

Award No. 4558
Docket No. 4560
2-SP(PL)-FO-'64

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Firemen & Oilers)**

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Laborer Rafael N. Lopez was unjustly treated when he was dismissed from service on October 9, 1962, after five (5) years with the Carrier.

2. That accordingly the Carrier be ordered to restore the aforementioned Laborer to service with seniority rights unimpaired and compensation for all time lost due to said unjust dismissal.

EMPLOYEES' STATEMENT OF FACTS: Laborer Rafael N. Lopez herein-after referred to as the claimant was employed by the carrier and at the time of dismissal had about five (5) years of service. The claimant was dismissed from service October 9, 1962. Under the date of October 5, 1962, Master Mechanic S. S. Gillespie wrote the claimant advising him he was dismissed from the service of the Southern Pacific Company, hereinafter referred to as the carrier.

On the date of October 15, 1962, the claimant wrote to Master Mechanic S. S. Gillespie, referring to the date he received his letter of October 5, 1962, which was handed to him on October 10, 1962, by Foreman Corry. He denied all accusations contained therein and requested a formal hearing as is provided for in Rule 33 of the current agreement.

On the date of October 11, 1962, the carrier's Doctor L. A. Moren wrote to Master Mechanic S. S. Gillespie and explained the claimant's physical condition and requested reconsideration of his dismissal.

On October 15, 1962, the claimant requested and investigation in accordance with Rule 33 of the current agreement. A request for postponement of the investigation was granted by the officers of the carrier and investigation was held on November 13, 1962.

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 respectfully 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.

The claimant herein made application to this carrier for employment as a laborer at Carlin, Nevada. On October 24, 1958, he was sent to Ogden, Utah to complete the employment application requirements. The Carlin foreman sent a note with claimant which requested that the Ogden office assist the claimant in completing the employment forms because he had difficulty in reading or understanding English.

In completing form S-2946, the claimant answered as follows:

“Question: Have you ever been injured or suffered an amputation?

Answer: No.

Question: If you were ever injured did you present claim?

Answer: No.”

The record discloses that on July 22, 1958, the claimant complained of his back hurting to his then employer. And, on August 4, 1958, he was seen by a doctor for this back trouble. He told the doctor that his back had been aching since he did some lifting.

On September 13, 1958, while being treated for the same complaint, another doctor in the same local clinic diagnosed claimant's problem as prostatitis and pain in the left sacroiliac area. Subsequently claimant was treated twice more for this condition and was released from further treatment on October 18, 1958.

The employe states that on May 30, 1962, while lifting ice on the job, his back was injured. It is not known through this record exactly how long he was off work due to this injury, or the seriousness of it. However, claimant's initial position referred to in the record, and filed in the Superior Court of the State of California, in and for the City and County of San Francisco, alleges that he was off work for a period of three months. He also asked leave of the court to amend his complaint to insert the wage loss when it became known.

As a result of claimant's alleged injury on May 30, 1962, the carrier began an investigation into his background. It tells us that claimant was injured on July 22, 1958, while working for his former employer, that he was off work for 37 days as a result of the injury and that he received \$190 from the Nevada Industrial Commission for the disability. Based on, and because of, the above information the carrier dismissed the claimant from its employ on October 5, 1962, charging a “violation of that part of Rule 801 of the General Rules and Regulations, reading:

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

It is the carrier's position that claimant was dishonest in the answers which he gave in his employment application.

The claimant charges that he was unjustly treated when he was dismissed and requests that this Board order the carrier to restore him to service with seniority rights unimpaired and compensate him for all time lost.

The transcript of the testimony at the formal investigation lists claimant's wife as being present to serve as his interpreter. It also contains a letter from the doctor who treated him for his back trouble in 1958 to the effect that in his opinion (doctor's), due to claimant's difficulty in speaking and understanding English, the failure of the claimant to mention his back trouble may very well have been unintentional and caused by his failure to understand the question.

It is too well established to be questioned that the carrier has a right to require that its employment application forms be completely and correctly, as well as honestly, prepared by each job applicant. Whenever an employe has deliberately or deceitfully withheld, or has given incorrect information concerning a material fact, he is subject to discipline upon its discovery. Because he, in such case, has been dishonest.

The record presented to us by the parties discloses that claimant was uneducated and spoke limited English in 1958. The first carrier supervisor to interview him requested that the employing office assist claimant in preparing his application forms; such was not done. A disinterested doctor, having examined claimant in 1958, said that in his opinion claimant could well have misunderstood the questions on the application at that time. The claimant himself said that he would answer the question the same way, as of the time of the hearing, because he believed that he was sick, rather than injured, while working for his former employer. Moreover the record does not tell us date that claimant filed his claim or the date that he was paid \$190.

Based upon this record we are of the opinion that the claimant was unjustly treated when he was dismissed from service. His name should be restored to the seniority list with those rights unimpaired. Because claimant's physical condition is unknown to us except by way of the reference made to his suit filed in the Superior Court his claim (2) is sustained subject to his being physically available to perform the work of his position and also subject to the carrier receiving credit for any compensation earned or statutory benefits received by him.

AWARD

Claims (1) and (2) sustained in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of July 1964.