

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Duluth, Missabe & Iron Range Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The termination of service and seniority of Mr. J. P. Hampston for allegedly furnishing incorrect information in connection with his application for employment form was arbitrary, capricious and in violation of the Agreement (Claim No. 14-88).

(2) The Claimant shall be reinstated with his seniority rights and all other benefits intact and he shall be compensated for all pay loss suffered."

FINDINGS:

The Third 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 originally applied for employment with this Carrier on April 12, 1973. In that application he indicated no previous injuries, accidents or impairments. Also he denied ever making any legal claims as a result of an accident. The application was updated on January 3, 1975, with the same information regarding prior accidents and legal actions. On April 14, 1975, in the course of a pre-employment physical examination, Claimant indicated no prior back injuries. Claimant began work for Carrier as a Track Laborer on May 5, 1975.

During the first nine years of his employment, Claimant had reported several injuries suffered on the job including three to his back and one to his neck. In 1986, Claimant filed a suit against Carrier under the Federal Employers Liability Act seeking compensation for a back injury allegedly suffered on the job on November 13, 1984. In the course of testimony relating to the lawsuit, on November 18, 1987, Claimant stated that he had treatments for

back problems starting in 1969. Further he testified that he had been involved in a serious automobile accident (a head-on collision) in 1971 resulting in considerable neck and back problems requiring treatment from a neurosurgeon through at least 1974. Part of Claimant's physician's diagnosis was that Claimant had a 5% permanent partial impairment of spinal function. The lawsuit was settled for \$87,000. and an understanding that Claimant would be reinstated to his job without retaliation or harassment. Following a physical examination, Claimant returned to work.

The record indicates that Carrier received the detailed medical information concerning Claimant's prior medical history produced as part of the lawsuit, on April 21, 1988. Shortly thereafter Carrier's Chief Medical Officer reported that Claimant's prior back injury and history, if known, would have precluded his being hired. Claimant was thereafter withheld from service and charged, by letter dated April 29, 1988, with falsifying his employment application. Following an investigation he was found guilty and discharged.

The Rule involved in this matter provides:

"SUPPLEMENT NO. 40

Application For Employment

(a) Applications for employment will be rejected within sixty (60) calendar days after seniority date is established, or applicant shall be considered accepted. Applications rejected by the carrier must be declined in writing to the applicant.

(b) An employee who has been accepted for employment in accordance with Section 1 will not be terminated or disciplined by the carrier for furnishing incorrect information in connection with an application for employment or for withholding information therefrom unless the information involved was of such a nature that the employee would not have been hired if the carrier had had timely knowledge of it.

(National Agreement 10/30/78)"

The Organization contends that Carrier has made no credible showing that Claimant would not have been hired had Carrier been aware of his back injury and history prior to his employment. In support of his position it is argued that Claimant had nine years of credible service prior to any serious problems. Further it is noted that he was returned to work following his testimony at the trial which not only attests to Carrier's awareness of the inconsequential nature of his history but it also estopps Carrier's dismissal of Claimant subsequently. It is also urged that Carrier waived its rights to

raise the issue by waiting five months after it was aware of the information raised at the trial before charging Claimant with an infraction. Finally, the Organization insists that the Charge was not precise since it did not specify the particular section of the application which allegedly had been falsified but merely alluded to the application as a whole.

Carrier maintains that Claimant falsified his application significantly, was accorded full due process and in view of the seriousness of his offense was properly discharged. Carrier points out that it was unaware of the full extent of Claimant's back problem until April 21, 1988, and acted promptly thereafter. There was no waiver and there are no time limits with respect to the falsification charges.

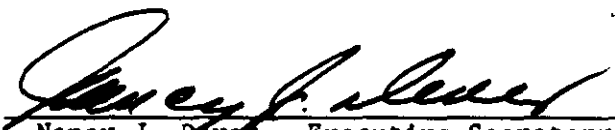
Initially, the Board observes that Claimant admitted that he had falsified his job application and further it appears to have been deliberate. There was no impairment of Claimant's defense by the wording of the charge which was quite adequate. It is quite apparent that in this case Claimant intended to deceive Carrier and was successful in his effort (see Second Division Award 9870). It is also clear that given the nature of his medical history and permanent impairment, he would not have been hired had Carrier known of his history. There were no time limit violations by Carrier since none were applicable to this type of infraction; further there was no probative evidence of any waiver by Carrier applicable to Claimant's employment following the lawsuit. In sum, it must be concluded that Carrier acted in accordance with the Agreement provisions and the evidence in its determination that Claimant was guilty of dishonesty in his initial application for employment.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Devet - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1991.