

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36328
Docket No. MW-36405
02-3-00-3-658

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent dismissal) imposed on Mr. A.B. Gaines for allegedly falsifying his ‘APPLICATION FOR EMPLOYMENT’ FORM 15000 in connection with allegedly failing to indicate a previous conviction of a misdemeanor was without just and sufficient cause and in violation of the Agreement (Carrier’s File 1213022 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. A.B. Gaines shall now ‘ . . . be immediately reinstated to his respective assigned position and that his seniority and all other contractual rights be restored unimpaired. We are also requesting that he be compensated net wage loss that he has suffered since his wrongful dismissal and that all charges be expunged from his personal record.’”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant originally commenced employment with the Carrier in 1985. In 1995, the Claimant left the Carrier's services and worked elsewhere, however, on May 22, 1998, the Claimant presented his application for re-employment with the Carrier. The Claimant's application was accepted, and on June 9, 1998, the Claimant commenced work as a Trackman in the Track Sub-department on the Western Seniority District.

As the result of an August 19, 1999 formal Investigation, the Claimant was assessed a Level 5 (dismissal) discipline under the UPGRADE discipline policy. Specifically, the Claimant was found guilty of violating Rules 1.1 (Safety) 1.6 (Conduct) and 70.1 (Safety Responsibilities) in connection with falsifying his application for employment (i.e., failure to disclose a previous criminal court conviction).

The Organization protested the discipline, maintaining that the Carrier had failed to act timely upon the information which the Claimant had provided on his May 22 application for employment and that such time limit was specified within Rule 4-Validating Record. For his part, the Claimant asserted that he "didn't remember" marking the "no" box with respect to his criminal record on the application. The Claimant further asserted that during his employment interview, he admitted that he had been charged with a misdemeanor, and he "thought" he saw Project Manager Construction May make note of same on his application form.

The Carrier denied the claim, maintaining that the Claimant had knowingly falsified his employment application, thereby rendering the discipline of dismissal appropriate. Specifically, the Carrier quoted from a statement received from Manager Track Projects Howland, in which he stated, in pertinent part:

"Mr. Gaines admitted in the investigation that he had been charged with a misdemeanor but did not show it on his application."

The issue remained unresolved on the property, and is now before the Board for adjudication.

At the outset the Organization asserts that the Carrier violated Rule 4(b) of the Agreement which provides that an employee who has been accepted for employment, in accordance with Rule 4(a) will not be terminated or disciplined by the Carrier for furnishing incorrect information in connection with an application for employment unless the information involved was of such a nature that the employee would not have been hired if the Carrier had had timely knowledge of it.

The Organization's assertion must fail for two reasons. First, the contention as made relies upon the Claimant's unsubstantiated statement that he notified the individuals who conducted his interview, Messrs. May and Zickefoose, regarding his criminal record, and that he was told "not to worry about it" and that the criminal

conviction "would not stand in the way" of his employment. Although Zickefoose retired from service, May did not confirm Claimant's recollection of the events. In fact, May stated unequivocally that he did not recall the Claimant mentioning anything regarding his criminal record. The Claimant had the burden of going forward with corroborative evidence when he raised this affirmative defense and he failed to do so.

Secondly, even if arguendo, the Claimant did tell the interviewers about his criminal record, he still failed to complete his employment application honestly or accurately, nor did the Claimant correct the application when he had the opportunity to do so. Clearly, the Claimant knew that the "information involved was of such a nature that the employee would not have been hired if the Carrier had had timely knowledge of it."

There is no dispute that the Claimant was dishonest when he submitted an employment application to the Carrier in which he indicated that he had "never been convicted of a felony or a misdemeanor." The Claimant's defense that he notified the Carrier's personnel at the time of the employment interview and was advised that a criminal conviction would not stand in the way of his employment, and that it was not necessary to change his "no" answer to "yes," is simply not credible.

Given the serious nature of the proven offense, it cannot be said that the assessment of discipline in this case was unjust, excessive or arbitrary. Therefore, this claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of December 2002.