

The Second Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

Parties to Dispute: (System Federation No. 97, Railway Employees'
(Department, A.F.L. - C.I.O.
((Electrical Workers)
(
(The Atchison, Topeka and Santa Fe Railway Company

Dispute: Claim of Employees:

1. That the Carrier erred and violated the contractual rights of Electrician E. A. Nerad when he was removed from service as a result of an investigation held on April 13, 1972.
2. That, therefore, Mr. Nerad be returned to service with all rights, privileges and benefits restored and that he be compensated for all lost wages.

Findings:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Claimant was employed by Carrier as an electrician on November 2, 1971. On April 27, 1972, following a formal investigation, he was discharged for falsifying his employment application.

On October 26, 1971 Claimant filed his application for employment with Carrier. Under Item 13 he was required to report his previous employment and reasons for leaving that employment. He listed, among other jobs, employment as an Electronic Mechanic from April 1969 to December 1970 at the Marine Corps Supply Center. He stated that his reason for leaving that employment was "Retirement". Further the application in item 15 reads: "Have you any deformity, physical impairment, organic

or other ailment? If so give particulars." Claimant's response was "Yes" and then "Mild arthritis lower spine".

On October 29, 1971 Claimant was examined by the Company's physician for an Entrance to Service physical examination. As part of that process he was asked to fill out part of a medical questionnaire, the first question being: "Have you ever been examined for Santa Fe or any other industry or military service and rejected or discharged for medical reasons?" He responded "No". On the physician's report, approving Claimant for work as an electrician, appears the comment: "States has 'minor' arthritis of lumbar spine but doesn't bother him. Motion OK."

In the course of an investigation caused by an unrelated medical problem of Claimant, Carrier determined that Claimant had received a Civil Service Disability Retirement from his Marine Corps position due to degenerative arthritis. This was affirmed by Claimant during the investigation; however he indicated that he had applied for the retirement and had been granted this type of retirement as part of a large reduction in force program at the base.

Pertinent portions of Rule 40 of the Agreement provide:

"Applicants for Employment - Rule 40 (a) Applicants for employment will be required to furnish such information as may be desired to fully satisfy the Company's representatives as to their fitness for employment and competency to perform the services for which they make application.

"(b) Applicants for employment will be required to pass physical examination before a Company physician.

"MEMO No. 1: Paragraph (a) - If after applicant is employed, investigation develops that he is undesirable or has falsified application, he may be relieved from service by invoking the provisions of Rule 33 1/2."

The investigation and the submissions of the parties do not reveal any significant conflict as to the facts in this dispute, but rather important differences in their interpretation. Carrier contends that Claimant deliberately falsified his employment application - and further that his characterization of his arthritic condition as "mild" was untrue since he knew it was a degenerative type. Carrier asserts that had it been known that Claimant had received a disability retirement from the Marine Corps his application for employment would have been disapproved. It is argued that Carrier was entitled to be put on notice of a disability so that appropriate investigation could be made; this is particularly

important with respect to arthritis which frequently cannot be adequately evaluated without X-rays. Carrier also asserts that Claimant responded improperly to the first question on the medical questionnaire discussed above.

Claimant denies that he falsified his application. He admits error in not adding the word "Disability" to his retirement from the Marine Corps but claims it was not intentional. This he buttressed by asserting that he had not hidden his arthritic condition in either his application or in his medical examination and discussion with the physician. Furthermore, he claims that his condition was indeed "mild" and he was not restricted in employment.

First, we do not view Claimant's characterization of his ailment as "mild arthritis lower spine" rather than "Lumbosacral arthritis - degenerative type" as being an inaccurate lay description. The term "degenerative" is not an indication of severity, but rather type. Further, with respect to the response Claimant offered in the medical questionnaire, no reasonable man would equate a discharge for medical reasons with an employee initiated disability retirement. This then leaves the principal issue of Claimant's inaccurate description of his reason for separation from the Marine Corps position.

In First Division Award 15506 (and a series of following Awards) certain criteria were posed which are relevant to this dispute:

"It first should be said here that it is not every misstatement of a fact in obtaining employment that on discovery would disqualify the employee from remaining in service after serving for sixty days. For instance, the misrepresentation may be been incorrectly and mistakenly made. It might involve immaterial matters, or that which was false at the time may have since become harmless. The true test is, (1) did the employee intend to deceive, (2) was the carrier deceived, (3) had there been full and honest disclosure would the employee have been hired, and (4) was the deception such as presently makes the one guilty thereof an unfit person to remain in service....."

In the instant dispute there is no evidence that Claimant did intend to deceive. Carrier repeatedly claims that it was deceived and would not have employed Claimant in the absence of the falsification. We do not know whether or not Claimant would have been hired had the missing word been included; and finally we have no basis for concluding that the deception was such as to render Claimant presently unfit as an employee. It is noted that there was no allegation of Claimant being unable to perform his duties during his tenure due to his arthritic condition.

Although we have no reason to question Claimant's motivation and we recognize his candor during the hiring process, the culpability of his omission may not be ignored. Carrier has the unqualified right to be put on notice as to all facts which impinge on the employment decision; in this case the omitted word may well have triggered, at very least, further investigation. (See Awards 1934, 5959, 6013 and 6391 among others).

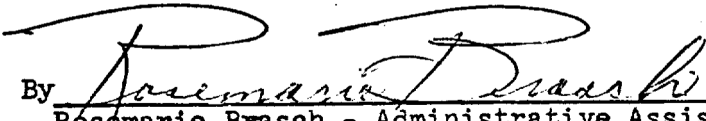
Under the particular circumstances of this case there is not undisputed evidence of Claimant's guilt; we would characterize the evidence as ambiguous at best. The omission of the one word taken together with the remainder of the application and the medical examination do not persuade us that Claimant deliberately falsified his application. However, the fact and the effect of the omission may not be ignored. We conclude, therefore, that the penalty was inappropriate. Claimant shall be reinstated with all rights unimpaired, but with no payment for time lost. His reinstatement, in view of the nature of his disability, shall be conditioned upon his being physically qualified currently for the position.

A W A R D

Claim sustained in accordance with the findings above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 17th day of April, 1974.