

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24463
Docket Number CL-24164

John B. LaRocco, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship Clerks
(Freight Handlers, Express and Station Employees
(
(Burlington Northern Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9483)
that:

1. Carrier violated the Agreement between the parties when, effective March 17, 1981, it terminated from service Mr. James A. Banks, Extra Telegrapher, Gillette, Wyoming.

2. Carrier shall now be required to reinstate Mr. James A. Banks, Extra Telegrapher, Gillette, Wyoming, to the service of the Carrier with seniority and other rights unimpaired, and pay for loss of time and exonerate him of all charges in his personal record.

OPINION OF BOARD: On October 29, 1979, Claimant completed and signed an application form requesting employment with the Carrier. One question asked Claimant if he had been convicted of a crime within the past seven years. Claimant marked the negative box. Next to the question was an explanatory note stating that a conviction would not necessarily disqualify the applicant from employment. The following language is prevalently set forth above Claimant's signature on the application form:

"I certify that all information given in this application has been carefully completed and is correct to the best of my knowledge and belief. I authorize investigation of all statements contained in my application for employment. I UNDERSTAND THAT MISREPRESENTATION OR OMISSION OF FACTS CALLED FOR HEREIN WILL BE SUFFICIENT CAUSE FOR CANCELLATION OF CONSIDERATION FOR ANY EMPLOYMENT OR TERMINATION OF MY CONTINUED EMPLOYMENT WHENEVER SUCH FACTS ARE DISCOVERED."
(Emphasis in text.)

On or about April 4, 1978, Claimant had been convicted of violating a Wyoming criminal statute. According to applicable Wyoming law, Claimant's conviction could be annulled and his criminal record stricken after satisfactory completion of a one-year probationary period. However, Claimant's conviction was not annulled until Claimant brought a motion which was granted by a court order dated March 26, 1980. The court order stated that Claimant could respond negatively to all "future inquiries" regarding the criminal conviction entered against him April 4, 1978.

Prior to the annulment, the Carrier discovered Claimant's criminal record. On March 17, 1980, it summarily terminated Claimant without notice or hearing.

During the appeal of this claim on the property, an April 9, 1980 letter from Claimant's attorney was made a part of the record. According to Claimant's lawyer, he had contacted the probation department on April 9, 1979 and the department assured him that Claimant's conviction would be annulled. The lawyer so advised Claimant. Only after Claimant's termination did the lawyer learn that Claimant's conviction had not been annulled. He took immediate legal action leading to the March 26, 1980 annulment.

The Carrier argues that Claimant gave a false response on his employment application which justified his termination pursuant to the language found in the employment application as well as Rule 7 of the applicable Agreement. The Carrier submits that giving an untrue answer on the application form voids the employment arrangement. The Organization asserts that since the employment application states that a prior conviction will not disqualify an applicant from obtaining employment, the Carrier is now barred from using the conviction to terminate Claimant. The Organization also contends that Claimant truthfully responded on the employment form because he had a good faith basis for believing his prior conviction had been expunged from public records. Alternatively, the Organization maintains that the Carrier was obligated to provide Claimant with notice and a Rule 18 hearing prior to his dismissal.

Contrary to the Organization's position, the record discloses that Claimant was terminated for allegedly giving a false response on his employment application rather than for his criminal record. In addition, Rule 18, by its express terms, is inapplicable to this particular case since the Carrier's decision to terminate Claimant was premised on Rule 7.

Many awards of this Board have ruled that giving false or misleading information on an employment application is grounds for dismissal: Third Division Awards Nos. 14274 (Ives); No. 20225 (Lazar); No. 21562 (Sickles); No. 24121 (Suntrup). The issue is whether Claimant provided the Carrier with false or misleading information.

The Carrier, in making routine checks on the veracity of employment applications, must rely on the accuracy of public records. At the time Claimant completed his application and at the time of his termination, the Wyoming public records clearly showed that Claimant had been convicted of a criminal offense. Thus, when Claimant checked the negative response to the criminal conviction question on his employment form, he was giving the Carrier misleading information.

However, the record also demonstrates that Claimant was misinformed concerning the status of his criminal record. While Claimant must shoulder some responsibility for the untrue response, he had no specific intent to deceive the Carrier. Claimant's conviction could have been (and should have been) annulled before he applied for a position with the Carrier. Under the unique circumstances of this case, we will reinstate Claimant to service with his seniority unimpaired but without compensation for time lost. See Third Division Award No. 22590 (Roukis).

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of July 1983.