Award No. 3618

Docket No. 3564

2-CRR-FO-'60

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Mortimer Stone, when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 44, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Firemen & Oilers)

CLINCHFIELD RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Ray Erwin was unjustly dismissed from the service on April 20, 1959 at Erwin, Tennessee.

2. That accordingly he is entitled to be reinstated to the service and his former seniority rights with compensation for all time lost from April 20, 1959.

EMPLOYES' STATEMENT OF FACTS: Laborer Ray Erwin, hereinafter referred to as the claimant, was employed by the Clinchfield Railroad Company, hereinafter referred to as the carrier, on December 17, 1951, and has maintained continuous employment relationship with the carrier, as evidenced by the seniority roster submitted herewith and identified as Exhibit A. The claimant was regularly assigned from 7:00 A. M. to 3:30 P. M. Monday through Friday.

Under date of March 20, 1959, the claimant was instructed by letter from Superintendent of Shops R. J. McBride, to appear for formal investigation at 10:00 A. M. March 31, 1959 to answer charge of:

> "giving false and erroneous information, with respect to your physical condition, in your application for employment, and in the medical history report which you gave at time of employment."

also informing him:

> "You may have a representative with you if you desire."

The claimant appeared at Mr. McBride's office at the scheduled time with Mr. James F. Turner to represent him at the hearing. The carrier refused to allow the claimant to have a representative of his choice, giving as their reason:

> "He is not affiliated with the Brotherhood."

Carrier respectfully requests the Board to so find and deny the claim.

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 were given due notice of hearing thereon.

Article V of the agreement of August 21, 1954 plainly controls the time limit rather than Rule 20 of the printed Agreement. No ground of estoppel appears and appeal in behalf of claimant was timely.

Rule 20 provides that no employe shall be discharged without being given an investigation. The word "investigation" has a recognized meaning in the industry. It means a full and fair hearing with right to representation, except as may be restricted by the agreement, and opportunity to defend. It must contain substantial supporting evidence to justify a discharge.

It appears from the record of the investigation that claimant signed his application for employment on November 9, 1950. More than eight years later he was charged with giving false and erroneous information with respect to his physical condition in his application for employment and in the medical history report which he gave at the time of employment.

The statements charged as fraudulent were his statements that he had never had any previous injuries or accidents except broken leg by shrapnel in Italy; that he had never had any "diseases or conditions" of the spine; that he had no diseases, accidents or injuries in the past five years, and that he last consulted a physician in 1947 for physical examination at a named hospital.

Fraud is predicated on showing at the investigation by evidence of a chiropractor that he had treated claimant for "a back and neck condition" 14 times beginning May 2, 1949. No statement or inquiry was made of the chiropractor as to the nature of the "condition" for which he treated claimant or its cause or seriousness. Claimant stated that the treatment was for "a sore shoulder"; that he had not remembered it and that he did not have any intent to defraud. He further posed the question to the Superintendent of Shops, who conducted the investigation, whether a chiropractor is a physician. The superintendent passed the question on to the general car foreman who answered that he did not know the technical or scientific definition of either a physician or a chiropractor.

Not all misstatements of fact in an application will vitiate an agreement. They must concern material and substantial facts which might well cause rejection of the applicant and they must be patently false so as to show an apparent attempt to deceive. Particularly should this be so where an employe has given satisfactory service over a term of years as was here shown. We do not find that claimant gave any such false or erroneous information in his application.

AWARD

Claim sustained with compensation for wages lost, if any, pursuant to the agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois this 9th day of December, 1960.