PUBLIC LAW BOARD NO 6103

Award No.
Case No. 16

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(Burlington Northern Santa Fe Railway (former St. Louis
(San Francisco Railway Company)

STATEMENT OF CLAIM:

1. The Carrier violated the current Agreement and allegedly unjustly treated Mr. David S. Loebig when his employment application was rejected when it was allegedly discovered that he had not properly completed his application and that he had allegedly left a past employer off the application form.

2. As a consequence of the Carrier's violation referred to above, Claimant shall be returned to service and he shall be compensated for all wages lost in accordance with the Agreement.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On June 11, 1999, Carrier wrote Claimant advising him that his employment application, "is being rejected. Please return all company property...."

Claimant, through his Representative, asked for and received an unjust treatment hearing. The investigation was set, then postponed three times, finally being held on August 25, 1999. Following the investigation, the Carrier reaffirmed its right to reject Claimant's application for employment after five years, five months of working for the Carrier, principally as a Maintenance employee with a short stint as a Brakeman.

The alleged improperly completed employment application was brought to light after Claimant had filed a personal injury report and a Claims Agent for the Carrier started to dig into Claimant's history. The Claims Agent discovered Claimant had worked for an outfit called

"Tower Maintenance Company" and while working for them, sustained a back injury resulting in an operation as well as a claim for Workman's Comp.

These facts were not listed on Claimant's employment application, nor on the medical application filled out by individuals seeking employment. In response to the question asked on the medical form, "Have you ever filed a claim for personal injury?", Claimant wrote "N/A" which he testified was the abbreviation for not available. Also on the medical form was a notation concerning Claimant's depressed skull fracture, his scoped left knee operation and his back surgery, information the medical examiner received on March 25, 1995. It is also noted, with all that information, the medical examiner approved the hiring of Claimant on April 3, 1995.

It is fact that Claimant did not list his part-time employment with the Tower Maintenance Company, and more importantly, the fact he sustained an injury while working with that company, filed a Workman's Compensation claim and underwent corrective back surgery.

However, from the medical application it is clear that the medical examiner knew about Claimant's medical history when his application for employment was approved medically.

It is also a fact known to the applicant that the application form contains an EMPLOYMENT AGREEMENT which, when he signs the application, he also enters into that agreement. A pertinent portion of that Agreements reads:

> "I UNDERSTAND THAT MISREPRESENTATION OR OMISSION OF FACTS CALLED FOR HEREIN WILL BE SUFFICIENT CAUSE FOR CANCELLATION OF CONSIDERATION OF MY EMPLOYMENT OR TERMINATION OF MY CONTINUED EMPLOYMENT WHENEVER SUCH FACTS ARE DISCOVERED...."

This is not the first such case an arbitrator has been called upon to resolve and probably won't be the last. In most all the cases, however, the individual outright lies on the application when it comes to the employee admitting to any kind of felony conviction or

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personal injury claim.

When the lie is discovered, the Carrier usually takes prompt action and rejects the employment application. In this instance, the Carrier's medical examiner, who approved Claimant's physical examination for employment, knew that of the three surgeries Claimant had, he listed only the knee scope. The medical examiner knew or perhaps overlooked, which is not Claimant's problem, the N/A response to question asking if the applicant ever filed a claim for personal injury.

In lieu of raising a red flag regarding Claimant's application for an employment physical, the medical examiner approved Claimant for employment. That clause in the employment agreement reading, "whenever such facts are discovered" means just what it says. The Carrier's medical department must have known of the discrepancies in his physical application, yet they accepted the Claimant for employment.

Regarding Claimant's omitting the part-time employment is a factor, but then this Board finds the Carrier' asks nothing about part-time work. They ask for the last three employers of the applicant. He listed the last three full-time employers. If they also wanted a complete work history, they should have requested all full-time and/or part-time jobs and, if necessary, if there are more than three, continue the list on another sheet or on the back, whatever.

Because Carrier knew or should have known about Claimant's omission in his medical application for employment on April 3, 1995, and because of the employment application not being clear as to what is wanted, Claimant's seniority is to be reinstated to service but there will be no pay for time lost as Claimant testified during the investigation that he was on medical leave.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.

Robert L. Hicks

Robert L. Hicks. Neutral Member & Chairman
Public Law Board 6103

Dated: July 31, 2000