Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 10482
SECOND DIVISION Docket No. 10451
2-NRPC-MA-85

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

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(
(National Railroad Passenger Corporation (Amtrak)

Dispute: Claim of Employes:

1. That the National Railroad Passenger Corporation (hereinafter referred to as the Carrier) improperly dismissed Machinist A. D. Katry (hereinafter referred to as the Claimant) on September 10, 1982.

2. That the Carrier be ordered to compensate Claimant for all loss (sic) wages incurred from September 10, 1982 to date of restoration to Carrier service with all rights and fringe benefits restored in full.

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 were given due notice of hearing thereon.

On September 29, 1979, Claimant, A. D. Katry, prepared an application form for employment with the Carrier at the Redondo Junction Maintenance Facility, Los Angeles, California. Carrier later had reason to believe that Claimant had falsified said application and conducted an investigation into the matter. The charges against Claimant read:

> "...your alleged violation of Rule 'I' of the National Railroad Passenger Corporation Rules of Conduct, in that on the date of May 28, 1981, Amtrak received notification from your former employer, the Southern Pacific Transportation Company, that on the date of September 26, 1979, you did willfully and knowingly falsify your Amtrak employment application concerning the length of time you were employed with the Southern Pacific Transportation Company."

As a result of the evidence adduced at the investigation, the Investigating Officer found that the evidence proved the charges and dismissed Claimant from service.

Claimant had been employed as a Machinist with the Southern Pacific Transportation Company from July 25, 1979, until September 20, 1979. At that time he was released on the grounds of not being qualified. This evidence is undisputed in the record.

Claimant's only defense to the charges was that he spoke very little English and that he had a friend accompany him to the personnel office for the purpose of writing the answers to the propounded questions.

The Carrier now hypothesizes that it would not have hired this Claimant since another railroad found him unqualified to perform journeyman duties. This Board will accept that statement at face value.

Both sides raise procedural issues. The Claimant states that the first investigation was scheduled to be held on June 22, 1981, when in fact the actual hearing took place on August 31, 1982. The relevant rule, Rule 24, states in pertinent part:

> "...The investigation shall be held at the city of employment within 10 calendar days of the date when notified of the offenses or held from service..."

Under the literal terms of the Rule, the Carrier would be in default. The Carrier's explanation for the delay was that Claimant was on furlough when the first date was to occur and it decided to wait until Claimant returned to hold the investigation. In view of the nature of the charges and of the investigation, the Board cannot find that delay prejudiced or disadvantaged anyone. Moreover, the issue of time limits was not raised at the investigation and cannot be considered here because it is new matter.

The Carrier raised the issue of time limits in that it claims that the Claimant did not comply with the time limits of Rule 24(c) which states:

> "(c) Employees dissatisfied with the decisions shall have the right to appeal, either in person or through their duly accredited representative, to the next higher designated officer, and a conference shall be granted, provided written request is made to such officer and copy furnished to the officer whose decision is appealed within 30 calendar days of the date of receipt of a copy of the transcript..."

After the investigation was held on August 31, 1982, the Claimant appealed the decision by letter dated November 12, 1982. This is some sixty-five days after the investigation and clearly outside the relevant time limits. Organization relies on a letter from the Regional Manager of Labor Relations, to whose office the appeal must first go, as a waiver of the time limits. That letter reads:

> "This has reference to your letter dated December 2, 1982, file 82-IAM-397-disc, relative to above subject matter wherein you suggest conference with the understanding time limits be suspended pending conclusion of discussions.
>
> Please be advised that your suggestion is acceptable."

Sometime later, acting in behalf of the Regional Manager, a subordinate held that the time limits had expired and that Claimant was barred from further appeal.

While the regional labor relations personnel may have not intended to suspend the time limits, the Board can find no other purpose in holding the conference. If the conference was held only to notify Claimant that he was barred in pursuing his remedy, there was no need for such a meeting. If the conference was held to discuss the merits of the matter and the Carrier knew that it would raise the time limit bar later, it should not have put any language in the letter agreeing to suspend time limits because they were effectively not suspended at all. It would seem logical that a conference could be held at any time. The only conclusion that the Board can draw is that the time limits were suspended for the purpose of holding the conference applicable under Rule 24.

