Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8936
SECOND DIVISION Docket No. 8856
2-CR-FO-'82

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

Parties to Dispute: (International Brotherhood of Firemen & Oilers
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. That, in violation of the current agreement, Firemen & Oiler Adolph H. Flisser was unjustly dismissed from service of the Carrier following trial held on May 7, 1979.

2. That, accordingly, the Carrier be ordered to make the aforementioned Adolph H. Flisser whole by restoring him to Carrier's service, with seniority rights unimpaired, made whole for all vacation rights, holidays, sick leave benefits, and all other benefits that are a condition of employment unimpaired, and compensated for all lost time plus ten (10%) percent interest annually on all lost wages, also reimbursement for all losses sustained account of coverage under health and welfare and life insurance agreements during the time he has been held out of service.

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.

In this case, in a letter of April 30, 1979, Carrier's Regional Mechanical Supervisor was apprised that Claimant had a criminal record. In view of the fact that on his employment application, respecting the job he then held with Carrier, Claimant had written "No" in response to the question "Have you ever been convicted?" Carrier issued a letter dated May 1, 1979, notifying Claimant to attend a May 7, 1979 trial in connection with the charge: "Alleged falsification of Application for Employment dated August 2, 1978". The trial was held on May 7th and continued, as well, on May 15, 1979. Pursuant to the trial, Claimant was notified by document dated May 18, 1979, that he was dismissed from service in all capacities.

At the outset, the Organization alleges a procedural error by asserting that the post trial appeal hearing, to which it asserts Claimant is entitled, by Rules 21(a) and 21(b), was not accorded to Claimant. Rule 21(a) states, in

part: "Appeal from discipline must be made in writing by the employee or on his behalf ... within 15 calendar days after receipt of written notice of discipline". In a letter dated May 29, 1979 the Organization's Vice General Chairman wrote to Carrier's Manager of Labor Relations: "Appeal dismissal (of Claimant) ... on May 18, 1979 ..." Carrier asserts that this letter did not actually specify the desire for an appeal hearing. It also contends that, nevertheless, an offer was made to grant such a hearing. In any event, Carrier also points out that its Manager of Labor Relations timely replied to this letter, denying the appeal.

No further evidence is presented by either party respecting the asserted violation of Rule 21 and this Board simply has not been presented with sufficient evidence, to make a determination as to whether Rule 21 has been violated in these premises.

Another procedural point raised by Organization is that the charge "alleged falsification of application for employment dated August 2, 1978" was not sufficiently precise and exact to have permitted Claimant to have formulated an adequate defense to the allegation that his "No" answer to the question "Have you ever been convicted of a crime?" was a fallacious one. But this assertion seems belied by the awareness demonstrated by Claimant, at the hearing, as to exactly what was at issue in the trial. Such awareness is suggested by the fact that at the trial when the Hearing Officer questioned Claimant as to the accuracy of the data he supplied on pages 1-3 of the employment application, none of which pages contained any questions about convictions Claimant simply responded "Yes". However, when the Hearing Officer queried Claimant regarding Claimant's answers to the questions on page 4 of the application, which page contained the question about convictions, Claimant's response was: "Well to my ability and my way of thinking I think it is". This response intimates, strongly, that Claimant was aware that the key matter as to whether he'd falsified the application related to its fourth page, and in particular, to the question about past convictions which appeared there. Further suggesting that Claimant focused on his answer to the question about past convictions, as the gravamen of the falsification charge addressed to him, is the fact that Claimant appeared at the trial represented by a lawyer. While this fact does not conclusively establish, in Claimant's mind, a link between the letter of charge and his response to the question about convictions it is highly unusual for Claimants at these types of trials to appear with anyone other than an Organization Official to represent them. So Claimant's bringing an attorney with him does suggest that Claimant though that matters relating to crimes could well come into issue at the trial.

For these reasons, as well as because of, as will be indicated below, what had to be Claimant's knowledge of his actual past criminal record in relation to how he had answered the convictions question on the employment application, we find that Claimant well understood what the charge "Alleged falsification of application..." referred to and consequently, had adequate opportunity to prepare a defense to such charge.

Evidence presented at the trial clearly demonstrates that Claimant was convicted, prior to his filing his employment application, of at least two crimes: a) in 1964 of unlawful entry pursuant to a 3rd degree burglary charge and b) in 1973 of driving while intoxicated. Thus, in the most straightforward way, it can be seen that he falsely completed the employment application when he

answered "No" to the question "Have you ever been convicted?"

However, for purposes of sustaining a charge such as made here, "falsification" might be interpreted to mean "knowing" or "intentional" falsification, i.e. presenting inaccurate information with the design of deliberately misleading the party to whom the information is submitted. And Claimant, in the context of urging such an interpretation, sought to show, at the trial, that his inaccurate answer was not such a deliberate attempt to mislead.

Claimant tried to prove that he was induced to answer "No" to the "Have you ever been convicted?" question by actions of the individual who, on behalf of Carrier, administered the process whereby Claimant, as well as others, completed employment applications. There is some intimation by Claimant that he was simply told to put "No", to that question, by this individual at the time that Claimant filled out the application. Indeed, Claimant seems to assert that the person in charge when Claimant and other applicants were filling out their applications, told everyone in the room to answer "No" to the conviction question. However, at first, at the trial Claimant said that he did not know who the other individuals present in the room at that time were. Later, after being given an opportunity to produce some of these individuals for the purpose of supporting Claimant's testimony, Claimant stated that he could not get any such persons to appear on his behalf because they feared they would lose their jobs if they did appear.

