Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9115
SECOND DIVISION Docket No. 9256
2-NRPC-EW-'82

The Second Division consisted of the regular members and in addition Referee Albert A. Blum when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(National Railroad Passenger Corporation

Dispute: Claim of Employes:

1. That the National Railroad Passenger Corporation (Amtrak), violated the current Agreement when they unjustly dismissed Electrician J. W. Coons from the service on Friday, March 7, 1980 without a fair and impartial hearing.

2. That, accordingly the National Railroad Passenger Corporation (Amtrak) be ordered to return Electrician J. W. Coons to service with seniority unimpaired and to be made whole for all loss of wages and other rights including premiums and benefits for insurance and vacation.

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.

The issues raised by the Organization is whether the Agreement was violated because the Claimant was terminated without a hearing. The Carrier responded by citing Rule 3 which says that applications for newly-hired employes should be acted upon within 60 days (commonly termed a probationary period) but that this limitation would be extended to three years if the applicant submitted "materially false information". As a result, the Carrier claims that since the Claimant did respond falsely in his application by not reporting that he had "tennis elbow", a fact which he admitted later, and since a hearing is not necessary if an application for employment is not approved within the time allotted (three years in this case), that therefore the discharge of the Claimant was justified.

A number of earlier awards consistently ruled that a hearing is not necessary if an employe's application is not approved within the allotted time in the agreement (Second Division Awards 1463, 4817, 4720, 7534, 7624). Other awards have been rendered that ruled that lying on an application, could be reason for termination (Second Division Awards 4359, 6391, and 6381). But there usually was a hearing in such cases. The question then remains as to whether

there should have been a hearing in the present case with a determination made by a Hearing Officer.

The Carrier is correct in stating that under Rule 3(b) the "probationary period" time limit is extended to three years if an applicant gave "materially false information" on his application. Rule 3(a) has no clauses limiting the Carrier's power to decide for itself whether or not to keep an employe within 60 days of the employe beginning employment. Consequently, no hearing is required. But Rule 3(b) does have specific language in it - namely, that the applicant has to have given "materially false information" (emphasis added) to have the "probationary period" extended to three years. Rule 3(b) does not say only "false" information, as for example in Third Division Award No. 22695, but it says "materially" false information. The question is: was the failure to list "tennis elbow" materially false information? While it may be clear that not listing that one has had a severe heart attack or been in jail three times for robbery may be material false information, is that true of "tennis elbow"? It is to differentiate among various types of "false information" that we have to assume the bargainers meant when they used the term "materially".

The Carrier claims that there need not be an investigation under Rule 23 since a claimed violation of Rule 3 means the employe was not disciplined or dismissed, instead that his employment application was disapproved. But in the absence of information secured through an investigation provided under Rule 22, one does not know whether the Carrier appropriately used Rule 3. If "tennis elbow" is not materially false information, then Rule 3 was not applicable in terminating the Claimant. The Carrier claims that the issue of "materially" false information was not in dispute because the Organization never specifically asked for an investigation to discover whether materially false information was given by the Claimant. Although it is true that the Organization did not specifically ask for a hearing on the issue of materially false information, it steadily challenged the Carrier's overall decision not to hold a hearing.

Finally, the Carrier is correct that a specific Rule 3 preempts the more general Rule 22; similarly, the more specific adjective "materially" preempts the more general adjective "false" in determining the kind of "information" described in Rule 3(b). It, therefore, requires an investigation take place which might well determine that the Claimant should have been disciplined as in this case or received some other kind of discipline if the investigation shows that the information was "materially false".

We find that Electrician J. W. Coons be returned to service with seniority unimpaired and that he be made whole for all loss of wages with all other rights and benefits unimpaired.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of June, 1982.