

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35825
Docket No. MW-35808
01-3-99-3-801**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Montana Rail Link, Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Truck Driver R. J. Clark for his alleged failure to provide factual information on an employment application on April 1, 1998 was without just and sufficient cause and in violation of the Agreement (System File MRL-153/RK/C-3539).**
- (2) As a consequence of the violation referred to in Part (1) above, Truck Driver R. J. Clark shall be returned to service with seniority and all other rights unimpaired and compensated for all wage 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 employee 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 April 1, 1988, R. J. Clark (Claimant) submitted an employment application. He indicated that he had a high school diploma and had attended a junior college for one year. The Claimant's application was approved and he commenced employment shortly thereafter.

Almost ten years later, on March 30, 1998, in a deposition given in connection with an alleged on-duty injury, the Claimant testified that he had only completed the tenth grade. On April 2, 1999 while testifying under oath at a FELA trial, the Claimant admitted that he had "misled" the Carrier on his employment application and had completed only one year of high school and did not have either a high school diploma or a GED.

As a result of those admissions, by letter dated April 8, 1999, the Claimant was instructed to attend a fact finding for allegedly falsifying his April 1, 1988 employment application. The fact finding was held on April 29, 1999, and shortly thereafter, the Carrier informed the Claimant that he was dismissed effective May 20, 1999 for his violation of General Safety Rules 520 and 528 (formerly Burlington Northern Safety Rules 564 and 574, which were in effect at the time the Claimant began his employment).

The Organization protested the discipline, asserting that the Carrier had violated Article 13 of the Agreement. Specifically, the General Chairman asserted that the Carrier, who had the Claimant's application for over ten years, had "all rights" to check the application and "did nothing." Further, the Organization argues that although the Carrier had knowledge of "the discrepancy" on the Claimant's application "months" prior to the FELA trial, it did not act on that knowledge until after the Claimant's FELA suit had been decided in the Carrier's favor. Finally, the Organization deems the Carrier's decision to dismiss the Claimant excessive in light of his heretofore unblemished personal record.

For his part, the Claimant admitted that he knew the Carrier required a high school diploma, but contends that he "misled" the Carrier regarding his education because he had four children to support at the time and desperately needed the job.

The Carrier denied the claim, maintaining at the outset that the Claimant had not been denied any contractual rights. The Carrier noted that because it had no knowledge of the Claimant's "lie" prior to April 2, 1999, the fact-finding was held "well within the

parameters” of the Agreement, thereby rendering the Organization’s timeliness argument baseless.

Turning to the merits of the dispute, the Carrier asserts that the Claimant “knew what would happen” if he was not truthful on his employment application, and it was “self-serving” for him to allege that he lied because of his family. Finally, the Carrier contends that the Claimant’s dishonesty demonstrates “a lack of moral character which cannot be tolerated.”

At the outset the Organization asserts that the Carrier had knowledge of the Claimant’s false statements prior to the April 2, 1999 FELA trial testimony, but did not act on that knowledge within the time limits set forth in Article 13 of the Agreement. However, a review of the record reveals that the Carrier was unaware of any discrepancy in the employment application until the Claimant was directly confronted with the issue during his April 2, 1999 FELA trial and admitted to lying under oath.

There is no dispute that the Claimant was dishonest when he submitted an employment application to Montana Rail Link in which he indicated that he had a high school diploma and had attended a junior college for one year. However, when the discovery of employment application falsification is not made until after a substantial intervening period of satisfactory employment, such as the case at bar, management is held to a heavy burden of proof to justify the maximum penalty of discharge for a later-discovered falsification. In these circumstances, the time that has elapsed since the falsification and discovery, in addition to the Claimant’s unblemished personal record, mitigates what would otherwise constitute a dischargeable offense.

Based on all of the foregoing, the discharge is modified to a suspension without pay for time held out of service. Conditioned upon the Claimant’s satisfactory completion of normal required return-to-service examinations, the Carrier shall reinstate him to service with seniority unimpaired, but without backpay or benefits for the period of time held out of service.

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 4

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 14th day of November, 2001.