

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25868
Docket Number MW-25668

Nicholas Duda, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Houston Belt and Terminal Railway Company

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

(1) The dismissal of Laborer-Driver E. G. Martinex for alleged falsification of his application for employment was without just and reasonable cause and in violation of the Agreement (Carrier's File 1143).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered including holiday and overtime pay beginning May 5, 1983."

OPINION OF BOARD: Claimant was born in Mexico in 1945. His formal education, consisting of six years of elementary school, was taught in the Spanish language. After immigrating to the United States about 1967, he worked as a Laborer in a Chicago Steel Mill for three years. Then on February 16, 1971 he applied for employment with the Carrier. At that time, Claimant could speak but could not read or write English. For that reason, the questions on the written employment application form were read to him by another person. Claimant provided the answers orally which the other person wrote onto the form. When all the entries were completed, Claimant signed the application. He was hired the next day, February 17, 1971. He worked as a Laborer-Driver for the next twelve years.

Beginning at least in 1982, Carrier became dissatisfied with Claimant's attendance record. Specifically, he was allegedly missing work without permission, in violation of Rule 25. At first, he was only criticized by Supervision for taking days off without permission. Then, on June 3, 1982, he was given a form letter warning him that he would be disciplined for not protecting his job thereafter. On June 7, 1982, he was given another letter criticizing his absence for the period May 17, 1982 through June 4, 1982 when he went to Mexico, allegedly because of illness in his family. From the end of August until February 16, 1983, he received six letters, each of which criticized him for missing work on a day without permission.

On March 24, 1983, Claimant and his Supervisor had a conversation. Claimant said he had injured his right wrist that day pulling spikes. He also mentioned that the same wrist had been injured a number of years earlier. The next day, March 25, 1983, the Superintendent of Maintenance of Way gave him a letter informing that he was being sent to the Carrier's Doctor for a checkup on his "right wrist". The letter said "You stated that this happened in Mexico, approximately 16-17 years ago. A copy of this letter is being placed on your personal record." That same day the Company Doctor did interview Claimant and examined his wrist. In the interview, Claimant said that he had hurt his wrist pulling spikes on March 24, 1983. He also told the Doctor that the same wrist had been fractured 16-17 years earlier, but had not given him pain since that time. The Doctor concluded that there was:

"tenderness and swelling of the right wrist. Motion slightly restricted by discomfort but accomplished through full range. No [word undecipherable] or deformity. Needs orthopedic workup."

After the Doctor's examination, but still on March 25, 1983, the Carrier's Manager of Human Resources sent Claimant a letter notifying:

"As a result of Dr. Robins examination, you will not be allowed to work or perform service for [Carrier] until such time as you are released by your doctors and can pass the Company Physician's examination After you have been released by the doctors, bring the release from them, in writing, to my office, and we'll arrange an appointment for you with Dr. Robins."

About a week after receiving that letter from Carrier's Manager of Human Resources, Claimant received another letter notifying him of:

"a formal investigation to develop the facts and place the individual responsibility, if any, in connection with the report of your falsifying your application for employment"

At the formal investigation, Claimant testified that in response to the question on his 1971 employment application, he had directed that the answer "no" be placed after the question "Have you ever been injured or alleged to have been injured?" He also testified that he had fractured his right wrist about 17 years earlier in Mexico. In other testimony, Claimant said that he had not thoroughly read the application before he signed it because he "really didn't know much English, I just wanted to work" He explained that he had said "no" in answer to the question about prior injury because the wrist "never bothered me, the hand is like I've never been injured".

After the Hearing the Carrier notified Claimant that he was dismissed, "In connection with your falsifying your application for employment"

The Carrier is entitled to ask applicants for employment reasonable questions such as the question about prior injury. This right is well established in the Railroad Industry and generally in Industrial Relations. The applicant has the responsibility to answer such questions truthfully and honestly.

Carrier asked whether Claimant had "ever been injured". His negative answer was false. Claimant had been injured in the past.

The Organization claims that discipline for the false answer is barred by Rule 2(c). This Board does not agree. That Rule merely determines when seniority begins; acquisition of seniority does not prevent discipline for a just and sufficient cause that is established. It is well understood that falsification on the application for employment is just and sufficient cause for discipline.

The evidence is not clear or convincing the Claimant willfully or dishonestly sought to deceive the Carrier on a significant, material fact. Claimant had only a very limited education - in the Spanish language. At the time he answered the subject question Claimant was a foreigner who did not speak English well and was answering what was read to him by another person. His explanation that he understood the question to concern any past injury which still troubled him is not unreasonable or implausible.

In the two years immediately prior to Claimant's dismissal, the Carrier became dissatisfied with the number of days that he was taking off without permission. However, there was no evidence that the condition of his right wrist hindered his work performance or was related to absenteeism in any of the twelve years of his employment prior to the injury pulling spikes. As a matter of fact, the only evidence about a fracture was provided by Claimant himself. When he was injured on March 24, 1983, he had no hesitancy in telling his Supervisor and the Doctor that the same wrist had been fractured a number of years before, but had not troubled him, although it felt "loose". After the Carrier's physician determined that the wrist should be examined, presumably because of the tenderness and swelling, as well as the mention of the report of the prior fracture, no action was taken by the Carrier to have such an examination.

The condition of Claimant's right wrist might have caused Carrier to be disinclined to hire Claimant. Carrier was entitled to a correct answer to its reasonable question. Because Claimant did not provide a correct and truthful answer, he is subject to discipline.

The punishment imposed was dismissal. In the final analysis the dismissal was for an incorrect answer which resulted from an improper interpretation by a person with limited knowledge of English. There is no persuasive evidence that the false answer caused any harm to the Carrier. Under those circumstances, this Board concludes that dismissal is an unduly harsh penalty. Claimant should be reinstated with his seniority unimpaired, but without backpay conditioned upon his passing a physical examination by Carrier's physician that considers the physical condition of his right wrist as well as other considerations.

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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of January 1986.