

The Second Division consisted of the regular members and in addition Referee Steven Briggs when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen and Oilers
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(Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That in violation of the current agreement, Fireman and Oiler N. R. Wood, was unjustly dismissed from the service of the Carrier on December 7, 1979, following a hearing held on December 4, 1979.
2. That accordingly, the Carrier be ordered to make the aforementioned N. R. Wood, whole by restoring him to Carrier's service with seniority rights unimpaired, plus restoration of all holiday, vacation, health and welfare benefits, pass privileges and all other rights, benefits and/or privileges that he is entitled to under rules, agreements, custom or law and compensated for all lost wages. In addition to money claimed herein, the Carrier shall pay the Claimant an additional amount of 6% per annum compounded annually on the anniversary date of this claim.

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 Claimant joined the Carrier's employ on August 13, 1979. In the employment application process he completed Carrier's Personal Record Form CS-2946 (employment application). Under the section entitled "Employment Record" the Claimant indicated he had worked for Price's Dairies from April to August, 1976, and, under "Reason for Leaving" he wrote, "just relief driver for vacations - got laid off - got job with UPS." He signed the form directly under the following printed statement:

"I hereby declare that the information given in the foregoing is true and correct and that any misrepresentation or false statement herein will justify and cause termination of my service regardless of when such fact may be discovered by the Company."

Plant Manager J. B. Harstad hired the Claimant based upon the information on his employment application and followed his progress as a new employe. Harstad counselled the Claimant after he displayed some initial performance problems, and the Claimant's performance subsequently improved. According to Harstad, once the Claimant completed his probationary period his performance again deteriorated. This reportedly prompted Harstad to personally investigate the information on the Claimant's employment application.

As a result of his personal investigation, Harstad received the following November 15, 1979, letter from Charles Lea, Retail Sales Manager, Price Creameries:

"Regarding your inquiry about Norman Wood, Mr. Wood was dismissed from the employ of Price's Creameries on August 15, 1976, because he failed to report for work on this day.

Mr. Wood was hired 3 1/2 months prior to his dismissal date, and was still on a probationary status. Upon hiring Norman Wood, it was with the understanding that we could depend on him to report for work every day."

On November 27, after the Claimant's 60-day probationary period had elapsed, Harstad sent him the following letter:

"You are hereby notified to report to the Plant Manager's Office ... on December 4, 1979, for a Formal Hearing to be held to develop the facts and place responsibility, if any, in connection with your alleged CS 2946 on July 27, 1979, in which you allegedly stated that you had been "laid off" from Price's Dairies in August of 1976.

Your action in this matter may involve violation of the following quoted portions of Rule 801 ...
"Employes will not be retained in service who are ... dishonest ..."

According to Harstad, the Claimant would not have been hired if his dismissal from Price Creamery had been reflected in his application for employment with the Carrier. The Carrier asserts that the Claimant obtained his employment by fraudulent means and that the dismissal should be upheld.

The Organization argues that the evidence against the Claimant is insufficient to sustain the dismissal. It notes that though the November 15, 1979, letter from Sales Manager Lea of Price Dairies indicates that the Claimant had been dismissed on August 15, 1976, for failure to report to work that day, Lea he also wrote the following letter dated August 10, 1976:

"To Whom it May Concern:

I have known Norman R. Wood, Jr. for about one year and he has worked for me on occasions when I have needed a relief man for vacations and have found him to be very honest and well liked by the other employees.

Any consideration shown him will be greatly appreciated."

In view of this conflict, the Organization asserts, one of the letters must be incorrect, and the Carrier has not met its burden of proving its case.

The Board has scrutinized both letters from Sales Manager Lea. Both are on Price Dairies letterhead. The second letter is typed; the first is hand-written. We find this distinction to be of minor significance. There is nothing in the record to explain the conflict between the two letters. Absent such evidence, the Board attaches little weight to either letter.

On balance, we find that the Carrier has not met its burden of proving that the Claimant falsified the employment application. As discussed, Sales Manager Lea's November 15, 1979, letter is not persuasive. It is in direct conflict with his letter of August 10, 1976, which was written around the time the Claimant's employment with Price Dairies was severed.

If Lea had been called to testify at the Carrier's investigatory hearing it is possible that he could have explained the conflict between the two letters. Perhaps in 1976 there was some confusion as to the exact nature of the Claimant's disassociation with Price Dairies. Absent more information about that employment severance, however, we cannot conclude with certainty whether the Claimant either was laid off as he indicated on his application or was dismissed for absenteeism as the Carrier claims.

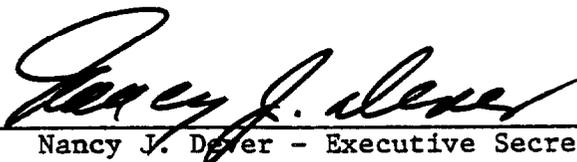
This Board has consistently held that employes who falsify employment applications are subject to dismissal, and we are inclined to follow that established pattern in cases of this type. However, it is incumbent upon the Carrier to demonstrate that such falsification knowingly took place. It is the Carrier who raised the allegation in the first place, and it is the Carrier which must support that allegation. We have concluded in the instant matter that the Carrier did not meet its burden of proof. That is, we are simply not convinced from the record that the Claimant falsified his application in an attempt to fraudulently obtain employment.

A W A R D

Claim sustained. No interest is awarded, in keeping with this Division's past policy. Deduction of outside earnings shall be made in computing compensation due.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of September, 1983.