NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21404

THIRD DIVISION Docket Number CL-21498

William G. Caples, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Southern Pacific Transportation Company
(Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-8070, that:

(a) The Southern Pacific Transportation Company violated the current Clerks' Agreement on March 5, 1974 when it dismissed Mrs. Virginia I. Cox from service; and,

(b) The Southern Pacific Transportation Company shall now be required to return Mrs. Virginia I. Cox to service with all seniority rights unimpaired and earnings on position she wished to displace on February 16, 1974 in addition to all expenses incurred which would otherwise have been borne by the Southern Pacific Transportation Company if she had not been dismissed; to reimburse her for any travel expense in other employment; and to compensate her for all hospitalization, Travelers Insurance Company loss, suffered from time dismissed until restored to service with all of the above rights.

OPINION OF BOARD: The facts in this case are that Claimant made an application for employment on November 4, 1969. In so doing she filled out and signed a "Personal Record" form S-2946 (Rev. 4-67) which contained, among other things, the following:

"Were you previously employed by Southern Pacific? X yes _no
If yes, complete the following:

Occupation: Guaranteed Extra, Board Clerk, Division or Department; Oregon dates from 11-59 to 8-65

Have you ever (a) been injured? yes (b) suffered an amputation? no

If so, give all particulars. Auto accident Seattle 8-65 -- 2-67 Accident (Don't remember date, Dr. Day has records). If injured, did you present claim? yes

If so, against whom? Teachers Insurance.

How was claim settled? They offered settlement and I accepted.

"Have you ever employed or been represented by an attorney in connection with any claim or suit for damages?
no

* * *

Have you ever been convicted of a crime? ___yes X no
If yes, give details of each conviction, including a date, place, charge and final disposition.

* * *

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

Subsequently on March 17, 1972 and February 14, 1974, Claimant filled out and signed the same form after a "sick" leave on the 1972 date and a "leave" on the 1974 date.

The record is clear that there was a material misstatement of fact in each of the forms signed by the Claimant.

The Organization contends (1) that the form is an application for employment and the Carrier is limited in its use to that purpose so that "Claimant was in continuous employment of the Carrier from November 4, 1969 to the date of her dismissal March 5, 1974," citing Third Division Award 5201 and 16535 to the effect that authorized leave and sick leave do not break continuous service; (2) that Claimant was notified to be present at an investigation "in connection with alleged falsification of your application for employment. In that completing the application you did not accurately apprise the Company of the information requested." The notification also states Claimant action "in this case may involve violation of Rule 801 of the Ground Rules and Regulations of the Carrier" that portion reading:

"Employes will not be retained in the service who are . . . dishonest . . .";

(3) Claimant was dismissed for "falsification of personal record forms S-2946, signed by Claimant on March 17, 1972 and February 14, 1974, notwithstanding that Claimant was charged with falsification of her application for employment"; (4) Rule 59 part of which reads as follows:

"Applicants for employment entering the service shall be accepted or rejected within sixty (60) days after the applicant begins work. When applicant is not notified to the contrary within the time stated, it will be understood that the applicant becomes an accepted employe, but this rule shall not operate to prevent the removal from service of such applicant, if subsequent to the expiration of sixty (60) days, it is found that information given by him in his application is false, provided, however, this exception shall not be applicable to an employe who has been in service for a period of three (3) years or more. * * *"

should be interpreted as a limitation upon the Carrier to prevent the questioning of any statement in the application after three (3) years of continuous employment from the date of hire, citing Third Division Awards 5560, 5773 and 6312 to the effect that this Board is required by the Railway Labor Act to give effect to the Agreement between the parties and to decide this dispute in accord therewith, Rulings with which this Board is in accord.

The Carrier position is (1) that falsification of an employment application is a proper basis for dismissal; citing a number of Third Division Awards to that effect 6391, 10090, Second Division Award 6013, a position with which this Board is generally in accord, if standing alone, or if buttressed by the Carrier's reliance on such falsification as the basis for hire; (2) that there is no time limit under the Agreement between the parties in which the Carrier can bring charges for dismissal if falsification of an application for employment is found after proper investigation, citing Third Division Awards 18475, 18103 and 11328 in which dismissals were sustained after time lags as long as fifteen years. It is stated in Award 11328:

"We have consistently held that an employe who falsifies his employment application, irrespective of the elapsed time between the date of the application and the date when the falsification was discovered, is subject to discharge. Awards 10090 (Mitchell), 5994 (Jasper), 5665 (Weykoff), 4391 (Carter), and 4328 (Elkouri)."

