

PUBLIC LAW BOARD NO. 2267

Award No. 8
Case No. 10

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees

and

Union Pacific Railroad Company

STATEMENT
OF CLAIM:

1. That the Carrier violated the Parties' Agreement when on October 3, 1978 they suspended First Class Carpenter D. A. Harley from his position and subsequently discharged him following hearing conducted November 9, 1978.
2. That the Carrier shall now reinstate Claimant D. A. Harley to his former position with seniority, vacation and all other rights unimpaired and compensate him for loss of wages suffered account the Carrier's improper action.

FINDINGS:

By reason of the Agreement dated August 31, 1978, and upon the whole record and all the evidence, the Board finds that the parties herein are employee and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

By letter of October 3, 1978, the Carrier informed Grievant that "Effective October 3, 1978 at 12:00 noon you are hereby suspended from your duties with the Union Pacific Railroad Company for violation of Company General Notice, General Rule B, General Regulations 700, 701, 701A, and 702B of Form 7908, Rules Governing Duties and Department of Employees, Safety Instructions and Use of Radio. Such violation occurred on October 2, 1978." By letter of October 10, 1978, the Carrier advised Grievant to "Report to the Roadmaster's Office in Green River, Wyoming, at 10:00 AM, October 23, 1978, for investigation and hearing to develop facts and determine your responsibility in the alleged incidence of October 2, 1978 when you allegedly threatened Foreman Hennik's life, wherewith you were charged with violation of Company General Notice, General Rule "B", General Regulations 700, 701, 701(A), and 702(B) of Form 7908, Rules Governing Duties and Department of Employees, Safety Instructions and Use of Radio." Further, on October 13, 1978, the Carrier wrote Grievant: "In reference to my letter to you dated October 3, 1978 suspending you from your duties with Union Pacific Railroad. I inadvertently did not describe the violations occuring on October 2, 1978, and by copy of this letter, you were

suspended from duty on October 3, 1978 due to alleged altercations between yourself and Foreman D. D. Hennek while you were discussing time rolls and pay checks, whereby you allegedly threatened Foreman's Hennek's life, and for falsifying your application for employment on forms 2941 and 2946 dated May 17 and 18, 1978." By letters of October 16, 1978, October 27, 1978, and by letter of November 6, 1978, at the request of the Organization, hearing was rescheduled for November 9, 1978. The evidence of record is conclusive that adequate time was afforded to prepare a defense. If additional time were needed, and the record in no way reflects this to be the case, there was full opportunity to seek further postponement. The record contains no evidence of prejudice or surprise to Grievant. The Carrier's communications stating the charges were adequate and informative, and Grievant's refusal to defend against the charges of falsification of employment application after full knowledge of such charges was a refusal at his peril.

Grievant was charged with alleged violation of Carrier's General Rule "B" and General Regulations 700, 701, 701-A and 702-B of Form 7908, "Rules Governing Duties and Department of Employees, Safety Instructions and Use of Radio," which read:

"B. Employees must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, they must apply to proper authority of the railroad for an explanation."

"700. Employees will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations."

"701. Courteous, orderly conduct is required of all employees. Boisterous, profane or vulgar language is forbidden."

"701(A). Employees must not enter into altercation with any person, regardless of provocation, but will make note of the facts and report such incident in writing to their supervising officer."

"702(B). Employees must comply with instructions from proper authority."

