

The Second Division consisted of the regular members and in addition Referee T. Page Sharp when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(
(Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current Agreement, Laborer L. Voss, Alliance, Nebraska, was unfairly dismissed from service of the Burlington Northern Railroad Company effective October 9, 1981.
2. That accordingly, the Carrier be ordered to make Mr. Voss whole by restoring him to service with seniority rights, vacation rights, and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 6% annual interest; with reimbursement of all losses sustained account loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service; and the mark removed from his record.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

Claimant, L. Voss, was a Laborer in the service of Carrier from November 2, 1978 until October 9, 1981, when his services were terminated by the Carrier. He now brings his case to the Division claiming that he was unjustly discharged without a hearing as required by the Collective Bargaining Agreement.

The application form completed by Claimant had numerous questions to be answered which were considered important information to the Carrier concerning the fitness and ability of a potential applicant for employment. One of these questions was "Have you been convicted of a crime within the past seven years?". To this question the Claimant answered "No".

Also on the form which was signed by Claimant was the following statement:

"1. I certify that all the information given in this application has been carefully completed and is correct to the best of my knowledge and belief. I authorize investigation of all statements contained in my application for employment. I UNDERSTAND THAT MIS-REPRESENTATION OR OMISSION OF FACTS CALLED FOR HEREIN WILL BE SUFFICIENT CAUSE FOR CANCELLATION OF CONSIDERATION FOR ANY EMPLOYMENT OR TERMINATION OF MY CONTINUED EMPLOYMENT WHENEVER SUCH FACTS ARE DISCOVERED."

On October 9, 1981, the Carrier sent a letter to Claimant which stated:

"Effective immediately your services with the Burlington Northern Railroad are terminated and your application disapproved per provisions of Rule 29 of the Agreement between Burlington Northern and its Employees Represented by the International Brotherhood of Firemen and Oilers, when you falsified your application of August 17, 1978 by stating you had not been convicted of a crime within seven years of date of application.

Please acknowledge receipt by affixing your signature in the space provided on copy of this letter."

Claimant signed the letter.

Rule 29 of the Agreement provides:

"Rule 29. APPLICATION FOR EMPLOYMENT

An applicant for employment will be required to fill out and execute the Railway Company's application form and pass required physical and visual examinations.

If application is not disapproved within sixty (60) calendar days of commencement of service, the application will be considered as having been approved, unless it is found that false information has been given."

Based upon the statements from the application and the application of Rule 29 of the Agreement, the Carrier terminated the Claimant.

Claimant contends that he was improperly dismissed per the provisions of Rule 28(a). That Rule states:

"(a) An employee in service more than sixty (60) days will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than thirty (30) days from the date of the occurrence, except that personal conduct cases will be subject to the thirty (30) day limit from the date information is obtained by an officer of the Carrier and except as provided in (b) hereof."

The Carrier disputes any applicability of this Rule, but further argues that if it were to apply, the time limits of the Rule are governed by Rule 27(a) as referenced by Rule 28(h), and the time permitted by these Rules has elapsed, thereby barring the filing of claims. Those Rules read in pertinent part:

"Rule 27. CLAIMS OR GRIEVANCES

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based..."

"Rule 28

(h) The provisions of Rule 27 shall be applicable to the filing of claims and to appeals in discipline cases."

The Carrier would read the Rule as being self executing by consent of the applicant when he signed the application. The self-execution would negate the employment relationship, therefore no contractual rights would have vested in the applicant. However, this reading is negated by their terms of the stipulation which states that discovery allows the Carrier to terminate the employment relationship.

The Board is not called upon to decide the substantive issues often raised in a falsification case, e.g., the seriousness of the past conviction, the length of the passage of time, the relation of the crime to the type of work now being performed. The issue for decision is purely procedural.

Some sort of procedural inquiry, if desired, is necessary under the Agreement. To hold otherwise would permit a Carrier, without any basis in fact, to summarily dismiss an employee at any date on the grounds of falsification. Given the prominence of the warning in the application statement which an applicant voluntarily signs, the scope of an inquiry under Rule 27 must necessarily be limited to the factual issue of a prior conviction. If the prior conviction is established, the signed application form becomes self-executing in that the merits of a prior conviction as it relates to the employment history is irrelevant.

The right to a hearing, albeit a limited one, is not the same as the exercise of that right. By its explicit terms Rule 28, the vehicle under which a hearing arises, is keyed to the time limits of Rule 27. Rule 27 is explicit in its mandate that any claim or grievance must be filed within sixty days of the occurrence upon which it is based. The only occurrence on which a claim or grievance can be based in this instance is the alleged wrongful termination made on October 9, 1981. Inasmuch as the present claim was filed on November 23, 1982, some thirteen months after the termination was issued, the claim is obviously outside the time limits permitted by Rule 27.

The Board finds that the claim was filed beyond the time limits permitted under the Agreement.

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Award No. 10439
Docket No. 10428
2-BN-F&O-'85

A W A R D

Claim denied and dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois, this 5th day of June 1985.