Neither party cites any decision which interprets a provision similar to Rule 59 of the Agreement between these parties effective November 15, 1971, cited in full heretofore in this opinion, or in which there appears to be a limitation provision. It is the interpretation of that language which must control the decision of this Board. The pertinent parts quoted or paraphrased are:

"'When applicant is not notified to the contrary' as accepted or rejected 'within' sixty (60) days after the applicant begins work 'it will be understood that the applicant becomes an accepted employe, but this rule shall not operate to prevent the removal from service of such applicant if subsequent to the expiration of sixty (60) days it is found that the information given by him in his application is false, provided, however, this exception shall not be applicable to an employe who has been in service for a period of three (3) years or more.'" (Underlining the Board's)

The exception to the sixty-day rule is limited to the application for employment and a reading of the contract shows no other exception. The parties then limited the exception to an employe who has been in service for a period less than three years. The language is, in the opinion of this Board, unambiguous and is, in effect, a "statute of limitations" preventing discipline because of falsification after three years of service.

No Awards were cited directly in point on this issue. In the interpretation of bargaining agreements it is the generally established practice that plain and unambiguous words are undisputed facts. The conduct of the Carrier by the additional use of the "Personal Record" may not change the meaning of the words and phrases in the agreement. The administrative acts of either party cannot be used to change the explicit terms of a contract. The Board's function in Awards heretofore cited is limited and it cannot rewrite a contract, but its function is limited to finding out what the parties intended under a particular clause. The intent of the parties is to be found in the words which they, themselves, employ to express their intent. When the language used is clear and explicit, the Board is constrained to give effect to the thought expressed by the words used.

In view of the time limitation set forth in the Agreement the discipline "in connection with the alleged falsification of Claimant's application for employment" cannot be sustained.

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

The Agreement has been violated.

A W A R D

The Claimant's record shall be cleared of the charge and the employe shall be reinstated and paid for wage loss in accord with the provisions of the agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1977.

CARRIER MEMBERS' DISSENT TO AWARD 21404, DOCKET CL-21498

(Referee Caples)

I

LYING ABOUT RELEVANT FACTS IN AN APPLICATION FOR EMPLOYMENT IS A PROPER GROUNDS FOR DISMISSAL UNDER THE DISCIPLINE RULE, AND NEITHER THE RULE ON AUTOMATIC ACCEPTANCE OF AN EMPLOYEE NOR THE EXCEPTION TO THAT RULE IS RELEVANT TO FORMAL CHARGES BASED ON SUCH LYING: PETITIONER ADMITS CLAIMANT LIED ABOUT HER PAST CRIMINAL RECORD AND VARIOUS ACCIDENTS IN HER APPLICATION FOR EMPLOYMENT AND BASES THIS ENTIRE CLAIM ON THE PALPABLY ERRONEOUS SUPPOSITION THAT THE EXCEPTION TO THE AUTOMATIC ACCEPTANCE RULE PRECLUDES DISCIPLINE FOR SUCH LYING; HENCE, THE ENTIRE CLAIM SHOULD HAVE BEEN DENIED.

This entire case turns on a very simple and perfectly established principle of construction, namely, the rule that a specific exception to a particular rule in an agreement has no broader application than the rule itself—the exception, like water, cannot rise above its source.

Petitioner's entire case in favor of the claim herein, including Petitioner's procedural objections, is predicated on the erroneous theory that the exception to the automatic acceptance rule laid down in Rule 59 of the parties' agreement is broader in its application than the automatic acceptance rule itself. The pertinent portions of the rule read:

> "Applicants for employment entering the service shall be accepted or rejected within sixty (60) days after the applicant begins work. When applicant is not notified to the contrary within the time stated, it will be understood that the applicant becomes an accepted employe, but this rule shall not operate to prevent the removal from service of such applicant, if subsequent to the expiration of sixty (60) days, it is found that information given by him in his application is false, provided, however, this exception shall not be applicable to an employe who has been in service for a period of three (3) years or more."
> (Underlining added.)

Here we have stated with perfect clarity the rule that acceptance of an employee by Carrier is automatic unless the employee is notified to the contrary within 60 days. We then have stated with equal clarity an exception to that specific automatic acceptance rule, which is simply that the acceptance of an applicant as an employee shall not be automatic after sixty days and within three years of the application if it is found that the applicant submitted false information. The exception refers specifically

and solely to the automatic acceptance rule, so that in case of any false statements discovered within a three year period, the applicant may be terminated simply by giving the notice provided for in the first part of the rule. The giving of such a notice, refusing to accept one as an employee, is an act within the prerogative of Carrier which has nothing to do with discipline; for the applicant in that probationary period before acceptance has no rights under the discipline rule.

In other words, the three year exception to the automatic acceptance rule does nothing more than extend the period of time allowed to Carrier in which to accept or reject an employee in those cases where false information is given.

This, of course, has nothing whatever to do with the firmly established rule that lying about relevant facts in order to obtain employment is a dismissal offense when established under the discipline rule after an employee's application has been accepted and the usual employee relationship established—see Subdivision II, below, for typical examples of the many sound awards recognizing this as a distinct dismissal offense; also, see Subdivision III, below, for awards on the point that dishonesty in all its forms constitutes a dismissal offense.

