NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20225
THIRD DIVISION Docket Number CL-20338

Joseph Lazar, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the Burlington Northern System Board of Adjustment (CL-7363) that the Carrier:

1. Violated the rules of the March 3, 1970 Rules Agreement by dismissing Mr. Walter Merritt, Jr., Clerk, Kansas City, Missouri, from the service of the Railway Company effective November 4, 1970, without giving him the benefit of an investigation or hearing, as required by the Agreement.

2. Shall now reinstate Mr. Walter Merritt, Jr. into the service of the Railway Company with seniority and other rights unimpaired, and payment for all wage loss, commencing November 4, 1970.

OPINION OF BOARD: The record clearly shows that on November 20, 1972 the Organization instituted proceedings in the instant matter before the Special Board of Adjustment established by Appendix "K" of Agreement, and that this was done within the 9 months provided for in Appendix "C" of Agreement, reading in part: "All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided In Section 3 Second of the Railway Labor Act." The record presents no procedural issue concerning questions of tine limitation, raised by the parties on the property, and it is not for the Board to initiate such a procedural question on its own initiative at the present tine, although it continually must exercise responsibility and authority to detenine whether it has jurisdiction over a dispute involved in a docket.

On October 8, 1969, Claimant signed his application for employment, which stated in part: "False statement by applicant will justify rejection of this application regardless of when such fact may be discovered." The Carrier removed Claimant from service effective

November 4, 1970 when he was advised that his application of employment was rejected. No hearing or investigation was accorded Claimant. The Carrier advised the Local Chairman on November 16, 1970 that:

> At Judo practice while in Vietnam in 1969, he fell on his right shoulder and dislocated it. The medical records indicate repeated and recurrent dislocations since this time in 1969 and of which Mr. Merritt must have known. He, however, reports negative to all medical questions including request as to when he was last unable to work on account of Injury and explanation thereof.
>
> Since Medical Records show Mr. Merritt falsified his application for employment and withheld medical history, Mr. Merritt's application was not approved and he was removed from service.

The employment application, on page 58 of the record, asks: "When were you last unable to work on account of injury?" and it is answered by Claimant, "No." No mention is made of the dislocated shoulder although there is the question, "Do you now have or have you ever had ...Any other physical defects" to which Claimant. replied, "No."

We have reviewed the record moat carefully and must conclude that Claimant falsified his employment application.

The Organization contends that the Carrier does not have the unilateral right, consistent with Rules of the Clerks' Agreement, to dismiss an employe without holding a requested investigation. Rules 58, 56, and 4 are relied upon. Rule 58 reads:

> An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided for by Rule 56....

Rule 56 reads, in part:

> A. An employee who has been in service more than sixty (60) days or whose application has been formally approved shall not be disciplined or dismissed without investigation, at which investigation, the employe if he desires to be represented by other than himself, may be accompanied and represented only by the duly accredited representative, as that term is defined in this agreement....

Rule 4 reads, in part:

> Rule 4. SENIORITY
>
> A. Seniority of employea shall date from the first paid performance of service on positions covered by this agreement.
>
> B. When new employea enter service, if their services are satisfactory, and application for permanent employment is not declined within sixty (60) calendar days, their names shall then be listed on the seniority roster with a seniority date as specified in Paragraph A. of this rule. New employes whose names have been listed on the seniority roster in accordance with the provisions of this rule will be considered permanently employed, and shall not thereafter be dismissed on account of unsatisfactory references, other than as provided by Rule 56.

The aforequoted rules apply to an "employe" or to "employes". In the instant case, however, rejection by the Carrier of Claimant's falsified employment application resulted in a void contract, and, in effect, Claimant never became an employe of the Carrier. A contract of employment obtained by fraudulent representation is a nullity. Claimant, accordingly, is not an "employe" to whoa the aforequoted rules apply. This is the teaching of case after case decided by this Board. (First Division Awards: 8302; 12107; 12159; 15570; 16239; 16747; 17162; 19954; 21445. Second Division: 5988; 6391; 6530; 6013; 4359; 1934. Third Division: 4328: 4391; 5665; 5994; 11328; 14274; 10090; 18103; 18475. Fourth Division: 2286.) In the absence of terminology of "individual" or "person" along with the word "employe" in Rule 56, or some other explicit language pertaining to falsified employment applications, it must be presumed that the use of the term "employe" contemplated the continued application of the clear and unambiguous holdings of this Board.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of tbe Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1974.

LABOR MEMBER'S DISSENT
TO AWARD 20225 , DOCKET CL-20338

(REFEREE LAZAR)

Award 20225 is palpably in error and requires dissent. To hold that Claimant "never became an employe of the Carrier" is absurd. The use of the terns "employe" and "employes" within Rules 56 and 4 are not to be interpreted as technical "words of art" reflecting the lawyers value judgment but are to be construed In terms discriptive of activities or behavior. The discriptive activities and behavior of Claimant and his employer immediately preceeding Claimant's release from the Carrier's service without hearing or investigation as required by the Rules Agreement clearly demonstrates that Claimant was an employe within the coverage and protection of the Rules Agreement. Moreover, Claimant at all times fell within the definition of "employee" as that term is used in Section 1, Fifth, of the Railway Labor Act.

Award 20225 cites twenty-five awards of all four Divisions of the National Railroad Adjustment Eoard and improperly concludes that a "contract of employment obtained by fraudulent representation is a nullity". This conclusion omits or ignores two important considerations prevailing in the instant case. First, it has never been established that Claimant secured his contract of employment through fraudulent rep-esentatlons. Secondly, there was never a hearing or investigation held as required under the Rules Aprcement at which Claimant could make his case against unsupported allegations. Examination of the twenty-five cited Awards demonstrates that

over four-fifths contained either an investigation or a hearing on the property before submission to the Adjustment Board and in the few that did not either special rules were involved or else there was an unqualified demonstration of fraud. Neither situation was obtained in the instant case.

The "teaching of case after case decided by this Board" is not that expressed in this Award but rather that expressed in Award 19064 (Cull). Award 19064 held:

> "The question for decision is not whether Carrier had a right to dismiss Claimant after learning of his falsification hut whether he had been in Carrier's employ long enough to have acquired the protection afforded by the Agreement. Claimant, the record shows was in service 10 months on the date of the hearing, Parch 10. This is a period substantially greater than the thirty days needed to receive the protection of the Agreement. Rule 50 reads as follows, in part:
>
> > '(a) An employe who has been In the service more than thirty (30) days will not he disciplined or dismissed without a fair and Impartial hearing he * * *'
>
> Having served the requisite time the protection afforded by the Agreement was available to Claimant. We find that the statement on the application giving the Carrier the right to discharge because of falsification does not supersede the collective Agreement. I? Carrier wanted an exception to Rule 50 in cases of falsification it should have sought it throuph the collective bargaining process. We are persuaded that the sound cases adhere to this approach for to allow an individual agreement to erode the collective agreement would leave the process of collective bargaining meaningless. O.R.T. v Railway Express Agency, Inc. 321 U. S. 342; Awards 5703, 11958 and 2602 and others."

Award 20225 is palpably wrong and we dissent.

J. C. Fletcher
Labor Member
4-30-74

LABOR MEMBER'S DISSENT TO
AWARD 20225 , DOCKET CL-203