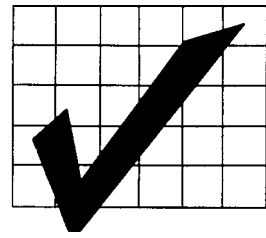


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# FALSIFICATION

## OF EMPLOYMENT APPLICATIONS



Nearly all agreements covering TCU members in the rail industry contain rules limiting the time in which a carrier must approve or disapprove employment applications of new employes, typically either 60 or 90 days. During this so-called probationary period, the employing carrier can dismiss the employe--disapprove his or her application--without cause. It is only after the approval of the employment application that the new employe is entitled to the due process protection of an investigation or hearing.

Some, although not all, of these rules also acknowledge that a carrier has the right to bring charges for falsification of the job application even after the probationary period. However, even where the rule does not specifically allow the carrier additional time in which to bring charges where falsification of the job application is suspected, arbitrators have taken such a dim view of falsifying employment applications that they will generally allow a carrier to bring charges after the probationary period has elapsed--even many years later.

This article looks at prior arbitration awards dealing with the subject of falsifying employment applications. As with any issue which is discussed *in the Winning Edge*, you must look first to the language in your agreement before drawing any conclusions as to how an arbitrator would rule on a similar claim on your property.

The arbitrators' rationale for allowing a carrier to take action against employes at any time for falsification of employment applications was stated in Second Division Award 5959:

"As a general proposition, Carrier is entitled from prospective applicants for employment, through an application for employment, to be put on notice of any fact or factor which would (a) be grounds for rejecting the applicant or (b) cause Carrier to investigate further before employing the applicant. "

This sentiment was echoed in Third Division Award 20225:

"A contract of employment obtained by fraudulent representation is a nullity. "

This arbitral theory--that falsification of an employment application in effect means that there never was an employment relationship--has been referred to as the annulment theory. Some arbitrators have taken this theory to the extreme and have held that a carrier is not even obligated to hold an investigation before dismissing the employe. Where an employe was discharged five months after being hired, the arbitrator in Third Division Award 14274 stated:

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*This article looks at prior arbitration awards dealing with the subject of falsifying employment applications and how you, their union representative, might defend members so accused. As with any issue, you must look first to the language in your agreement before drawing any conclusions about how an arbitrator would rule on a similar claim on your property.*

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"This is not a disciplinary matter involving an employe whose application for employment had been accepted, formally or otherwise, by the Carrier and consequently the provisions of Rule 22(a) are also inapplicable. We have consistently held that employes who falsify employment applications are subject to discharge despite lapses of time between dates of application and the dates of discovery. " (Despite this, TCU always takes the position that an investigation must be held.)

In addition to ruling that the employment itself was a nullity, arbitrators have also found that placing false information on employment applications is itself a dishonest act: "Falsifying work records or information on job applications are two particularly troublesome and common acts of dishonesty" (Third Division Award 21122).

Where unions have had success in convincing arbitrators to overturn such discipline, it was because the arbitrator was convinced that the employe's responses to the questions asked were not intentionally false or because the agreement rule itself restricted the employer's right to impose discipline after the probationary period to only limited circumstances.

Some rules in TCU agreements provide limited exceptions to the carrier's right to discipline employes after the expiration of the probationary period. These rules usually refer to where the employe gave "*detrimental* false information" or "*materially* false information. "

Where your agreement rule provides these kinds of limitations, your strategy in an investigation should be to minimize the importance of the allegedly false information which was submitted. In other words, not every bit of false information should be serious enough to warrant discipline. Whether to base your defense on this tactic requires a case by case analysis; however, examples of when it might be effective are where the applicants have provided incorrect birth dates or they committed minor omissions in employment or medical history. When considering making this claim, you should discuss your planned defense with the General Chairman's office.

Other rules provide a so-called statute of limitations, whereby the employe cannot be charged after being in service for a period of time, usually several years. An example of this kind of language was the issue in Third Division Award 21404: "...this rule shall not operate or prevent the removal from service of such applicant, if subsequent to the expiration of sixty (60) days, it is found that information given by him in his application is false, provided, however, this exception shall not be applicable to an employe who has been in service for a period of three (3) years or more. "

Another possible strategy to be used in hearings is to focus on the language of the question on the employment application that is at issue. The goal here is to show that the response was based on either a reasonable interpretation of the question asked or that the response was truthful insofar as the applicant knew.

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Award 42 of Special Board of Adjustment No. 1026 addressed the following question on carrier's Application For Employment:

"Have you ever been convicted of a Felony which has not been fully annulled or removed?"

In that dispute, the employe answered "No" to the question. However, the employe had pled nolo contendere (no contest) to a charge of drug possession and was given probation. As a result, the court withheld adjudication and made no finding of guilt. After the probation had been served, the files were sealed and his record cleared of the charge. Years later, when the carrier found out about the incident, an investigation was held and the employe was dismissed.

In restoring the employe to service, the arbitrator held:

"In common usage, a conviction involves a Court finding that a person is guilty of a criminal offense and the imposition of a sentence. In view of the Court's withholding an adjudication on the charge of possession of cocaine against Claimant, the question of whether Claimant was actually convicted of that charge is uncertain in the record. In any event, on the evidence presented, Claimant could have reasonably believed he had not been convicted of the felony charge. Consequently, the evidence fails to establish that Claimant knew when he filled in the application that he had been convicted of a felony and intentionally denied it. Carrier's dismissal of Claimant therefore was not for just cause. Carrier shall restore Claimant to service, with all rights unimpaired and shall reimburse him for all lost earnings."

Arbitration outside the rail industry has also addressed the subject of falsification of employment applications. A review of those decisions suggests that there are several ways that unions can improve their success rate in these kinds of disputes.

A very good way for you to defend your members in disciplinary hearings is to force the carrier to prove the following in order to establish guilt:

1. Was the false information submitted with the intention to deceive?
2. Was the false information material to the hiring decision?
3. Was the false information material to the employer at the time of discharge?

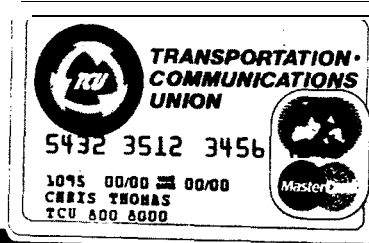
We have already cited an award which is a good example of the intention to deceive test. The second category--whether the misrepresentation was material to the hiring decision--seeks to prove the proposition that the employe would have been hired despite the false information. Here, your strategy would be to minimize the seriousness of the misrepresentation and show that it was insignificant.

The last category requires the carrier to prove that because of the false information the employe is unsuitable to continue his or her

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employment. Basically, here you would seek to show that the employee's record is good and that there has been no effect on his or her job performance because of the misrepresentation.

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