Falsification of employment application is always a serious matter and is usually grounds for discipline when discovered. However, the materiality of falsification is relevant. If an employee states that Detroit, Michigan is his place of birth when it was actually Warren, Michigan, most Boards would not hold such a statement to be serious enough to warrant discipline. Only when the falsification becomes very material does the lie warrant dismissal.

In this case the Claimant represented himself to be a journeyman machinist. Under the terms of the Carrier's Collective Bargaining Agreement, he must be a journeyman machinist to draw journeyman's pay. To be a journeyman machinist requires that an employee have completed a recognized apprenticeship or is the graduate of some training school approved by the Carrier that qualified him as a journeyman. Perusal of the Claimant's application does not reveal that he graduated from some recognized course of study. The only description of the background of Claimant was his statement on the application form which reads:

"Work for Southern Pacific Transportation Co. at present time, member of Int's. Ass's. of Machinists and Aerospace Workers-AFL CIO-Journeyman."

The fact that he was a member of the Machinist's Union means nothing to the Carrier. If the Carrier (Southern Pacific) employs an individual as a journeyman, qualified or not, he must join the Organization. However, the fact that he was stated to be employed as a journeyman by a major Carrier undoubtedly led the Carrier to believe that he was a qualified journeyman.

The Board holds that the Claimant has thirty days to furnish the Board proof that the Claimant had the requisite training to be considered a journeyman machinist under the terms of the Collective Bargaining Agreement. The training must be of the type described above. If he cannot furnish sufficient proof to this Board, the Board holds that he cannot be employed under the terms of the Collective Bargaining Agreement as a journeyman machinist and will deny the claim.

A W A R D

Reinstatement conditioned upon proof as described in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of July 1985.

CARRIER MEMBERS' DISSENT
TO
AWARD 10482, DOCKET 10451
(Referee Sharp)

The decision of the Majority, in essence, transfers the employment function of the Carrier to this Board. Obviously, a Dissent is mandatory.

The Majority found that Claimant lied in his application for employment as a journeyman Machinist when he stated that he was, at the time, in the employ of another Carrier as a journeyman Machinist. In truth, Claimant had worked for the other Carrier for only a period of 58 days, at which time he had been dismissed as incompetent. At this point, one would have reason to expect that the Board would summarily deny the claim. Falsification of an employment application, particularly where, as here, the falsification goes to the essence of the employment decision, has long been held by this Board to be grounds for dismissal. Second Division Awards: 7430, 6391, 6381.

Such expectation did not materialize, however. Instead, the Majority turned the falsification issue into a competency issue. Thus, the Majority held that notwithstanding the lie, and regardless of the fact that the provisions of the employment application subject the falsifier to dismissal, the Claimant still would be entitled to reinstatement if he was competent for the position. Such competency, the Majority held, could be established if the Claimant could show that he,

> "completed a recognized apprenticeship or is the graduate of some training school approved by the Carrier that qualified him as a journeyman."

The Claimant was given 30 days from the date of the Award to provide such information, not to the Carrier, but to the Board. To compound the confusion, the Majority neglected to explain what it meant by a "recognized apprenticeship", or how it would ascertain whether a "training school" has "been approved by the Carrier." In any event, the Majority set itself as the body that would determine the employment qualifications of the Carrier and as the body that would determine whether the Claimant met such employment qualifications.

The Majority's novel approach was not suggested by the Organization on the property or before the Board. The evidence requested by the Majority was never presented on the property, and the Majority does not bother to set forth how it will be able to consider such new information in the face of the prohibition of the Railway Labor Act and Circular No. 1 to the admissibility of evidence not presented on the property.

The assumption of powers by the Majority is unprecedented, at the least and, even more, beyond its jurisdiction.

We Dissent.

M. W. Fingerhut

P. V. Varga

J. E. Yost