

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36335
Docket No. MW-36644
02-3-01-3-186**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company (Western Lines))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent dismissal) imposed on Mr. J. S. Palmaffy for allegedly falsifying his application for employment was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (Carrier’s File 1230866 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J. S. Palmaffy shall now ‘ . . . be reinstated to the service of the Carrier to his former position with seniority and all other rights restored unimpaired, compensated for net wage and benefit loss suffered by him, including, but not limited to, medical and/or insurance premium costs for the Claimant and his family beginning on the date the Claimant was dismissed and continuing, and the alleged charge(s) be expunged from his personal record.”**

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.

In 1997, the Claimant submitted an application for employment with the Carrier. On his employment application form, under the heading of "General Information," the Claimant was asked to complete the following information:

"Have you ever been convicted of or pleaded guilty to a felony?"

Yes _____ No _____ If yes, provide the following information:

Approximate Date: Month _____ Day _____ Year _____ City _____ State _____

Violation _____ "

The application then goes on to state: "Conviction does not constitute an automatic rejection from employment consideration."

The Claimant checked "no" indicating that he had never been convicted of or pleaded guilty to a felony. He then affixed his signature to the employment application, immediately above a paragraph which states:

"I hereby declare that the information given in the foregoing is true and correct and that any misrepresentation, omission, or false statement herein will justify and cause termination of my employment regardless of when such fact may be discovered by the company."

The Claimant was hired by the Carrier on March 17, 1997 and established seniority in various classes within the Track Subdepartment. Following an incident in which the Claimant sustained an alleged injury while on duty, a background check was performed which revealed that the Claimant had pled guilty in 1993 to the felony charge that he unlawfully discharged a firearm. The Claimant served 180 days in jail and was given a 36-month probation.

Upon receipt of this information, the Carrier issued the Claimant a letter dated January 10, 2000 notifying him to appear at a formal Hearing to determine whether he falsified his application for employment. He was withheld from service pending the outcome of the Investigation. The Hearing was conducted on January 21, 2000, after

which time the Claimant was assessed a Level 5 dismissal from the Carrier's service by letter dated February 15, 2000.

The instant claim filed by the Organization on the Claimant's behalf contends that the Carrier did not prove the misconduct alleged. The Organization argues that the Claimant's response on his employment application was consistent with his understanding that the felony charge had been reduced to a misdemeanor after time had been served and probation had been completed. In that regard, the Organization asserts that the Claimant's understanding was reasonable and supported in the record by letters from his attorney and his probation officer attesting to the State of California's administrative redress procedures. Thus, the Organization maintains that *intent to deceive was not established because the Claimant was under no obligation to disclose what he understood to be a misdemeanor on his record.*

The Carrier takes the position that there was substantial evidence to support the determination of the Hearing Officer that the Claimant falsified his employment application. As a result of the Claimant's material misrepresentation, the Carrier was denied the opportunity to make an informed judgment as to the Claimant's suitability for employment. Termination is the appropriate penalty for such serious misconduct, the Carrier argues.

The Board carefully considered the entire record, including the contention of the Organization that the Claimant reasonably believed that his record no longer reflected his earlier felony conviction. The question that was put to him, however, was whether he had "ever" been convicted of or pled guilty to a felony. There is no dispute that the Claimant pled guilty to a felony despite what later action was taken with respect to the public records. The Board is unwilling to accept that an unqualified "no" was the *correct or truthful answer*. The Claimant owed his prospective employer an explanation that could have been provided by describing the violation and its subsequent disposition. By signing the application, the Claimant in effect verified that the information he provided was truthful and accurate. In point of fact, however, he misrepresented his criminal history, thereby depriving the Carrier of the opportunity to make an informed decision regarding his employment based on facts that were clearly relevant and material.

Numerous Awards have firmly supported the Carrier's right to require prospective employees to provide factually correct information during the hiring process and to enforce that right by promptly and consistently discharging employees

who have deliberately falsified their employment applications to conceal information that was material at the time of the application. See, Third Division Awards 20507, 30820; Second Division 10286; Public Law Board No. 5934, Award 20; Special Board of Adjustment No. 279, Awards 120, 827; Public Law Board No. 1760, Award 124. The interests of the Carrier are very substantial in this regard. Concluding as we do that the Claimant was guilty of falsifying his employment application, any remedy other than dismissal would clearly undermine the Carrier's ability to protect its legitimate interests. Accordingly, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of December 2002.