Concerning the alleged threat to Foreman Hennik's life, Foreman Hennik testified:

"Well, I went in the car and I believe we had a Safety Meeting and when that was through, Mr. A. E. Torres asked me if I would check on his time, as he said he had been shorted from the week before. We

started discussing it, and it was about the third time that I had been approached on the same deal. It was my fault that his was short, because the previous period I had forgotten to make out a 'gray' copy on him. We kind of got into a discussion on the pay period or something and everybody had been short and I was trying to explain to them what I thought the matter was; being we were working nine hour days, and four hours on Fridays, and anyway I was telling them that was the reason that they were coming up short the one half and that they would be long on the one of the other halves. Well I don't know what went on from there, but I guess I did get a little carried away and started yelling and started yelling and I didn't think anybody was made or anything over the deal. So I said let's go to work, and when I started outside the rest of them had went out and Don grabbed my arm and said he wanted to talk to me alone. So the last one out the door, I think, was A. E. Torres. So anyhow, he shut the door behind him and he told me don't ever yell at me again. Well I didn't think too much of it and said 'Well this is the way I am.', and I kind of laughed it off. Anyhow, he said 'If you ever yell at me again, I will kill you.' Well, when he said that, I had never had anyone say anything like that to me, so I didn't say another word; I just walked outside and said 'Let's go over and see if we can't straighten out the deal with the checks. So we went over to the Depot and called Carla and we got that straightened out.' (Tr., p. 6).

"Mr. Stokes: You stated that Mr. Harley grabbed your arm. Was that to attract your attention, so that he could talk to you?

Mr. Hennik: I believe it was, yes sir.

Mr. Stokes: In grabbing your arm, did he viciously grab it, or partially to restrain you from leaving, so that he could discuss something with you?

Mr. Hennik: Just so as to get my attention.

Mr. Stokes: There was no violence in your discussion?

Mr. Hennik: No sir.

Mr. Stokes: Your statement that you said he made 'Don't yell at me, I will kill you.' How was it made?

Mr. Hennik: Meaningfully - - or that is the way I took it.

Mr. Stokes: So the only thing that transpired was that he grabbed your arm to refrain you from leaving, and the statement of 'Don't yell at me, or I will kill you.'.

Mr. Hennik: Yes sir." (Tr. p. 7).

The transcript of the hearing reports the following testimony of Grievant:

"Presently believing that October 2nd was a Monday, and as on previous Mondays we as a crew congregated within my railroad car, at which point a discussion brought about by Mr. Torres commenced in regard to a shortage of pay, at which time I also stated that I believed that my pay check was also short. From that point on the discussion was carried on by Mr. Torres and other crew members prior to 7:30 in the morning. From that point I continued eating my breakfast and listened to the conversation carried on by crew members and Foreman Hennik. At this point Mr. Hennik looked at me sitting at the kitchen table and interpreted by my expression that I was accusing him of shorting us on our pay. At this point Mr. Hennik, looking at me, commenced to holler and I in turn told him that it was not necessary for him to holler at us. The crew, and Mr. Hennik and I were then all involved in a mixed discussion as to the remedy for the problem of pay checks. Shortly thereafter, the personal conversation commenced between Foreman Hennik and myself. Mr. Hennik told me that if I could not tolerate his hollering at me I could bid out for another position. Thereafter the crew began to line out the door, with Mr. Hennik bringing up the rear, at which time I reached out and guided Mr. Hennik from the door of my railroad car to the kitchen table and reiterated to him that I was not going to tolerate his hollering at me and that I was not going to bid for another position.

Mr. Larsen: You said you was not going to tolerate his hollering. What did you intend to do if he kept hollering at you?

Mr. Harley: In reiterating to Mr. Hennik that I was not going to tolerate his hollering at me was in essence as one would state in writing emphasis added.

Mr. Larsen: Did you threaten his life?

Mr. Harley: That I did not.

Mr. Larsen: When you told him that you didn't want him hollering any more, did you intend this conversation to solve his rude behavior?

Mr. Harley: I had hopes that my reiterating of my displeasure of his hollering at me would be sufficient and that in the future he would conduct himself to me in a more agreeable manner. My intention was then, and is now, to in no way physically harm Mr. Hennik."

Mr. Stokes: Mr. Harley, in fraining Mr. Hennik from leaving the outfit car, you grabbed his arm and lead him to the table?

Mr. Harley: Correction. I guided him. There was no closing of the hand.

Mr. Stokes: Did you state "Don't yell at me, I will kill you?"

