

PUBLIC LAW BOARD NO. 2774

Award No. 9
Case No. 15

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
The Atchison, Topeka & Santa Fe Railway Company

STATEMENT
OF CLAIM

- "1. That the Carrier violated the Agreement between the Atchison, Topeka & Santa Fe Railway Company and the Brotherhood of Maintenance of Way Employees when on May 16, 1980 they dismissed Colorado Division Bridge & Building Mechanic L.T. Whatley from the service. Said dismissal being arbitrary, unreasonable and in abuse of discretion.
2. That the Carrier now restore former Bridge & Building Mechanic L.D. Whatley to the service with seniority, vacation and all benefit rights unimpaired and pay for all wage loss beginning May 16, 1980 and continuing forward and/or otherwise made whole."

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 an investigation held on May 16, 1980 Claimant herein was discharged for allegedly misrepresenting facts when filling out his employment application with Carrier dated July 20, 1978. At the hearing there was no question but that Claimant admitted that he falsified that section of the employment application involving conviction of crimes. He testified that he had been convicted of a crime leading to his serving time in the State Penitentiary for impaired driving and possession of marijuana. This sentencing occurred in 1968.

Article XI of the October 30, 1978 National Agreement provides as follows:

"Section (a) - Probationary Period. Applications for employment will be rejected within sixty (60) calendar days after seniority date is established, or applicant shall be considered accepted. Applications rejected by the carrier must be declined in writing to the applicant.

Section (b) - Omission or Falsification of Information. An employe who has been accepted for employment in accordance with Section (a) 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 employe would not have been hired if the carrier had had timely knowledge of it."

Carrier argues that if it had knowledge of Claimant's prior criminal record, he would not have been hired. Furthermore, this decision would have been left to the discretion of the employing officer at the time. Carrier concludes that the hearing was fairly conducted and Claimant's rights to due process were fully adhered to. Further, in view of his falsifying information on his application and in view of his short service, the dismissal decision was appropriate.

Petitioner alleges that Claimant was not afforded a full and fair investigation in that certain evidence relative to the matter and in defense of Claimant was refused by Carrier. Further, the Organization maintains that Carrier violated the National Agreement in that Carrier's only witness testified at the investigation that Claimant would have been hired if he had listed the alleged criminal incident on his employment application in 1978. Further, it is argued that Claimant was a responsible conscientious and respected employee and was well regarded by his supervisors and his peers. The Organization maintains that the entire matter herein was triggered by another dispute involving a grievance filed by Claimant concerning a promotion. The Organization argues that Carrier refused to permit material with respect to the Foreman's attitude triggered by the other dispute to be introduced into this matter thus impairing its defense of Claimant.

As the Board reviews the record of this dispute, it becomes clear that the 1978 National Agreement is involved herein and distinguishes this dispute from other cases involving employment application falsifications cited by Carrier. The particular distinguishing factor is the language in Article XI which states that the information involved

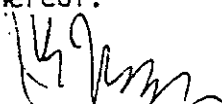
had to be "of such a nature that the employee would not have been hired if the Carrier had had timely knowledge of it." It must be noted that although Carrier insists that had it known of Claimant's record for possession of marijuana and his criminal incarceration as a result thereof, it would not have hired him, its only witness at the investigation testified directly to the contrary. Had Carrier wished to present such information it could indeed have secured the testimony of the employing officer to substantiate its argument. Thus, Carrier has no basis for its argument that it would not have employed Claimant had it known of the incident. While the Board is obviously concerned with any argument with respect to due process, particularly such as raised by Petitioner herein, it is apparent that in this instance the entire subject matter of Petitioner's position is involved in another dispute under a different tribunal (the Third Division NRAB). The Board must conclude that on the basis of the testimony produced at the hearing there were two errors involved in this dispute. First, it is apparent that Claimant made a dishonest and untrue statement on his employment application. Secondly, however, it is also clear that Carrier did not present evidence to indicate that such an omission was of significance to impair the possibility of hiring Claimant at the outset. Our conclusion therefore is, that Claimant should be reinstated to his former position with all rights unimpaired but because of his knowing error he should not be paid for time lost.

AWARD

Claim sustained in part; Claimant will be reinstated to his former position with all rights unimpaired but without compensation for time lost.

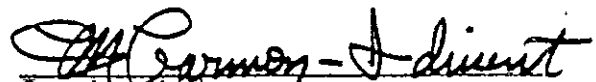
ORDER

Carrier will comply with the Award herein within thirty (30) days from the date hereof.


I.M. Lieberman, Neutral-Chairman


Employee Member

Chicago, Illinois


Carrier Member

CARRIER'S DISSENT TO AWARD NO. 9 OF
PUBLIC LAW BOARD NO. 2774

The Award is based on the erroneous conclusion that Carrier would have hired Claimant if it had known of his record involving possession of marijuana and his criminal incarceration as a result thereof. This erroneous conclusion apparently was reached based on the following testimony of Special Agent M. W. Ingle, Carrier's Witness, on Page 11 of the transcript:

"Q. Mr. Ingle, had these things been known and listed on the application would Mr. Whatley be given an opportunity to be an employee of the Santa Fe Railway?

A. I have no idea. That's not my decision to make. I am sure he would have.

Q. You're sure he would have had the opportunity to be an employee?

A. I would think so. I don't know. Those decisions are not up to me. (Emphasis supplied).

It was pointed out in the Carrier's submission and at the Hearing that the testimony of this witness clearly indicates he did not know whether or not Claimant would have been hired if the Carrier had known about his record. However, the Honorable Referee chose to ignore the positive testimony of this witness and rely solely on the assumption of the witness. The testimony of a witness to the effect that he assumed something would have occurred, together with a positive statement that he had no knowledge of the matter, can hardly be considered as supporting testimony.

As stated by Referee A. Thomas Van Wart in Award No. 5 of Public Law Board No. 2524 (UTU vs. AT&SF), in denying a claim filed under a rule which is virtually identical to Article XI of the October 30, 1978 National Agreement, "****it is not an unfair or improper conclusion for the Board to surmise that Carrier would not have hired Claimant had it been aware of his prior***record***." (Emphasis supplied). The Honorable Referee in the instant case, however, surmised that the Carrier would have hired Claimant in spite of his record. I submit that his conclusion is unfair and improper, based on the facts and testimony which were considered in adjudicating this dispute.

For the reasons set forth herein, I must dissent to Award No. 9.


Carrier Member