatment and then left. On the following day (October 29, 1960), a Topeka newspaper reported the shooting and stated, among other things, that the Claimant "was admitted to the hospital for treatment and observation, but attendants said he walked out before being dismissed."

The Claimant reported for work in the morning of October 29th. At approximately 3:00 P. M., he told E. E. Buckman, a carman and write up man, that he had a cold and felt sick. He went home and did not report for work on October 30 and 31, 1960, which were regular working days for him. November 1 and 2, 1960 were his assigned rest days. When he reported for work in the morning of November 3, 1960, he was informed by lead carman Pressgrove that master mechanic J. W. Gann had issued instructions that he (the Claimant) would not be permitted to return to work until he obtained a company doctor's release. The Claimant did not submit such a release and, therefore, was not allowed to work.

On or about November 7, 1960, the Carrier instructed special agent C. P. Ahern to make a check of the Claimant's police record. Ahern's investigation revealed that, during the period from May, 1940, to July, 1949, the Claimant had been fined or forfeited bond for being drunk on seven different occasions. During the same period, he was also fined $100.00 and sentenced to serve 60 days in jail for driving while intoxicated and leaving the scene of an accident. In addition, the police record showed that, during said period, the Claimant was fined or forfeited bond once for using profane language, resisting arrest, disregarding police officers and disturbing the peace by fighting, respectively.

Under date of November 8, 1960, the Carrier charged the Claimant with (A) having absented himself from work without permission on October 30, 1960; (B) having been involved in a fight and shooting on October 28, 1960; and (C) having falsified question 10 of the application form for employment.

After an investigation hearing, the Claimant was dismissed from the Carrier's service, effective as of November 25, 1960, on the sole ground that he violated Rule "N" of Form G-147, Revised. He filed the instant grievance in which he contended that he was unjustly dismissed. He requested reinstatement with all rights unimpaired and with compensation for all time lost since November 25, 1960. The Carrier denied the grievance.

Rule "N" on which the Claimant's dismissal is exclusively based reads, in part, as follows:

"Employes who are . . . dishonest . . . will not be retained in the service."

The basic question posed by this case is whether the Claimant was dishonest within the purview of Rule "N" when he answered question 10 in the negative.

1. In a strictly technical sense, the term "crime" connotes any positive or negative act in violation of penal law. However in common usage, the term only refers to such offenses as are of a more serious and grave character. See: Black's Law Dictionary, 4th Ed., 1951, pp. 444-445. In other words, not every minor traffic violation or other slight infraction of the law are regarded as crimes in common parlance. See: Award 1301 of the Second Division. Moreover the law of labor relations is firmly settled that not all omissions in an application form for employment warrant discipline when they are subsequently discovered. Omissions caused by an oversight, a lapse of memory, and the like are normally disregarded and do not justify discipline. On the other hand, this Board as well as industrial arbitrators have consistently held that an employe is subject to discipline when he deliberately and deceitfully, or, in other words, dishonestly, misrepresents or omits material and substantial facts which would have been a bar to employment if they had been known. See: Awards 12159, 15570, and 16239 of the First Division; 3618 of the Second Division; and 4328 of the Third Division; Arbitration Awards in re Lockheed Aircraft Corp., 18 LA 733 (1952); Douglas Aircraft Co., Inc., 19 LA 854 (1953); Rexall Drug Store Co., 39 LA 142 (1962).

Applying the above principles to this case, we have reached the following conclusions:

The record shows that, during the period from 1940 to 1949, the Claimant ran afoul of the law because of drunkeness on numerous occasions. Moreover, he was convicted for driving an automobile while intoxicated and leaving the scene of an accident. Furthermore, he was fined or forfeited bond for several other violations of the law. The accumulation and frequency of his offenses clothe them with a serious and grave character. In addition, his many violations of the law for which he was convicted or forfeited bond constituted a material and substantial fact that would, in all likelihood, have barred him from employment with the Carrier. Finally, the evidence on the record considered as a whole demonstrates beyond a doubt that the Claimant willfully and deliberately concealed said fact in his employment application with intent to deceive the Carrier. Hence, he was dishonest within the contemplation of Rule "N" of Form G-147 Revised.

2. The Claimant argues that he signed the application form about nine years before the investigation hearing was held. This argument is besides the point. In the absence of any knowledge of the Claimant's deliberately untrue answer to question 10, the Carrier was not precluded from invoking Rule "N" merely because of the passage of time. See: Awards 1934 of the Second Division and 5994 of the Third Division; Arbitration Award in re Diamond Power Specialty Corp., 31 LA 599, 603 (1958).

3. We have consistently held that a Carrier's disciplinary action can successfully be challenged before this Board only on the ground that it was arbitrary, capricious, excessive or an abuse of managerial discretion. See: Award 4358 of the Second Division and cases cited therein. In the instant case, we fail to see that the Claimant's dismissal was based on such unreasonable grounds. Accordingly, we hold that he was not unjustly dismissed within the contemplation of Rule 34 of the applicable labor agreement.

4. Since we are of the opinion that the instant grievance is without merit for the reasons stated hereinbefore, it becomes unnecessary to rule on the Carrier's charges (A) and (B), and we express no opinion on the validity thereof.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December, 1963.

DISSENT OF LABOR MEMBERS TO AWARD 4359

The majority is incorrect in stating that "The basic question posed by this case is whether the claimant was dishonest within the purview of Carrier's Exparte Rule 'N,'" which rule was superseded by Section 2 Eighth of the Railway Labor Act and the collective agreement made pursuant thereto; the basic question is whether the claimant was unjustly dismissed under the terms of the governing agreement between the parties to the dispute.

It is apparent that much confusion exists in the findings of the majority due to the fact that it is not understood that there is a difference between arbitration of disputes and adjustment of disputes.

Claimant signed his application for employment in 1951. More than nine years later, because he was arrested for something that happened outside of the hours of his employment, the carrier decided to conduct a so-called "fishing expedition" and charged him with giving false and erroneous information on his application for employment and dismissed him. With and without referees the Board has cautioned that great care should be taken to protect the rights of employes who are dependent upon their wages for their livelihood. Upholding dismissal of an employe for something that occurred outside his employment relation with the carrier, especially after he has given satisfactory service over a term of years as was here shown, is inexcusable.

C. E. Bagwell

T. E. Losey

E. J. McDermott

R. E. Stenzinger

James B. Zink