PUBLIC LAW BOARD NO. 2439

Award No. 57
Case No. 57

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM:

"1. The dismissal of bridge and building sub-department carpenter, Mr. J. N. Couthren, was without just and sufficient cause on the basis of unproven charges and in violation of the Agreement, said action being in abuse of discretion.

2. That Claimant's record shall be cleared of all charges and he shall be reinstated to the service of the Carrier with compensation for all time lost and all rights restored unimpaired."

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.

Claimant had been employed by one of Carrier's wholly-owned subsidiaries, the Northwestern Pacific Railroad Company, in 1969. He was placed on furlough in January of 1981 and in June of 1981 he transferred to service with Carrier, filling out a required employment application. Approximately six months later, on January 7, 1982, while on duty on the property, Claimant alleged that he turned his foot and fell back, striking his left shoulder, suffering what was later diagnosed as a shoulder separation. On February 12, 1982, Claimant was informed that he was being removed from service, being charged with being dishonest in the completion of his accident report with respect to the January incident. Based on that action, a hearing was held on February 18, 1982, resulting in termination of Claimant subsequently. His termination notice was dated February 26, 1982. In the course of the investigation of the accident report, Carrier discovered that there was an apparent falsification in the employment application record involved in his transfer to this Carrier's service. By letter dated February 11 Claimant was notified of a formal hearing to be convened on February 18, 1982. He was again dismissed, following that hearing, by letter dated March 1, 1982. Subsequently, after both of the incidents were appealed, the parties agreed to combine the two dismissals for adjudication as one case which is that involved herein.

Carrier argues that the testimony adduced at the hearing with respect to the alleged accident in January indicated that it could not have occurred while Claimant was on duty in the manner which he described. Carrier's cites Claimant's contradictory testimony and also the testimony of medical experts and supervisors with respect to the allegations contained in the original accident report. With respect to the second set of charges, Carrier notes that in examining the employment application filled out by Claimant, one of the questions was: "Have you ever been injured?" The response to that was, in Claimant's instance, "No". That application also carried the certificate with the information that the signing of the application indicated that any misrepresentation or false statement would justify and cause termination. Carrier discovered that in the previous employment with the subsidiary company, Claimant had sustained five personal injuries, two of which resulted in 18 days of lost time at work. Carrier concluded that both incidents were individually sufficient to justify its decision to dismiss Claimant.

Petitioner argues that Carrier has failed to prove that Claimant did not sustain an on-duty injury as outlined in his report. The organization insists that Carrier's attempt to use documents supplied by individuals who were neither privy to the accident nor reliable from the standpoint of their relationship to the matter is clearly inadequate. Petitioner notes, for example, that the Dr. Sander relied on in large part by Carrier never testified and was never permitted to be questioned by petitioner with respect to his statements. Among other things, the organization notes that Carrier has submitted none of the medical reports for examination, so that its reliance on such reports is totally improper. The organization insists that it was Carrier's failure to support its position adequately which caused it to rely and precipitate the second series of accusations against Claimant concerning his employment application.

With respect to the second charge concerning the falsification of the employment application, the organization denies that Carrier has sustained its position. First, the organization notes that none of the alleged injuries, which Claimant's record indicated he had been involved in, caused any lost time. They were all insignificant, according to the organization. Further, Claimant, in his testimony, indicated that he thought the question related to current injuries and not to those which had occurred some time ago, as long as five years previously. And finally, the organization insists that none of the evidence submitted by Carrier contained information which would show that Carrier would not have hired Claimant had it been

aware of his prior record. Thus, Article 11 of the Agreement, which provides that an employee who had been accepted for employment may not be terminated upon falsifying his application unless the information involved was of such a nature that he would not have been hired had the Carrier been aware of such information, is applicable. In this instance, Carrier was obviously not aware of the information but made no showing that it would not have hired Claimant. For the reasons indicated, petitioner insists that Claimant be restored to service and that Carrier has not sustained its burden of proof.

After careful evaluation of the evidence at the two hearings involved, the Board is of the conclusion that Carrier was well within its right, supported by the evidence, in its decision to terminate Claimant. Even assuming arguendo, that Carrier's evidence with respect to the initial false injury report was not supported there was sufficient evidence with respect to the second charge to warrant Carrier's conclusion. There was no doubt but that Claimant did falsify his employment application and, contrary to the petitioner's position, there were lost time accidents involved which were not reported. Hence, the incidents which were omitted from the employment application were not insignificant and were, indeed, important in making a determination. There is no doubt that an employee with the type of record which the Claimant did not indicates on his application would have been sufficient to cause Carrier considerable doubt as to his employment, at minimum. In addition, with respect to the first charge, the evidence of the relative implausability of Claimant's explanation of the accident, which caused his initial problem, is great. Further, Claimant did not request Dr. Sander's testimony and the documents which he submitted were accepted without question. Taking the entire record into consideration, including arguments presented, the Board is of the opinion that the evidence supported Carrier's conclusion and, thus, the Claim must be denied.

AWARD

Claim denied.

I. M. Lieberman, Neutral-Chairman

L. C. Scherling, Carrier Member

C. F. Foose, Employee Member

San Francisco, CA
October 12, 1983