

PUBLIC LAW BOARD NO. 4901

AWARD NO. 72  
CASE NO. 72

PARTIES TO  
THE DISPUTE: United Transportation Union (CT&Y)

vs.

Atchison, Topeka and Santa Fe Railway  
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied.

DATE: August 19, 1996

STATEMENT OF CLAIM:

Request in behalf of Albuquerque Division Engineer Trainee/Switchman/Brakeman M. J. Kolbek for reinstatement to the service of The Atchison, Topeka and Santa Fe Railway Company, Coast Lines, with seniority and all other rights unimpaired and with pay for all time lost including the payment of Health and Welfare Benefits, the equivalent of any monetary loss of any pay raises or lump sums, and any other monetary compensations received by his fellow workers while he is removed from service beginning on March 19, 1994, and continuing until returned to service.

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was discharged for falsification of his employment application. He checked the "NO" box asking whether he had ever been convicted of a crime. He also understood and signed the certification portion of the application that contained the following sentence:

I understand any misrepresentation in this application is sufficient cause for discharge.

After Claimant was arrested on a warrant issued by the State of Kansas, for non-payment of a fine in that state, Carrier learned of his criminal record. At the investigation, Claimant admitted to two prior felony convictions and one misdemeanor conviction. He said he was of

the understanding, based on comments by his attorney, that his record would be expunged after three years and he could properly respond "NO" on employment applications thereafter. After talking with his attorney, Claimant acknowledged that he misunderstood the timeframe. His record was to have been expunged three years after completion of probation. At the time he applied to Carrier for employment, therefore, the convictions were still on his record. Claimant cleared up the unpaid fine within days. Apparently he did not know it was unpaid.

The investigation also revealed that Claimant had been a good worker and had developed an outstanding reputation in that regard while in some nine months of Carrier's service.

The Organization challenged Carrier's action on several grounds. First, it contended Claimant did not receive a fair and impartial investigation in that Carrier did not make certain requested witnesses available at the investigation. Second, it stressed that Claimant had innocent motives in filling out the application as he did. Third, it alleged that Carrier failed to sustain its burden of proof to establish grounds for discharge. Finally, it raised a time limits defense, based on Article 13(g)(1)(b) of the Agreement, in that Carrier did not separately notify both Claimant and his representative, in writing, of its disciplinary decision within thirty days. Carrier replied in writing only to Claimant's representative.

From our review of the record of investigation and the handling of the claim on the property, we conclude that the Organization's challenges must be rejected. The human resources witness requested by the Organization was no longer an employee at the time of the investigation. Moreover, the testimony to be elicited from her was hypothetical in nature. Under the circumstances, it was not Carrier's responsibility to produce her.

Despite the differing characterizations of Claimant's actions, the record does contain substantial evidence that he falsified his employment application and withheld information about his past criminal record. He admitted he made a judgment call in deciding to answer "NO" to the question. Claimant did not divulge the information after he was hired. Since he was informed that any misrepresentation would constitute grounds for discharge, Carrier was not unreasonable in

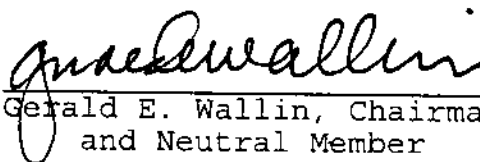
concluding that Claimant's actions violated its rules and policies prohibiting dishonesty and willful violation of applicable rules.

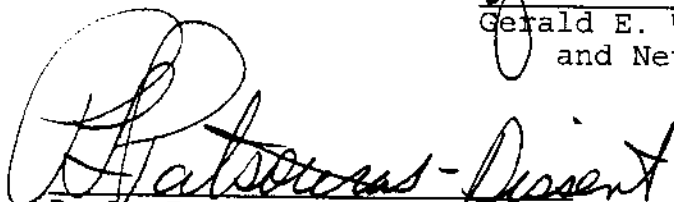
The Organization's alleged procedural violation must also be rejected. Article 13 does not explicitly provide that Claimant and his representative must be separately notified in writing. Moreover, the parties had a consistent practice for over eleven years at this location of informing only the representative. And although they later agreed to alter that practice in favor of separate notifications, that agreement was without prejudice to the instant Claim. Nothing in that agreement shows that it was to be applied retroactively. Since Carrier's actions on this Claim conformed to the long standing practice of the parties, no procedural violation is found.

It is undisputed on the record that Claimant was an exemplary employee during his brief term of employment with Carrier. Unfortunately, any leniency to be granted in this case must come from the Carrier. Our role is limited, under the circumstances of this dispute, to reviewing the record for substantial evidence. Given the nature of Claimant's conduct, discharge is the appropriate penalty under Carrier's disciplinary policy. The Claim, therefore, must be denied.

AWARD:

The Claim is denied.

  
Gerald E. Wallin, Chairman  
and Neutral Member

  
P. L. Patsouras,  
Organization Member

  
Milton H. Stegele, Jr.,  
Carrier Member

Dated this 19th day of August, 1996 in St. Paul, Minnesota.