Mr. Harley: No sir, I did not." (Tr., p. 14):

Details of the testimony of other crew members are fully consistent with the testimony of Grievant and Foreman Hennik as to what transpired prior to the conversation in private between Grievant and Foreman Hennik. Except for Grievant's denial of having told Foreman Hennik, "If you ever yell at me again, I will kill you.", there is a general agreement as to what was said in the described setting. It is clear that the Foreman's "hollering" with the gang present was expressly objected to by Grievant, and this is admitted by Grievant. There is no question that Foreman Hennik unequivocally felt threatened and responded in behavior and in reporting as if the "kill you" statement were actually made. There is no doubt that Grievant felt strongly hostile towards being "hollered" at and expressed his resentment "as one would state in writing emphasis added". On the record as a whole, the evidence is substantial and probative, and the testimony of Foreman Hennik is credible, in support of the Carrier's conclusion that Grievant threatened Foreman Hennik's life. This Referee, in the circumstances presented, will not substitute his judgment for the responsible and reasonable determination of the Carrier's officials.

Article 48(o) provides: "It is understood that nothing contained in this rule will prevent the supervisory officer from suspending an employe from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent...". The circumstances in this particular case, of threat to kill, constitute justification for suspension under Article 48(o). See, in this connection, Award No. 5 and Award No. 7 of this Board.

Although Grievant was under suspension for threatening to kill his Foreman, the Carrier remained fully empowered under Agreement and law to charge and try Grievant for falsification of his employment application. Conceivably, the charges of falsification of employment application might have been separately heard. There is no showing in the present case that there was prejudice to Grievant resulting from including the falsification charges in the same proceeding; and, as a matter of record, is there contention of the Grievant of prejudice resulting from including the falsification charges in the same hearing. Grievant's contention that the falsification of application charges were improper under the contractual obligation of the Carrier to make "precise" charges is without merit in the circumstances of this case.

The testimony of Carrier's Special Agent is as follows:

"Form 2941 has a question as follows: 'Have you ever been convicted of a crime or are you under sentence for a previous conviction in the last 7 years? The box marked 'NO' has an 'X' in it. ...There are two boxes on this form. One that is yes and one that is no and the no box has been marked....On Form 2946, question #13 deals with a criminal conviction and is quoted as follows: 'I have never been convicted of, under either my present or another name, the commission of any crime, except as follows (Not to include minor traffic offenses):' In the space provided for the listing of all convictions, dates, court

and final disposition is written the word 'None,' and it is underlined.

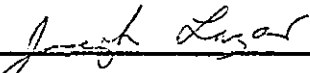
Mr. Stokes: These two Exhibits are then falsified because he was under a conviction or under sentence?

Mr. Jacobson: Yes sir." (Tr., p. 10).

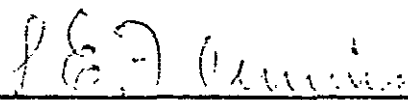
The evidence of record conclusively establishes the fact of falsification of employment application by Grievant. Grievant committed a very serious offense. It was a wilful manifestation which was designed by Grievant to create an employment relationship predicated upon fraud and deceit. The law has invariably held such transactions to be revokable. The fraud here was wilful and fully known by Grievant to be material in inducing the Carrier to employ him. In view of the nature of the crime which Grievant fraudulently concealed, serious question exists whether Carrier would have accepted the employment application if honest disclosure had been made by Grievant. Under the circumstances, where the employment relationship was born out of fraud and deceit, the Carrier has the right and power to revoke the employment relationship and discharge the Grievant. See, in this connection, Third Division Awards 4391, 14274, 18103, 22369.

A W A R D

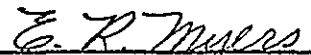
The claim is denied.



JOSEPH LAZAR, Chairman and Neutral Member



S. E. FLEMING, Employee Member



E. R. MYERS, Carrier Member

Dated: March 19, 1980