

PUBLIC LAW BOARD NO. 2774

Award No. 26
Case No. 35

PARTIES
TO
DISPUTE

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

STATEMENT
OF CLAIM

- "1. That the dismissal of Plains Division Miscellaneous Machine Operator H.W. Sain, Jr. was unjust.
2. That Claimant Sain be reinstated to service with seniority, vacation, all benefits rights unimpaired, paid for wage loss, 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.

Claimant filed an application for employment dated February 27, 1979 and was employed by Carrier as a Trackman on March 5, 1979. Following an investigation held on December 10, 1980, on December 17, 1980 Claimant was discharged for furnishing false information on his application for employment.

The record indicates that upon filling out the application for employment, Mr. Sain in response to the question "Have you ever been convicted of a crime?" answered in the negative. Furthermore, the application at its end, prior to the signature indicated "I understand that any misrepresentation in this application is sufficient cause for discharge.". Also relevant is Article IX of the October 30, 1978 National Agreement which 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 employee 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 employee would not have been hired if the Carrier had had timely knowledge of it."

At the hearing Claimant testified that he did not believe he had falsified his application since the incidents which Carrier had discovered (inadvertently in the course of an investigation of an accident) were not crimes as he saw it. Those incidents as revealed by the record were as follows: 1. On April 24, 1975 Claimant was arrested for possession of marijuana and subsequently put on probation after pleading guilty, for a period of eight months. Three months later he was arrested for possession of marijuana and the probation in the initial case was revoked and he served thirty days in jail and was fined \$200 plus costs. 2. On February 9, 1977 Claimant was issued a misdemeanor (equivalent to a traffic ticket) for disorderly conduct - urinating in public. He entered a plea of guilty and was fined \$52 plus costs. 3. On February 14, 1979 Claimant was arrested and charged with public intoxication. He pleaded guilty and was fined \$96.50 plus costs.

Carrier maintains that there is no doubt but that Claimant falsified his employment application. Further the convictions indicated in the testimony adduced at the hearing are clearly crimes under the laws of the state of Texas. The fact that they are misdemeanors rather than felonies is of no consequence. Finally, Claimant when he signed his employment application certified that the answers were correct and understood that any misrepresentation would be sufficient grounds for discharge. Thus, Carrier concludes that the discipline invoked was appropriate.

Petitioner argues that Claimant was unjustly discharged. Petitioner insists that Claimant did not misrepresent with respect to his employment application since he did not

believe that the incidents which he was involved in at an earlier age constituted crimes. Therefore, he filled out the application "to the best of his ability", according to Petitioner. Most significantly, Petitioner insists that the record contains no evidence that the Carrier's employing officer would not have hired Claimant had he had knowledge in timely fashion of the information concerning Claimant. The Organization insists that the obligation is clearly on Carrier to produce the evidence to demonstrate its actions were appropriate. In this case, the blatant failure to establish that the alleged misdemeanor-crimes committed by Claimant were sufficient to preclude him from employment, was not established by Carrier.

Several facts are evident in this matter. First, it is clear that whether or not the misdemeanors constituted crimes under the Carrier's employment application terms is not clearly set forth. But for all practical purposes, it must be concluded that Claimant did indeed omit information which the application appeared to call for because of his alleged interpretation of the term "crime". The most significant matter in this dispute, however, is the absence of testimony from the hiring officer that he would not have hired Claimant had he been aware of the misconduct involved. Certainly, the public intoxication and the urination in public do not appear to be major crimes and may or may not have been sufficient to cause the hiring officer to preclude Claimant's hiring. Possession of marijuana is yet another matter which must be considered even though it took place at an early age in Claimant's history. However, regardless of how these crimes are assessed, the fact remains that there was no evidence on the part of Carrier to indicate the reactions of the hiring officer had he been aware of such matters. The provisions of Section (b) of Article XI of the 1978 National Agreement are quite specific. It is incumbent upon Carrier to establish, as the Board views it, that the incorrect information furnished must be "of such a nature that the employee would not have been hired if the Carrier had had timely knowledge of it.". This the Carrier has failed to do and hence, the discipline assessed was inappropriate.

On balance, as the Board views it, Claimant made a grievous error in failing to furnish the information called for by the application in not reporting his convictions. At the same time, by virtue of Carrier's failure to indicate that he would not have been hired had Carrier been aware of this information, requires that he be reinstated to his former position. His culpability, however, warrants no compensation for loss of pay by virtue of his being out of service since the investigation. Hence, Claimant will be reinstated to his former position with all rights unimpaired but without pay for time lost.

AWARD



Claim sustained in part; Claimant will be returned to service with seniority and all other rights unimpaired but will not be compensated for time lost.

ORDER

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



I.M. Lieberman, Neutral-Chairman


S.E. Fleming, Employee Member
G.M. Gammon, Carrier Member

May 13, 1982
Chicago, IL