

PUBLIC LAW BOARD NO. 2444

Award No. 81

Case No. 95

Docket No. MW-81-190
-329-95-A

Parties Brotherhood of Maintenance of Way Employees
to and

Dispute Southern Pacific Transportation Company
(Texas and Louisiana Lines)

Statement

of Claim: Claimant White shall now be reinstated to his former position with his work record cleared of the alleged charge of knowingly falsifying his application for employment with the Southern Pacific Transportation Company and with all seniority and vacation, and any other rights accruing to him unimpaired in addition to all compensation losses commencing August 10, 1981, and to run concurrently until such time as to White is rightly restored to duty.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated July 19, 1979, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant, a Welder Helper at Carrier's System Welding Shop in Houston was advised under date of August 10, 1981 by the Welding Plant Supervisor as follows:

"For you knowingly falsified your application for employment with the Southern Pacific Transportation Company you are hereby dismissed from service. This is a direct violation of Article II, Section 4, Application for Employment."

Claimant requested and was granted a hearing which was held on September 10, 1981. As a result thereof, Claimant was advised that his dismissal was sustained.

The record reflects that Claimant applied for employment in late 1978. Question No. 6 in the first part of the employment application read:

"Have you ever been injured?"

Claimant answered "no" thereto. In response to his requested medical history, in particular, Questions 5, 6, 7, 8 and 10, Claimant advised in the negative. Such questions read:

"5. Have you had fits, convulsions or fainting spells?

6. Are you taking any medicine or drugs at his time? If so what?

7. How often do you have headaches?

8. Do you have or have you ever had any trouble with your neck, back or any joint?

10. Have you any hernia (rupture) or other physical defect disease or disability whatsoever which has not been listed above?"

Said medical examination was taken and filled out on January 25, 1979 by Dr. Howard Hayson.

Claimant was accepted for employment on January 29, 1979. He apparently commenced service at the Welding Shop on February 5, 1979.

Claimant received an on duty injury on May 1, 1979. He was attended in Carrier's clinic by Dr. Preston on May 14, 1979 with a diagnosis of strain of neck. Claimant returned to duty on July 10, 1979 after being released thereto by his own physician, Dr. Craig Ponder.

Claimant last worked on February 25, 1981. As a result of an off duty injury he did not perform any further service for Carrier.

On June 4, over three months later, Claimant appeared at the clinic in order to take a return to work physical examination. He advised Dr. Hayson that he had been off three months due to neck and back pain and had been treated by a Doctor Bettinger.

Dr. Hayson determined that Claimant had a vexed back, the x-ray class 5 (II) reflected that Claimant had previously undergone a myelogram

because of the dye shown in connection therewith and that Claimant had a history of cervical and lumbar strain. Claimant at no time stated to Dr. Hayson that he had any problems other than frequent neck pain.

Claimant in giving his medical history to Dr. Hayson answered Questions 5, 6 and 7 in the negative as he had in his 1979 employment physical examination. However, in reply to Question No. 8 which reads, "do you have or have you ever had trouble with your neck, back or any joint?" he now answered this time not in the negative as before but replied "yes neck and upper back." In answer to Question No. 9 reading "how much time have you lost from work due to illness or injury during the past year" Claimant advised "three months." Question No. 10, which had been answered previously in the negative, was now answered, "yes, hernia when I was a baby." Question No. 11 which had been left blank in the pre-employment physical examination in January 1979 and which read "describe any injury received during any previous employment or physical defect or time lost as a result thereof," was now answered "was hurt on 5-1-79 hit on lower neck & upper back with piece of steel."

Because of Claimant's long absence, February until June 1981, and because he had not presented any release he was informed that he would have to present the medical department with a full report before being permitted to return to duty. Claimant presented the Medical Department with a letter from his physician, Dr. Bettinger, on June 25, 1981. Dr. Bettinger stated therein that he had seen Claimant on April 28, 1981 for neck and back pain. Dr. Bettinger's report read:

"June 23, 1981

To Whom It May Concern:

Re: Daniel White

Daniel first consulted me on 4/28/81 because of neck and back pain. He gave a history of a work related injury 2 1/2 years ago followed by re-injury in Feb. 81. There was history of previous severe multiple injuries several years ago due to a car

wreck: he has seizures as a result of the latter.

