Award No. 11794
Docket No. CL-13808

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5299) that:

(a) The Carrier did not comply with the provisions of Rule 20 of the Agreement between the parties when it accused Mail Handler Emmett C. Green, Jr., of falsification of his application for employment, held an investigation nevertheless and dismissed him from service effective September 19, 1962, in that it did not state a precise charge and that it did not do so at a reasonable time prior to the investigation, and;

(b) The Carrier shall reinstate Emmett C. Green, Jr. to its service as a Mail Handler because of the agreement violation above; that his record be cleared of any charge; that he be paid for all time lost and that all seniority and other rights be restored retroactively.

OPINION OF BOARD: Claimant Emmett C. Green. Jr., made application for employment by the Carrier on November 7, 1961, on Carrier's Form 3, "Application for Employment" and Form C, "Medical Examination Form, Statement of Applicant." Carrier developed information that Claimant had falsified his application as follows:

Statement made on Application Form 3:

1. "I have not had any kind of accidents, no bones broken. I am sound in body and limb."

In answering the questions on Medical Examination Form "C" Claimant answered the question "Have you ever filed a lawsuit * * * because of an injury?", Claimant answered "No."; to questions asking if the applicant had ever been injured, had a back injury, back or leg pain or had an X-ray, Claimant answered "No." In point of fact the Carrier, after having made written inquiry of past employers, was informed that Mr. Green had been injured, had filed a Workman's Compensation claim, had suffered injuries and had had X-ray examinations. On September 19, 1962, the Carrier notified

Claimant to appear for a formal investigation as per a letter written to Petitioner by Baggage Agent, V. F. Juel. Claimant Green, accompanied by Local Chairman L. D. Graham of the Clerks' Organization, appeared at the hearing. The Organization excepted to the charge which stated, inter alia, "* * * You are charged with falsification of your application for employment dated November 7, 1961.", on the ground that the said charge was not clear, and precise.

Rule 20 of the current Agreement between the parties states:

> "At reasonable time prior to the investigation the employe shall be advised of the precise charge against him and given reasonable opportunity to secure the presence of necessary witnesses."

The crucial issue in the case is whether or not the Carrier's notice to Claimant to appear for a formal investigation on the charge that he falsified his application for employment is sufficiently clear and precise to meet the requirements of Rule 20 of the Agreement, quoted supra.

The principle of law concerning the adequacy of a Notice of Hearing is both clear and represents a fundamental right. It is succinctly set forth in the Monograph Series: 1, entitled "Due Process On The Railroads, Revised Edition," by Joseph Lazar of the Institute of Industrial Relations — University of California, and since it is germane to the case at bar, is being quoted below with approval by the Board:

> "The First Division has consistently held that a person charged with an offense is entitled to know the nature of the charge against him in **advance of the hearing.** Without this knowledge, the Division has held that he can make no defense, and the failure to afford the right is more than an irregularity in practice; it is a vital defect. This principle is not a technicality, but rests on the plainest principles of justice and fair play; it puts into effect the constitutional requirement of "due process of law," and secures to every man his "day in court" in advance of and as necessary to, any judgment against him." (Page 28, emphasis ours.) Also see Awards Nos. 5197, 9561.

Awards Nos. 5183 and 17460, First Division, further amplify the principle that "The charges against an employe must be broad enough to include the cause for which he was dismissed and sufficiently specific to acquaint the employe of the matters to be investigated. The charges preferred must inform the employe of the acts and conduct complained of, and the time and place of their occurrence."

The Carrier advances the interesting argument that even if it be admitted arguendo that the notice does not contain specific information sufficient to meet the requirements of "due process" the fact that a fraudulent statement was made in an application for employment is enough, standing alone, to justify dismissal.

This is so because when the Claimant applied for a job he assented to the Carrier's condition on the application blank that any fraudulent statement whenever discovered provides ground for immediate dismissal. Under these circumstances the Carrier contends that there was no obligation to grant the Claimant a hearing at all and therefore whatever defects may have developed either in the notice or in the hearing should not be allowed to disturb its decision of dismissal.