In any event, the individual who did supervise, the group of applicants in which Claimant found himself when Claimant completed his employment application, a Mr. Nubile strongly denied that he ever told or tells, applicants to automatically write "No" to the conviction question. Additionally, he testified that he tells applicants to answer that question to the best of their ability and advises that "we do not discriminate against anyone who had been convicted at one time". Nubile also testified that he tells applicants to read the legend on the application which states: "Furnishing false or incomplete information is a good cause for dismissal". Thus there is most imposing evidence arrayed against any possibility of believing that Claimant was simply instructed, without more, to write "No" to the conviction question. This seems especially true in view of what would appear to be great candor on Nubile's part, as will be indicated below.

However, the gist of Claimant's contention on the point of his allegation that he was induced to supply the inaccurate answer he, in fact, gave to the conviction question, can be interpreted, from the hearing transcript, to suggest that certain things said by Nubile, in relation to the conviction question, led Claimant to believe that entering a "No" response was appropriate. For, at one point, Claimant indicates that, in the process of filling out his employment application, he explained his past record to Nubile, by way of inquiring as to what would be an appropriate response to the conviction question and that Nubile told him to write "No" to that question. The plausibility that Claimant was misled in this fashion is heightened by Nubile's candid admission, in his testimony, that when he's asked what convicted means he usually says: "... it's robbery, rape, drugs, if they were in Federal Prison for any reason." Claimant asserts that he explained his record to Mr. Nubile, including the fact that he'd never

been involved in any rapes or murders, nor anything else about which Nubile asked him, and that Nubile then told him to write "No" to the conviction question.

It can be seen that if "convicted" is indeed equated with "robbery, rape, drugs, Federal Prison" Claimant could believe that he was entitled to answer "No" to the question since he asserts he's never been convicted in connection with any of the three mentioned activities nor spent any time in Federal Prison. This conclusion might seem especially warranted, to Claimant, in light of the allusion to Federal Prison, since he asserts that when he was convicted of unlawful entry in 1964 he received a one year sentence but was put on probation respecting it. Additionally, he asserts that after serving four months on probation "I was dismissed". Also, the driving while intoxicated conviction resulted only in a monetary fine.

However, on the other hand, the conviction for unlawful entry evolved out of a charge of burglary which, in the lay mind is not usually sharply distinguished from robbery. Thus, taking into account the spirit of the "Have you ever been convicted question?" viz; to elicit relevant information regarding criminal activities, even if "robbery" is one of the few categories applicable, candor and a desire to be forthright might have dictated that Claimant append to the question, even if answering it, as such, "No", an explanation that he had been charged with burglary in 1964 but that, stemming from this matter, he was eventually convicted only of unlawful entry. To this effect note the following language in Award No. 5959, Second Division:

> "As a general proposition, Carrier is entitled from prospective applicants for employment, though an application for employment, to be put on notice of any fact or factor which would a) be grounds for rejecting the applicant or b) cause Carrier to investigate further before employing the applicant."

Additionally, even if it be considered that drug related convictions are one of the few categories demanding a "Yes" response to the conviction question on April 30, 1979 letter from the Special Investigation Unit to the Carrier's Regional Mechanical Superintendent states that "Criminal Record Inquiry through the Department of Criminal Justice Services, Albany, New York developed the following record of arrests and convictions (regarding Claimant): ... 8/8/73 P.D. Mt. Vernon NY Driving While Intox Drugs Paid $150.00 fine ..." (Emphasis supplied) Thus, it would seem that a drug related offense may have been involved in this last noted incident for which Claimant was apparently convicted since he paid a $150.00 fine respecting it. Again, at the very least, since "drugs" appears on the so-called rap sheet, candor in responding to the conviction question might be thought to have indicated an explanation about the drugs even if Claimant believed an ultimate "No" answer to the question was warranted.

In any event, there is very strong authority to the effect that falsification of employment applications are treated at their face value, as falsifications, period, by applicants, and to the effect that an applicant can not shift the responsibility for making the judgment of whether s/he is entering false information on such a form, to the shoulders of another. Claimant knew that the

question was asking about convictions and knew that he had been convicted, for offenses in the past. For authority that this, in effect, ends the matter see Award No. 22695, Third Division, which stated: "This Board has on numerous occasions, upheld the dismissal of employees for falsification of employment applications".

A case which, perhaps, even more forcefully, establishes the point, that applicants give anything other than full and completely honest answers on employment applications at their peril appears in Award No. 5959, Second Division. Here Claimant's discharge for falsifying an employment application was upheld because he indicated that he had received an "Honorable Discharge" from the Armed Services, when, in fact, he had received a "General Discharge Under Honorable Conditions". It might be especially thought that the amount of deliberate misleading which Claimant's answer could be thought to be designed to generate would be extremely slender since the discharge which Claimant did receive even had the word "Honorable" in its title. However, as seen, this was not sufficient to save that Claimant from being deemed to have falsified his employment application.

Thus, there would seem to be very powerful authority, indeed, for the effect that the entry of false information, per se, on an employment application form constitutes falsification of the form by the applicant. Accordingly, in the face of such authority and because the Board, in its appellate capacity, can not, without excellent reason, overturn Carrier's decision, reached on the basis of the investigation, the determination that Claimant falsified his employment application is upheld.

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 24th day of February, 1982.