

PUBLIC LAW BOARD NO. 1795

Award No. 24
Case No. 24

PARTIES Southern Pacific Transportation Company (Pacific Line)
TO and
DISPUTE Brotherhood of Maintenance of Way Employees

STATEMENT
OF CLAIM

- "1. That the Carrier violated the Agreement when on June 1, 1977 it dismissed Track Laborer Mr. W.E. Hays from the service on charges not sustained in the hearing record, said action being in abuse of discretion and unduly harsh in light of testimony adduced at the hearing.
2. That Carrier now reinstate Claimant with seniority and all other rights restored and that Claimant be compensated for all time lost beginning June 1, 1977 and each day subsequent thereto until Claimant is placed in his rightful position."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Following the hearing conducted on May 18, 1977, Claimant was dismissed by Carrier having been found guilty of charges which may be summarized as alleging that he falsified his employment application in that the Company was not completely informed of certain previous physical injuries to his back. Claimant was hired by Carrier in August of 1976 as a Track Laborer. The record of the investigation reveals that one of the questions in the employment application was whether he had ever been injured to which Claimant answered no. Also, as part of his employment application, Claimant was required to fill out a medical history and examination sheet. On that sheet, one of the questions was: "Have you ever had any disorder of your back or spine, low back pains, lumbago, or sciatica?" To this question, Claimant answered no. Following a complete medical examination, including back X-rays, Claimant was considered to be employable for the position for which he had applied. It is noted that the employment application contained an affirmation in which the applicant indicated the truth of the statement and agreed that

any misrepresentation or false statement would justify termination.

The record indicates that the Carrier investigated the application in 1977 following Claimant suffering a lower back strain on January 11, 1977 while at work. According to the Carrier, Claimant received a \$1,450 settlement for that injury.

At the investigation Carrier produced evidence that Claimant had been injured in a previous position with another employer involving a strained back and collected Workmen's Compensation for this injury while off duty in 1973. Furthermore, he was put on light duty for five months following that injury after which time he was permitted to take a month off to permit his back to heal completely. Carrier argues that in view of the clear and unequivocal record of Claimant, not only being injured previously, not reporting it, but actually claiming compensation for such injury and having a lengthy recovery period, he obviously falsified his employment application intentionally. Based on the undisputed evidence at the hearing, Carrier concludes that its finding of guilt was amply justified. Further, Carrier insists that its decision that termination was the appropriate penalty for the falsification was hardly an abuse of discretion.

The Organization insists that Claimant was fully qualified for the position for which he applied after a total medical examination. The Organization points out that Claimant did not feel a muscle strain in his back could be classified as an injury and it was for this reason and no other that he answered the question negatively. The Organization argues that there was no willful falsification for the purpose of defrauding Carrier into giving him a job. Whether or not Claimant was correct in assuming that a strained muscle would not be classified as an injury is irrelevant. It is obvious, according to the Organization, that Claimant did not willfully perform a dishonest act. The Organization also points out that during his short term of service, Claimant had a good record with Carrier.

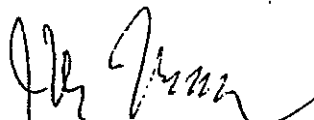
The Board cannot agree with Claimant that a mere muscle strain, as in this instance, cannot be classified as an injury. It is clear that when an injury results in a compensa-

tion claim and in a significantly reduced work load for a substantial period of time, in this case, many months, more than "a mere strain" is involved. Whether or not Claimant's motives were above suspicion is immaterial. It is obvious that he did not supply Carrier with required information in order for Carrier to make an intelligent judgment as to his original employability. As many Boards in the past have held, the employment application is an important tool which Carrier must use in making the employment decision. It is particularly important also for a physician to have accurate answers to a medical history in order to appropriately examine potential problems. In the case at bar Claimant's injury while working for Carrier may very well have been attributed to previous weakness due to the earlier injury. In any event, Carrier was at a significant disadvantage in not knowing of the earlier injury in making its medical judgment on Claimant's employability. It is also well established that employees' falsification of employment applications may be acted upon by Carrier regardless of the length of time from date of employment to the date of discovery. (See Second Division, NRAB Award 6391 among others)

With respect to the measure of discipline imposed by Carrier, this Board has little choice but to abide by the decision made. In view of the nature of the infraction, the penalty of dismissal is neither arbitrary, capricious nor an abuse of discretion. Consequently, the claim must be denied.

AWARD

Claim denied.



I.M. Lieberman-Neutral Chairman


Carrier Member
Employee Member

November , 1979
San Francisco, California