

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

Parties to Dispute: (International Association of Machinists and Aerospace Workers
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(Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That the Carrier improperly dismissed Machinist R. G. Fauntleroy (hereinafter referred to as Claimant) from service on April 2, 1981.
2. That, accordingly, the Carrier be ordered to restore Claimant to service with seniority and service rights unimpaired with compensation for all wage loss.

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 employes 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 was employed by the Carrier as a Machinist at its Sacramento, California, Locomotive Works. He entered the service of the Carrier on November 20, 1978. Following a formal investigation that was held on March 23, 1981, the Claimant was dismissed from service for dishonesty because he falsified portions of his employment application and pre-employment physical record.

A threshold issue has been raised by the Organization which must be resolved before consideration can be given to the merits of the instant dispute. The Organization contends that the Carrier failed to respond to its initial appeal "within sixty (60) days from the date same is filed" as required by Rule 38(b) of the Agreement. Contrary to the position of the Organization, the tolling of the sixty (60) day period for the Carrier's response did not begin on the date set forth on its letter of appeal dated July 24, 1981. If that were so, it would mean that the tolling would occur even before the Carrier received notice that there is, in fact, an appeal from its decision. It may very well be true that notice of the appeal is effected upon mail or posting. However, the date the appeal is received by the Carrier constitutes the filing of the appeal under Rule 38(b) for the purpose of triggering the sixty (60) day period for the purpose of responding to the appeal. Since the Organization's appeal dated July 24, 1981 was received by the Carrier on July 28, 1981, the Carrier's response which was sent on September 24, 1981 satisfied the sixty (60) day period provided in Rule 38(b).

Turning to the merits, the Board has concluded that the Claimant falsified his pre-employment physical examination and his employment application, both of which were filled out on October 31, 1981. Despite a previous industrial injury, the Claimant answered "No" to the query, "Have you ever been injured or suffered an amputation?" which was set forth on a pre-employment physical examination record. Asked on the employment application, when he had last been attended by a physician, the Claimant's written response was "October 1 (cold)." However, on October 13, 1978, the Claimant was examined by his attending physician who confirmed that he had an underlying "asthmatic condition" and "chronic bronchial asthma." It is unreasonable to believe that in filling out the employment application on October 31, 1978, the Claimant remembered that he was attended by a physician for a cold on October 1, 1978 but was unable to recall a medical examination twelve (12) days later, and roughly two (2) weeks before the date he completed the employment application. The Claimant's intent to conceal his chronic asthmatic condition is reinforced by denying on the same application that he "ever had or been told" that he suffered from a disease of the throat or lungs. In addition, he failed to answer the question "Have you ever had asthma?" The Board believes that the question was left blank by the Claimant because he was aware that had he answered it truthfully, whatever chance he had of being employed by the Carrier would have been placed in jeopardy. The Claimant's failure to disclose his chronic asthmatic condition in answer to the specific information called for on the pre-employment physical examination and employment application cannot be considered immaterial in the Carrier's determination to hire the Claimant. Knowledge of such a chronic ailment must be considered crucial and of great weight in the Carrier's decision to employ the Claimant.

Based upon the record, the Board infers that the Claimant intentionally concealed his chronic asthmatic condition from the Carrier for the purpose of gaining employment in November 1978. As stated in Public Law Board No. 1952, Award No. 34:

"It is clear from the substantive evidence of probative value that Claimant falsified his application for employment. As such, Carrier was deprived of its right to deny Claimant employment in his occupation if it had been aware of his asthmatic condition, employing instead an applicant who did not have asthma and who could carry out all of the assignments of his craft."

The Board is persuaded that the penalty of dismissal should not be disturbed.

Form 1
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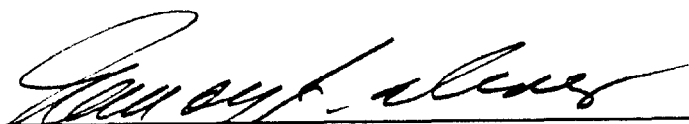
Award No. 10145
Docket No. 10157
2-SP-MA-'84

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1984.