Under Rule 59 Carrier in this case properly recognized that its right to disapprove Claimant's application for employment had expired under the three year provision, and for that reason Carrier properly proceeded under the discipline rule, according Claimant all the benefits and rights of an employee under that rule.

Petitioner frankly admits that in her employment application Claimant lied about her criminal record and also lied about prior personal injuries.

Petitioner's entire case before the Board is predicated on the palpably false assumption that the three year exception to the automatic acceptance rule provided for in Rule 59 applies to a discipline matter that is totally unrelated to acceptance or rejection of the employment application. The Petitioner falsely assumes that there was an absolute three year bar to any disciplinary action against an employee for lying in the employment application, and then on the basis of that assumption makes the further false assumption that Carrier attempted to discipline Claimant in this case because of false statements admittedly made by Claimant in identical application forms subsequently furnished to Carrier upon returning from leave.

This award simply adopts Petitioner's false assumptions as a basis for sustaining the claim. We dissent.

* * * * * * * *

II

FALSIFICATION OF AN EMPLOYMENT RECORD

IS PROPER BASIS FOR DISMISSAL.

Award 18103 (Devine):

> This Board has consistently held that an employe who falsifies his employment application, irrespective of the elapsed time between the date of the application and the date when falsification was discovered, is subject to discharge. Awards 14274, 11328, 10090, 5994, 5665, 4391, and 4328.

Award 18475 (Rimer):

> The Petitioner argues that the dismissal of the Claimant, following discovery of the alleged falsification occurred "150 consecutive calendar days after he had performed first service" and that he was protected from such action by the language of Section 1, Rule 6 which provides that seniority will be established as of the first day worked, if the application is not rejected within 60 days after the individual first enters service.
>
> It was further argued, with no supporting evidence on the record, that the dismissal was without just cause was "capricious, improper and unwarranted."
>
> The position of the Carrier rests on the evidence contained on the completed form MED-2, on which the answers were supplied by the Claimant and signed by him, certifying to their truthfulness and completeness. A long line of Awards were cited in support of its position, including cases in which the same "time limit" argument was advanced by the Petitioner as in the instant case.
>
> We find the argument of the Petitioner to be without merit. The investigation of the Carrier of the prior injury is in the record, timely action was taken after discovery, and all procedural aspects of the case were fully met.
>
> The Board has upheld the discharge of an employe who had falsified his employment application, irrespective of the elapsed time between the date of application and the date of discovery of falsification. In the extreme, Award 10090 held that laches was not present in the case even though eleven years had elapsed from the date of first service and dismissal for falsification.

Also see Awards 10090 (Mitchell), 11328 (Dolnick), 20507 (Franden) of this Division and Second Division Awards 5959 (Zumas), 6013 (Ritter), and 6391 (Lieberman), among others.

* * * * * * * *

III

DISMISSAL FROM THE SERVICE IS THE USUAL DISCIPLINE

FOR A RULE VIOLATION ASSOCIATED WITH DISHONESTY.

One would not suppose that it would ever be necessary to cite awards for the proposition that infidelity to an employer is a valid basis for dismissing an employee. Where an act of dishonesty is established, there can be no doubt whatever as to the right of Carrier to discharge an employee. As this Board observed in Award 16168 (Perelson):

> Dishonesty, in any form, is a matter of serious concern and dishonesty usually and frequently results in dismissal from the service of a Carrier.
>
> This Board has held on numerous occasions that dismissal from service for dishonest acts is not an excessive application of discipline or an abuse of discretion.

For other awards involving dismissal for acts of dishonesty, see Awards 8808 (Bailer), 9214, 9215 (Schedler), 10002 (Webster), 11278 (Stark), 12248 (Dorsey), 13086 (Ables), 13116 (Hamilton), 13130 (Kornblum), 13179 (Dorsey), 13670, 13674 (Weston), 15055 (Hamilton), 15456 (Harr), 16170, 16171, 16172 (Perelson), 16888 (Goodman), 17243 (Yagoda), 17565 (Ritter), 18037 (Dolnick), 18106 (Devine), 18668 (Edgett), 18708 (Franden), 18901 (Ritter), 19486, 19487 (Brent), 19493 (Devine), 19735 (Roadley), 19745, 19746, 19747, 19929 (Lieberman), 19984, 20003 (Blackwell), 20031 (Eischen), 20182 (Lieberman), 20211, 20267, 20292 (Sickles), 20603 (Lieberman), 20663 (Twomey), 20681 (Edgett), 20744 (Sickles), 20781 (Eischen), 20798 (Edgett), 20849 (Quinn), 20857 (Edgett), 20868, 20918 (Norris), 20952 (Bailer), 21005 (Sickles), 21109 (McBrearty), 21113 (Sickles), among others.

G. L. Naylor P. C. Carter

W. F. Euker J. E. Mason

G. M. Youhn