NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25038
Docket Number MW-25079

M. David Vaughn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Louisville and Nashville Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Track Repairman L. T. Rowan for alleged falsification of his 'application for employment' was without just and sufficient cause and on the basis of unproven charges (Carrier's File D-107958/E-306-17).

(2) The Claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant L. T. Rowan was employed as a Track Repairman. On August 14, 1980, while on duty, Claimant was a passenger in Carrier's truck when it lurched forward and struck a bumping post. Claimant allegedly sustained a back injury in the accident and subsequently sued the Carrier for his injuries.

In the course of the litigation, Claimant stated in response to interrogatories that he had, in 1972, been involved in a traffic accident in which he suffered "... a concussion, hurt neck, strained back and hurt coccyx."

The Carrier apparently checked Claimant's applications for employment and associated documents and found that Claimant had not reported the prior accident or his injuries. Indeed, Claimant had answered twice in response to questions on various employment forms and once in his physical examination that he had never had any back trouble. He further answered in response to another question that he had no previous serious injuries, illnesses or accidents. Claimant signed his employment application.

The Carrier conducted an investigatory hearing and, following the hearing, dismissed Claimant for falsifying his employment application and failing to tell the Carrier's examining physician of his prior injuries. This claim followed.

The Claimant and his Organization assert that Claimant simply forgot the incident, which occurred seven years prior to his application for employment. The Organization argues further that the omission rendered the application only incomplete rather than false. The Organization implies that even if Claimant had remembered the accident and injuries he would have considered them so inconsequential as not to require reporting. The Organization argues, therefore, that the Carrier did not sustain its burden of proving that Claimant intentionally falsified his application and, therefore, cannot justify the penalty of dismissal.

Clearly, the Carrier has a strong and legitimate interest in hiring only those employes who are healthy and able to perform the job for which they are hired, without injuring themselves or others. To make those determinations is a major purpose of the employment application process and the physical examination. Such a determination is particularly important for a physically-demanding job such as a Track Repairman.

Applicants for employment are properly charged with at least general knowledge of the job they seek and with the importance of full and complete disclosure of their health history. Applicants for employment are also responsible for answering the questions put to them on the employment application and by the Carrier's physician fully and completely. See Third Division Award 21979 which states in part:

> "Carrier's responsibility for the health and safety of all its employes is paramount and, as such, is entitled to full disclosure from prospective employees of any fact which might jeopardize that health and safety."

See also Award No. 92 of P.L.B. 974 and Third Division Award 18475.

Failure to disclose in an employment application material facts tantamount to willful misrepresentation will support dismissal. See Third Division Award 21979, above; Second Division Award 1934 and cases cited therein.

Back injuries are difficult to diagnose through examination. Such injuries frequently subject the injured person to a greater likelihood of injury from any future accidents. Here, Claimant's 1972 accident and injury was directly related to the physical requirements of the job for which he was applying and was, in fact, an injury of the same type he claims to have suffered in the August 14th incident. The Board expresses no opinion as to the relationship, if any, between the 1972 injury and the injury which allegedly occurred in 1980, but it is clear that the 1972 accident and injury was a material fact, in Claimant's employment and one which it was Claimant's duty to disclose. Claimant had at least four opportunities to remember and disclose the 1972 accident and injury, any one of which would have alerted the Carrier to examine his back and medical history more closely. He failed to do so.

The Organization argues that Claimant's actions resulted in merely an incomplete, rather than a fraudulent application. The Board disagrees. If the questions of accidents or injuries had gone unanswered by Claimant, the Organization's position might have merit. But here, Claimant was asked if he had had accidents or injuries and he answered in the negative, not once but several times and on several different occasions. The Board is unable to ascribe such actions to mere mistake or omission, particularly in light of Claimant's later ability, when pursuing his own interest in the litigation against the Carrier, to recall or discover not only the existence of the accident and injuries, but also the date, location, and treating physicians. Claimant owed equal diligence to ensure that his employment application disclosures were complete and correct and contained all material facts about Claimant's health.

The Organization correctly describes the burden of proof which rests with the Carrier; mere suspicion is not sufficient to support discipline, particularly dismissal. But there comes a point at which a studied failure to remember, in the face of a clear responsibility to disclose, becomes the equivalent, for evidentiary purposes, of willful falsification. The Board concludes that Claimant's failure here, whether it is viewed as a failure to remember or a failure to disclose, rose to that level.

There may be circumstances, such as long-term employment, satisfactory but for the misrepresentation or matters connected to it, which would mitigate the penalty of dismissal for some types of omissions from employment applications. That is not the case here, where Claimant had only eighteen months of service and where there are not in the record any other facts which would mitigate the penalty.

Accordingly, the Board concludes that the Carrier's action was not arbitrary or excessive and upholds the dismissal.

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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1984.