He was admitted to Tomball Hospital on 5/11/81 and discharged 5/19/81. He had lab blood tests, plus x-rays of the spine, and a complete pantopaque myelogram. All tests were acceptable, within normal limits except for T-6 compression fracture which is not of clinical significance in the opinion of myself and Dr. Howard Davis, an orthopedist called in by me for consultation.

There being no serious symptoms and normal neurological exam, normal myelogram, and inconsequential findings on x-ray, he was released to return to full work capacity on 6/1/81." (Underscoring supplied)

Claimant on his return to work physical examination answered "no" to the following questions asked him by Carrier's doctor in developing Claimant's medical history, Question 501 - "did he have a head injury without unconsciousness;" Question 502 - "did he have a head injury with unconsciousness;" Question 504 - "did he ever have fainting or blackouts;" Question 506, 507, 508, all involving headaches and 520 involving epilepsy, 521 - medication for epilepsy; 522 - epilepsy without loss of consciousness; 523 epilepsy, with loss of consciousness and Question 524 - a convulsion seizure.

The record reflects that Claimant had been involved in a pre-employment automobile accident in 1975. As a result thereof he suffered seizures. Carrier's Chief Medical Officer, Dr. Hyder, as a result of Dr. Bettinger's June 23, 1981 letter reviewed Claimant's medical records. He compared the one when Claimant entered service in 1979 and the one that he completed on his return to work on June 4, 1981. Such comparison reflected that Claimant had not in any way indicated that he had been injured or had suffered seizure episodes.

Claimant appeared before the Board. The Board requested the presence of Dr. Hyder and further information on Claimant. Dr. Hyder furnished the Board with the following:

"On November 23, 1982 I called the office of Dr. Jerry J. Bettinger regarding the above named employee.

Dr. Bettinger record librarian read me a clinic note from the file dated May 29, 1981. 'Status post traumatic neck pain improved. Regarding post traumatic seizures, Mr. White was severely injured in an automobile accident at age 17. He had intraabdominal injuries, intra thoracic injuries and had blood exuding from his ears due to basilar skull fracture. Three years later he had his first seizure and has had three seizures since then.'

Mr. White's date of birth is January 29, 1958. Therefore, the above described injuries occurred in an automobile accident in 1975, and his first seizure was prior to employment with Southern Pacific Transportation Company."

Both the Carrier's employment application and its medical examination report forms contain the same stipulation to which Claimant agreed and attested, to wit- that the information given therein was true and correct and that if there was any misrepresentation or false statements therein that such would be grounds for dismissal.

Article II, Section 4, provides:


"An employee who has been accepted for employment in accordance with Section 5 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 Carrier had timely knowledge of it."


The Board is impelled to find that the nature of the information withheld from Carrier in the instant case was such that Claimant would not have been employed in a position which permitted him to be on or near moving equipment. It would appear that Claimant had been on a continuous medication for a history of a idiopathic seizure disorder since his 1975 automobile injury and accident. The Board finds that while there was much merit to the arguments aggressively presented by

Claimant's representative such was not persuasive enough to overcome the sufficiency of evidence presented in support of Carrier's conclusion that Claimant had willfully and fraudulently deceived Carrier and that he withheld critical information necessary to a proper determination for his employment.

The Board concludes that the discipline of dismissal was consistent with Claimant's signed employment application that if any falsification would be found, irrespective of the time elapsed, dismissal would ensue. Dismissal is generally assessed in cases of this nature. This claim will be denied.

Award: Claim denied.


M. A. Christie, Employee Member


C. B. Goyse, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member

Issued March 14, 1983.