Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7959
SECOND DIVISION Docket No. 7807
2-B&O-FO-'79

The Second Division consisted of the regular members and in addition Referee Abraham Weiss when award was rendered.

Parties to Dispute: ( System Federation No. 4, Railway Employes' Department, A. F. of L. - C. I. O. (Firemen & Oilers)
( Baltimore and Ohio Railroad Company

Dispute: Claim of Employes:

1. That under the current Agreement Laborer Roy R. Rowe was unjustly dismissed from the Baltimore and Ohio Railroad Company effective May 10, 1977.

2. That accordingly the Baltimore and Ohio Railroad Company be ordered to reinstate this employe with seniority rights unimpaired, made whole for all vacation rights, made whole for all health and welfare insurance benefits, pension benefits including Railroad Retirement and unemployment insurance, and made whole for all other benefits including wages that he would have earned during the time he was held out of service, also that he be provided with 12% interest in all lost wages.

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.

Claimant was dismissed on May 10, 1977 for falsifying his employment application in that he had answered "No" to a question on the application form, "Have you ever been convicted of a crime(s)?"

Petitioner claims that the dismissal was in violation of the Agreement in that Claimant was dismissed without an investigation or hearing to determine whether Claimant was guilty of the charges; and that under Rule 9 he was entitled to a hearing as a matter of right so as to defend himself against the Carrier's charges. Petitioner argues that nowhere in the record has the Carrier substantiated the basis of its dismissal of Claimant nor has it documented its statements concerning Claimant's criminal convictions.

Rule 9 reads:

> "Employes disciplined will be advised of the causes for such action in writing when requested. No employes will be dismissed without first being given a fair and impartial hearing. Employes may, however, be held out of service pending such hearing."

Petitioner also argues a violation of Rule 15 - Seniority, which reads:

> "Seniority begins at the time the employe's pay starts."

Furthermore, it adds, the applicable Agreement does not provide for a probationary period.

Petitioner concludes that the company's application form, issued by the company, cannot conflict with the protection of a fair and impartial hearing afforded employees in Rule 9.

Carrier contends that its investigation determined that Claimant had several convictions for criminal offenses, although Claimant had stated on the application form that he had never been convicted of a crime; that Claimant's service was temporary pending approval or rejection of his application and that this had been the company's practice for 25 years; that Claimant was not an "employee" for purposes of the Agreement; that Rule 9 is not applicable; and that the Organization's argument that Claimant had established seniority under Rule 15, "in the absence of a probationary period" was not raised on the property and was, therefore, inadmissible.

Carrier also states that the application form, signed by Claimant, includes the following:

> "I hereby certify that the answers in this application are true and complete. I understand that any falsification, misrepresentation, or significant omission may constitute just cause for dismissal, regardless of when discovered.
>
> I voluntarily give C&O/B&O/WM the right to conduct a thorough investigation of my background and past employment, making such inquiries as may be required to determine my qualifications and suitability. And I release from all liability or responsibility all companies, corporations or individuals supplying such information.
>
> I further understand and agree that my employment is temporary pending the approval or rejection of this application and that this application may be rejected by the company for any cause which it may deem proper."

Carrier concludes that Claimant was not dismissed but that his application for employment was rejected because he had "deliberately falsified, misrepresented and omitted the information ... that he had been previously convicted of crimes".

Finally, Carrier cites Awards in which this Board has upheld Carrier's actions in rejecting the application of an employee and his dismissal from service in cases where the individual falsified the employment application, and in rejecting an applicant without a hearing under circumstances similar to those involved in the instant case. Carrier cites in particular Third Division Award 4391 in which the Board stated:

> "This Board has held that an employe working during the period reserved to the Carrier to approve or disapprove his application, is a probationary employe and if his application is denied he gains no rights under the Agreement. Awards 3152, 3520."

A review of the record discloses that Claimant filed his application on April 1, 1977; he started work on April 14, 1977; and that his application was disapproved May 10, 1977.

On this property, there is no probationary rule as such. The Board has held that where an Agreement does not provide a specific probationary period nor a specific period of time for a company to check the information supplied by an applicant on an employment application form, "The carrier has a reasonable length of time for this purpose and, while doing so, the applicant is not considered an employe in the service of the Carrier for the purposes of the Agreement and can gain no rights thereunder." (Second Division Award 1715, Referee Wenke, and Awards cited therein.)

In another case in which the Agreement states, as does the Agreement here involved, that an employee's seniority starts at the time his pay starts, the Board concluded "it is obviously conditioned upon the approval of the employment application". (Second Division Award 7713, Referee Lieberman.)

In signing the company's application form, Claimant agreed that his employment was temporary pending approval or rejection of the application, and that the company could reject the application "for any cause which it may deem proper". The Board in First Division Awards 10 196 (Burgue) and 15 247 (Bushnell) has clearly held that employees placed in service under similar conditions as those here involved are in temporary service; are not "employees" for purposes of the Agreement; and that their continued employment is at the discretion of the company until such time as the application receives final approval.

Carrier in the instant case disapproved Claimant's employment application 26 working days after his hire. Absent a time requirement for the disapproval of an application for employment, such action must be taken within a reasonable time or the employee will be deemed to have been accepted. (Third Division Award 3152 among others). In this case, Carrier's decision must be regarded as having been made within a reasonable period of time.

After careful review of the record, the Agreement and, prior Awards of this Board, the claim will be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of June, 1979.