

PUBLIC LAW BOARD NO. 1760

Award No. 124

Case No. 124

Docket No.

Parties Brotherhood of Maintenance of Way Employees
to and
Dispute Norfolk and Western Railway Company
(Former Wabash)

Statement
of Claim: Claim of L. B. Clark for reinstatement to service as
result of formal investigation held May 9, 1990 relative to
falsification of employment application.

Findings: The Board has jurisdiction of the of this case by reason of
the parties Agreement establishing this Board therefor.

The Claimant, Machine Operator L. B. Clark, applied for employment with Carrier on May 15, 1979. On his employment application, Clark stated that he had never been convicted of criminal offense other than a minor traffic violation. The Claimant also certified when completing the application that the information contained therein was true, and accurate by his signature. He further acknowledged by his signature, that, if employed, any misrepresentation of facts on the form would be sufficient grounds for his dismissal.

The Claimant failed to work the weeks of March 12 and March 19. However, on the Monday, of each week he called and requested vacation. The Claimant also failed to show for work on March 26 and 27, 1990. On March 28 Track Supervisor Johnson discussed the Claimant's excessive absenteeism with him. The Claimant advised Mr. Johnson that the Greyhound Bus strike was the proximate cause of his absence. He also acknowledged that he had a drinking problem, and had lost his driver's license for DWI. He consented to a drug and alcohol test which produced a negative result. Mr. Johnson notified the Norfolk Southern's Police Department to conduct an investigation on Clark's DWI record. Said investigation disclosed that the Claimant had two DWI convictions, one of which was prior to his employment with Carrier. As a result of said earlier conviction, Clark was sentenced to 364 days imprisonment, on June 28, 1977. Claimant failed to divulge this conviction to Carrier on his employment application.

The Claimant, as a consequence of this revelation, was cited to a formal investigation on the charge:

"...your falsifying your May 15, 1979 employment application, in that you stated no conviction or criminal offense, as of May 15, 1979, when you had been convicted on June 28, 1977 of DWI and sentenced to 364 days imprisonment..."

As a result of the investigation held, on May 9, 1987, the Carrier concluded therefrom that Claimant was culpable. He was dismissed from service as discipline therefor.

Rule 30 was violated insofar as the Claimant was held out of service on a voluntary blood and urine test for a possible Rule 6 violation for which he had never been charged. Consequently, he is entitled to be paid between the date of removal from service and the date the investigation was held. Such removal from service does not necessarily indicate prejudgment nor is it cause for a reversal of discipline. Rule 30 indicates that the Carrier may remove an individual in certain cases, and circumstances of this situation did not indicate that was one of those cases. It was a falsification of employment application charge.

The essence of the Claimant's testimony (T-20) was to the effect that he believed it to be a traffic violation which was not a felony offense but he was convicted and incarcerated. Clark felt that when filling out the application the matter was not a felony and therefore he did not believe that he had anything "criminal" to report.

The Carrier's witness, Sgt. Stark, attested that the employment policy in effect at that time still required the police department to interview the applicant, the whole application itself and make an investigation (T-18 and T-19). He attested:

"As far a background investigation on the criminal history goes on page 1 we usually do a background investigation in the state that he is making employment and any state that he may have lived in at the time prior to his application. We look for basically any type criminal history. And correspond that with what he answered on the application. And after that, we usually, depending upon what we find out in the background investigation, either mark the candidate as a favorable or unfavorable candidate for employment. Okay, they match that with the medical department's reviews and then make the decision basically upon the investigation by the police department."

Article XI of the 1978 National Agreement reads:

"Section 2 - Omission or falsification of Information

An employee who has been accepted for employment in accordance with Section 1 will not be terminated or disciplined by the Carrier for furnishing incorrect information in connection with an application for employment or for withholding information therefrom unless the information involved was of such a nature that the employee would not have been hired if the Carrier had timely knowledge of it."

Carrier's witnesses contended that knowing that he had a DWI in 1977 in the State of Illinois that he would not have been hired had the Carrier known that to be a fact.

The Claimant, as did the Employees, asserted that the Illinois Motor Vehicle Code, Article V Driving While Intoxicated, Transporting Alcoholic Liquor, and Reckless Driving, Section 11-501 effective July 1, 1990 reads:

"Driving while under the influence of alcohol, other drug, or combination thereof...:

(c) Except as provided under paragraph (d) of this Section, every person convicted of violating this Section or a similar provision of a local ordinance, shall be guilty of a class A misdemeanor and, in addition to any other criminal or administrative action, for any second conviction of violating this Section... shall be mandatorily sentenced to a minimum of 48 consecutive hours of imprisonment or assigned to a minimum of 10 days of community service as may be determined by the court.

(d) Every person convicted of committing a violation of this Section shall be guilty of a class 4 felony:

(1) Such person committed a violation of paragraphs (a) for the third or subsequent time; or

(2) Such person committed a violation of paragraph (a) while driving a school bus with children on board; or

(3) Such person in committing a violation of paragraph (a) was involved in a motor vehicle accident which resulted in great bodily harm or permanent disability or disfigurement to another when such violation was approximate cause of such injuries.

(f) ...the Secretary of State shall revoke the driving privileges of any person convicted under this Section or a similar provision of a local ordinance. Amended... effective January 1, 1990."

Applying the foregoing to the facts of this case and considering that only 7 months elapsed after a long incarceration when Clark applied for employment and to assert or allege that he thought that the reason for such imprisonment was only a misdemeanor was more than a belated, self serving assertion. It appears now to have been such a material fact that the decision now, as then, would have been not to employ. This claim will be denied. However, the Carrier is ordered to pay the Claimant for that period of time held out of service from the taking of the urine and blood test and the holding of the investigation.

Award: Claim denied as per findings.

Sol Hammons Jr.
S. Hammons, Jr. Employee Member

C. F. Miller, Jr. - Dissent to payment
C. F. Miller, Jr., Carrier Member from 4/17
thru 5/8/90

Arthur T. Van Wart
Arthur T. Van Wart, Chairman
and Neutral Member

Issued December 31, 1991.