

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

Parties to Dispute: (Carl J. Kelly  
(The Baltimore and Ohio Chicago Terminal Railroad Company

Dispute: Claim of Employees:

Mr. Kelly challenges the dismissal from the BCOT for the following reasons:

A. He did not intentionally fail to inform the carrier of any prior injury. He was unable to recall the incidents of injury because he was suffering from acute alcoholism from 1970 to 1979. Although he has been dry since 1979, his ability to recall many events during the period remains significantly impaired. Mr. Kelly had recovered from those injuries and committed no deception in his application.

B. Four out of five of the injuries alleged were minor in nature and of the nature that would normally be forgotten. One of the charges is groundless.

3. The carrier retained Mr. Kelly past the 30-day period of Rules 37 and 38 and he cannot arbitrarily be discharged. His dismissal was arbitrary and unjustified.

He requests that he be returned to service, that his record be cleared, that his seniority and vacation time be returned along with all rights and benefits withheld and that he be reimbursed for all money lost due to the dismissal of September 23, 1982.

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.

Claimant, C. J. Kelly, was a Carman in the services of Carrier from December, 1981 until September 23, 1982, when his services were terminated by the Carrier. He now brings his case to the Division claiming that his dismissal was arbitrary and unjustified.

Claimant answered the question on his employment application "Have you ever had an on-duty injury or illness?" by stating that he had had one prior injury, a sprained wrist. Approximately six months after he entered the service of the Carrier he sustained an on-duty injury. Two months later he sustained a second on-duty injury. In the course of its investigation the Carrier's Claims Department discovered that Claimant had suffered five on-duty injuries with his former employer, one of which resulted in a monetary settlement. Based on this information the Carrier conducted an investigation concerning Claimant's alleged falsification of his employment application.

At the investigation it was proved that Claimant had suffered five previous injuries; he injured his back and left shoulder, and he twice injured his left wrist. The span of injuries occurred in slightly more than a two year period. Claimant categorically stated that he could not remember any of these injuries, including the one where he received a substantial monetary settlement. He attributed this lack of knowledge to the fact that he had a severe alcohol problem which is now stated to be cured.

The question concerning injury was part of the employment application which contained the following affirmation before the signature block:

"This certifies that the above information is correct, and authorized the Medical Department personnel to obtain more detailed information. I understand that my deliberate omission or misrepresentation to secure employment are sufficient grounds for dismissal regardless of time when discovered."

Claimant seeks to avoid the mandate of this statement by negating a deliberate omission because of an alleged alcoholic fog. The verity of this statement must be determined by the initial decision maker, the Investigating Officer. Anyone who had falsified an employment application could utilize this or some similar reason to justify the falsification. Given the unassailable proof of the former injuries, the primary goal of the investigation was to determine whether the necessary elements for discipline are present. This became a matter of determining the credibility of the Claimant's statements. Absent any evidence in the record that would tend to impeach the findings of the Investigating Officer, this Board is not in a position to upset his assessment of credibility. There is no such evidence in the record. Therefore, the findings will stand.

Carriers are understandably eager to avoid the hiring of "accident prone" individuals. The Claimant has a continuing history of accidents. The fact that he has had two accidents in the short period of time he has been with the Carrier demonstrates the importance of having this knowledge before the time of hire. If a Carrier knows of such a past history and nevertheless employs an individual, it has assumed the risk of a continuing pattern of injury. Because the truth was concealed from the Carrier, it cannot be claimed that it assumed any risk.

Claimant states that all but one of his injuries were minor, thus the penalty of dismissal is harsh and arbitrary. However, the statement which the Claimant willingly signed leaves the degree of discipline completely within the hands of the Carrier. If the element of deliberateness is found, as it was here, the employee has authorized his own dismissal. While such a position may be harsh for minor infractions, any penalty may be avoided by telling the truth. It may be true that a Carrier would not hire an employee who has had even a minor injury, but, absent any relevant employment law, this discretion is in the hands of the Carrier. In this particular instance the cumulation of minor infractions plus one serious infraction for which settlement money was paid makes it very likely that Claimant would not have been hired.

Claimant also argues that the Carrier was under a duty to investigate his past employment record within the probationary period. Not to have done so is likened to acquiescence. Past records are difficult to investigate. Many laws, state and federal, shelter the individual from intensive investigation. The affirmative statement signed by the Claimant authorizes his dismissal when the falsification is found regardless of time when discovered. The Board finds no duty on a Carrier to immediately discover the falsification or be held to have acquiesced.

The Board finds that the Claimant deliberately falsified his employment application and that this act authorized his dismissal.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:   
Nancy G. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1985.