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NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6442
Docket No. 6197
2-SOU-CM-' 73

The Second Division consisted of the regular members and in addition Irving R. Shapiro when award was rendered.

Parties to Dispute: (System Federation No. 21, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Southern Railway Company

Dispute: Claim of Employees:

1. That under the current Agreement, Carman D. R. Everette, Hayne Shop, Spartanburg, South Carolina, was improperly discharged from service November 4, 1970.
2. That accordingly the Carrier be ordered to restore Carman D. R. Everette, Hayne Shop, Spartanburg, South Carolina, to service with all rights, this to include seniority rights, job rights, vacation rights, pass rights and paid for all time lost beginning November 4, 1970 until restored to service and that all of his insurance benefits with Travelers Insurance Company under Group Policy GA-23000 be kept in full force and effect.

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.

Claimant was discharged from service with the Carrier for falsification of his application for employment therewith. At the hearing on the property pursuant to Rule 34 of the Controlling Agreement, Claimant admitted rendering an untrue answer to consequential questions found on Surgeon's Report of Physical Examination which he completed prior to entering Carrier's employ.

As indicated at the hearing, some of the members of this Board have reservations concerning the form of the questions involved in that they fail to afford an applicant an opportunity to provide additional pertinent data. This is an invitation to withhold the information; applicant properly assuming that an affirmative answer to the broad, general question would assuredly result in his rejection as an employee. Despite this we will not reverse the long established doctrine set down in numerous Awards of this Board and succinctly stated in Award 1934 in the following manner:

"Carrier has the right and duty to use care in its selection of employes, to protect the public, its other employes and itself. In order so to do it may make inquiry as to any pertinent record of the applicant. It must be concerned with his physical, moral and mental fitness for the work. ...

... To deny carrier the right to discharge on learning of false denial ... is to deny it the right to investigate the true record of an applicant, and that right is not waived by lapse of time in the absence of knowledge of the false answer."

See also: Second Division Awards 4359, 5156, 5959, 6013; and Third Division Awards 4328, 4391, 5994, 10090, 11328, 14274, 18103, and 18475.

However, this record contains matters which make this case distinguishable from those cited. Claimant was removed from service on June 2, 1970 and instructed to submit to an examination by Carrier's doctor, when supervision believed his behavior to be irrational. Claimant complied with the order and was examined June 5, 1970. The Doctor advised Management that Claimant be disqualified and also notified Claimant that he was making that recommendation. On June 22, 1970 Claimant delivered a letter from a physician, who was treating him as an out patient at a psychiatric clinic, in which is stated that he considered Claimant capable of performing his work at Carrier's installation at Spartanburg, South Carolina. On June 29, 1970, the Carrier's Doctor rendered a report to Carrier. In it he found Claimant to be physically fit, but volunteers the following:

"IMPRESSION: Chronic schizophrenic state with paranoid tendencies.

COMMENT: The daydreaming state and rumination which this patient has exhibited at work make it very likely that he will be injured. With his paranoia, I would be extremely concerned that he would have a prolonged and perhaps impossible convalescence from such an injury.

In view of this, I feel it is best both for the patient and for his employer that he be disqualified."

There is no claim that the Carrier's Doctor is qualified as a psychiatrist. His determination was based upon his conversation with Claimant, in which it was revealed that Claimant was being treated at the psychiatric clinic and the

allegations made to him on the phone by carrier's supervisor. He further refers to a telephone conversation, obviously subsequent to his oral advice of June 5, 1970 and probably post June 22, 1970, with Claimant's physician. His June 29, 1970 report states that Claimant's doctor "stated that he had a form of paranoia". Neither Claimant or his organization were furnished a copy of Carrier's Doctor's report and on July 15, 1970, a grievance was filed against the disqualification of Claimant, demanding reinstatement with compensation for time lost. Carrier did not reply until October 19, 1970; beyond the time contractually provided for proper processing of a claim.

It is noted that in Carrier's Doctor's memorandum of June 29, 1970, reference is made to Claimant's statement to him to the effect that "he had been hospitalized for psychiatric illness ... several years ago. He had shock therapy on one occasion four years ago". Claimant's employment application was prepared and executed by him on February 8, 1968, two and one-quarter years prior to his revelation of a psychiatric condition and treatment therefor approximately two years prior to his securing employment with the Carrier. It was not until approximately four months after being alerted by its Doctor of the false reply to questions in his application for employment, that Carrier raised the new grounds for continuing Claimant out of service. It was not until November 2, 1970 that Carrier ordered a hearing on the charge of falsification of the application,

In February, 1971, the parties resolved the dispute stemming from the June 2, 1970 disqualification on the basis of procedural default on Carrier's part. However, a new claim arose out of Carrier's discharge of Claimant on November 11, 1970.

We see great merit in Petitioner's disturbance with the manner in which this dispute was handled on the property. It was clearly inconsistent with the edict of the Railway Labor Act and the underlying concepts of the Controlling Agreement which obligate the affording of due process to a grievant. The decision of Public Law Board No. 852, Award No. 2, sets forth the considered view of this Board to the effect that:

"The Board finds that the Carrier did not act with due diligence in dismissing the Claimant for allegedly falsifying his employment application, and therefore the dismissal must be set aside."

"There is a sound policy that demands that an employer proceed with dispatch to discipline an employee who has breached important rules reasonably soon after the employer has acquired competent evidence or knowledge of the employee's alleged breach of the rules. To permit the Carrier to proceed against the employee without any regard to the time or to when it acquired this knowledge is to vest within the Carrier arbitrary and unlimited power which violates the concepts of due process and fair play."

"Sound public policy holds that the Carrier is not privileged, after learning of the employee's alleged misconduct, albeit serious, to overlook or ignore this alleged misconduct, absent any valid or reasonable reason for so doing, and then at an appreciable subsequent date institute disciplinary proceedings for the alleged misconduct. Sound public policy holds that the failure to act promptly should be construed as a waiver of the Carrier's otherwise unquestioned right to proceed against the Claimant for allegedly falsifying his employment application."

However, we are not prepared to disregard the fundamental premises outlined in the cited Awards of this and the Third Division which stress our concern for safe operations in the transportation industry. It is our holding that all parties concerned proceed in accordance with the established practice on the property as outlined in Carrier's October 19, 1970 letter to the Organization as follows:

"... the procedure under the established practice throughout the years when there has been disagreement between the Company doctor and an employee's personal doctor over the physical qualifications of the employee to remain in, or return to, service, is that an examination by a neutral doctor be requested by the employee or his representative. In these cases, a neutral doctor is selected by the Company's doctor and the employee's personal doctor to examine the employee, whose decision shall be final and binding as to whether the employee is qualified from a medical standpoint to remain in, or return to, service and to safely and efficiently perform and carry out all of the duties and responsibilities of his assignment. The expense of the examination by the neutral doctor is, of course, shared equally by the parties. ..."

It is suggested that the neutral physician be a certified psychiatrist and that he be made fully aware of all aspects of the Claimant's job functions, the physical attributes of the area in which he is required to work, and be afforded Claimant's complete history of treatment for disturbances of a "mental" or psychiatric nature.

If the above is pursued and the Claimant is determined by the neutral physician to be qualified to return to his regular position as a Carman, then he shall be afforded reinstatement with all seniority rights. Because we cannot permit, and therefore be held to have condoned, an improper material falsification of an application for employment, it is the holding of this Board that Claimant receive no compensation for time lost for the period November 4, 1970 to the date the neutral doctor makes his report to the parties.

A W A R D

Claim sustained to the extent set forth in the Findings.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 16th day of February, 1973.