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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6391
Docket No. 6272
2-N&W-MA-'72

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. 16, Railway Employees'
(Department - A. F. of L. - C. I. O.
(Machinists)
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk and Western Railway Company violated the controlling Agreement when it improperly discharged Machinist Wayne J. Cox, Decatur, Illinois, on October 26, 1970 as a result of investigation held on October 6, 1970.
2. That accordingly, the Norfolk and Western Railway Company be ordered to restore Machinist Cox to service with all seniority, vacation, insurance and all other rights and benefits unimpaired and to properly compensate him for all wage loss retroactive to date of discharge with all indications of charges, investigation and discipline removed from his record.

Findings:

The Second Division of the 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 entered the employ of the Carrier on November 11, 1968. In Mid 1970 in the course of an investigation of an alleged back injury sustained by the Claimant in the course of his employment with the Carrier, the Carrier discovered that the Claimant had been involved in an automobile accident in December of 1962 and allegedly suffered a back injury at that time. Subsequently, after investigation and hearing the Claimant was discharged on October 26, 1970 for allegedly falsifying his employment application, in that he did not report the previous injury to his back.

Claimant raises several procedural points in this matter. First, it is aimed that the exact nature of the charge against Claimant was not disclosed the Carrier until the investigation was actually held, in violation of Rule 55. That rule states in part:

"No employee shall be disciplined without a fair hearing by designated officer of the Railroad. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses...."

The Claimant received a letter dated September 22, 1970 from Foreman Newell which stated:

"You are hereby notified to report to the office of the Assistant to the Master Mechanic, Decatur Locomotive Shop, Decatur, Illinois, at 9:30 A.M. Friday, September 25, 1970, for a formal investigation to determine your responsibility, if any, in connection with your falsifying information on your application for employment.

If you desire to have your duly authorized representatives and/or witnesses present at this formal investigation, please arrange for their presence."

It should be noted, contrary to the Carrier's argument, that Claimant did raise the issue of the lack of knowledge of the precise charge at the investigation in that he would not plead guilty since he said he was not aware of the specific charge.

Rule 33 was designed to protect the employees and insure due process. In this case Claimant was represented at the investigation by the General Chairman, the Local Chairman and two Committeemen, all of whom either knew or should have known what Claimant's rights were. At the hearing there was no formal objection made that Claimant had not been properly informed of the precise nature of the charges; further there was no motion for a continuance for time for adequate preparation. From the record it appears that Claimant and his representatives knew what it was Claimant was being charged with and were prepared and indeed did proceed. This Board finds that Claimant, by his conduct in proceeding with the hearing, without our making any determination of the sufficiency of the charge contained in the September 22nd letter above, waived any right to complain about the charge. This position has been well expressed in Second Division Awards 1251 and 1788 among others.

As a further matter of procedure, Claimant alleges in his submission that he was not charged with a violation of the controlling agreement. We find that it is not necessary to charge a violation of the agreement in order to proceed with an investigation or in order to discipline an employee. A long history of awards supports this position.

In its submission, Claimant states that the Carrier violated Rule 39 in the discharge. The pertinent sentence of Rule 39, which deals with employment applications is "The application shall be approved or disapproved within (30) thirty days after applicant begins work". We do not find support for the position that Rule 39 precludes any action by the Carrier in the event that information concerning falsification of the application comes into its possession more than thirty days after an employee starts to work.

The employment application contained the question, number 14; "Have you ever been injured? If so, when and at what place?" To this question Claimant responded "No", testifying however, that his wife filled out the application for him and he merely signed it and brought it into the office. The investigation presented no substantial evidence establishing the fact of a back injury; Claimant neither affirmed nor denied that he had suffered such injury. However Claimant, at the investigation, did admit that an automobile accident had taken place, that he had received a cash settlement, and that the settlement was for time lost. The amount of the settlement was for time lost considerably in excess of six months; it is reasonable to presume that such a wage loss was for significant injury (even if unspecified) sustained in the accident. For the reasons stated above we find that Claimant did falsify his employment application.

The employment application is a tool which the Carrier may appropriately use in his employment decision for either rejection, or further investigation prior to making a decision. In this case an accurate answer to Question 14 would at minimum have given the Carrier the option of further investigation. This Board has consistently held that employees who falsify applications for employment are subject to discharge regardless of the time lapse between the date of application and the date of discovery. (Second Division Award 5994 and Third Division Awards 11328, 14274, 18103 and others)

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 27th day of October, 1972.