The short answer to this argument is that since the Carrier elected to grant a hearing it can now not be heard to complain that the notice it sent Claimant, setting up the hearing it chose to hold, should not be evaluated as to its substantive adequacy. The Claimant appeared in response to the Carrier's notice of investigation. The notice was vague, general in nature, and on its face, did not meet the elementary requirement of stating a specific charge, in advance of the hearing which would enable the Claimant to make a defense. This principle is not a technicality, but rests on the plainest principles of justice and fair play; it puts into effect the constitutional requirement of "due process" and secures to every man his day in court in advance of and as necessary to, any judgment against him.

The Third Division, in Award 8992, on a strikingly similar state of facts, has found that the Carrier violated its Agreement when it failed to provide a Claimant in its notice of the charge against him before the investigation of the precise violations he is supposed to have committed.

How could Claimant prepare a defense to a charge of falsely answering questions on his application for employment when the form asks approximately 24 separate questions and the said notice does not specify which question or questions were falsely answered?

It is significant, in this connection, to note the actual language used by the Carrier in its letter of dismissal which was sent to Mr. Emmett C. Green by V. F. Juel on October 3, 1962 and appears in the record on page 11:

> "This will refer to formal investigation held in my office 10:00 A. M. September 27, 1962.
>
> A careful reading of the transcript reveals beyond any doubt that you falsified your application for employment dated November 7, 1961. For your responsibility you are hereby dismissed from the service of this Company effective September 19, 1962."

The Carrier, by its own words, predicated its dismissal of the Claimant on "A careful reading of the transcript" to arrive at the conclusion that Claimant falsified his application for employment. There cannot be a formal investigation and a hearing pursuant thereto at which a transcript is taken without meeting the essential condition precedent of providing the respondent with a specific charge, in advance of the said hearing, informing him of the acts and conduct complained of, and the time and place of their occurrence.

It would appear to be uncontested that Claimant did in fact falsify the answers he provided the Carrier on both his application for employment and the medical application. It would seem unfair to reward him for the frauds he committed by granting him back pay. Under the circumstances of this case it would therefore seem sufficient for the claim to be sustained only so far as to restore him to his job with all his other rights unimpaired, without back pay.

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 the 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 Carrier violated Rule 20 of the current Agreement between the parties.

AWARD

Claim sustained in part and modified as per the Opinion above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of October 1963.

DISSENT TO AWARD NO. 11794, DOCKET NO. CL-13808

This dissent is limited to the sustained portion of the Award.

Claimant by his own voluntary act severed his employment relationship with the Carrier. He removed himself from the ambit of the collective bargaining contract, including any right to a hearing under that Agreement. No infirmity in the hearing procedure could re-establish the basic employment relationship. No affirmative waiver of such a fundamental defense exists in the record, and it should not be found by implication.

Therefore, any hearing held in the matter was not a hearing under the contract and Rule 20 had no application. Carrier was not estopped from asserting this defense because it extended Claimant the courtesy of an inquiry it had no legal obligation to conduct.

Furthermore, in the absence of an employment relationship or contractual coverage, the Board had no power to act in the premises since its authority is limited under the Railway Labor Act to disputes between employes and carriers and to the interpretation and application of contracts. Being jurisdictional, this could not be waived and could have been noted by the Board of its own motion even if not raised by the Carrier.

The application papers included two forms. Form 3 contained questions concerning basic biographical and experience data and related information. Thereupon Claimant supplied false medical information in his own hand. Form C was medical and Claimant falsified four answers.

The pertinent portion of the notice read:

> "Please report to my office, Union Station Building, Kansas City, Missouri, at 10:00 A. M. Friday, September 21, 1962, for formal investigation. You are charged with falsification of your application for employment dated November 7, 1961."

Since medical and personal injury information was requested in Form 3, and Form C was exclusively medical, it is difficult to conclude that Claimant

was prejudiced by the notice when it specified falsification and the hearing established falsification of medical and related personal injury questions.

We feel that the notice was adequate and sufficiently specific to satisfy the test applied by Awards 3270, 10355, 11170, 11327, 11443, 11784 and many others of this and all Divisions.

T. F. Strunck

D. S. Dugan

P. C. Carter

W. H. Castle

G. C. White