

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: { System Federation No. 91, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Carmen)
 { Louisville and Nashville Railroad Company

Dispute: Claim of Employees:

1. That Carman C. B. Ivey was dismissed from service in violation of the current agreement on September 19, 1977, and
2. Accordingly, the Louisville and Nashville Railroad should be ordered to
 - (a) Restore him to service with seniority and all employee rights unimpaired.
 - (b) Compensate him for all time lost as a result of his dismissal with interest at the rate of 6% per annum on all money due him, and
 - (c) Pay premiums for his hospital, surgical, medical, group life insurance and supplemental sickness benefits for the extra time he is withheld from service.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant, a carman at Boyles Yard in Birmingham, Alabama, has been employed by the carrier since 1962. On September 16, 1977, the claimant was dismissed by the carrier, after an investigation had been held on August 10, 1977, for violation of Rule 21(b) of the working rule agreement which prohibits an employee from engaging in other employment while on leave of absence without the carrier's approval.

The basic facts are uncontested. On June 24, 1977, the claimant requested and was granted a two week leave of absence for the period from July 18, 1977 to July 29, 1977. The leave of absence would follow the claimant's two week vacation which was to commence on July 4, 1977. In his letter requesting leave,

the claimant stated that he needed the leave of absence to attend to his ill wife. On July 28, 1977, two carrier officials, the Master Mechanic and the General Car Foreman observed the claimant operating a machine for plugging golf greens at the Twin Lakes Golf Course. Claimant also sold a golf club to the carrier officials. The claimant and his immediate family owned the golf course.

The labor organization contends that the claimant did not engage in outside employment in violation of Rule 21(b) because he was not "working" at the golf course but merely moving some machinery on the property which he owned. Because the Claimant was not paid for the work, the organization asserts that the claimant was engaged in activities more akin to a hobby rather than to employment. Furthermore, the claimant argues, by operating the machinery, he was exercising his back pursuant to doctor's orders which he had received on July 27, 1977.

The carrier contends there was just cause for the dismissal because the claimant was operating machinery for the upkeep of the golf course which was beneficial to the claimant's business. The carrier asserts that Rule 21(b) specifically provides for dismissal since, an employee who engages in other employment, while on a leave of absence, "... automatically severs his relations with the company". Lastly, the carrier argues that the purpose of Rule 21(b) is to prevent employes from abusing leave of absence privileges. It is inequitable for the carrier to maintain employe benefits for a worker who is gainfully employed at another endeavor.

There is substantial evidence in the record demonstrating that the claimant was engaged in other employment during a leave of absence. The claimant inexplicably anticipated a problem with his wife's health a full month before the leave started. The hearing officer could reasonably conclude that the claimant intended to lengthen his vacation to work at the golf course. Similarly, the carrier correctly argues that the rule against outside employment during a leave of absence is to prevent employes from continuing to receive company benefits while working at other jobs. Here, the claimant was providing services to his own golf business. As an owner, the claimant received the benefit since he did not have to hire someone to plug the greens. Next, the plugging of greens can hardly be called a hobby. Playing golf is a hobby while operating golf green machinery is that type of physical work which one normally does for compensation.

Lastly, the claimant's back injuries are irrelevant to the charge. The back injury occurred more than a month after the claimant requested the leave of absence. The hearing officer could properly interpret all the evidence to support the charge that the claimant was engaged in substantial physical labor.

Even though the carrier has proven the charge based on substantial evidence in the record, the penalty, in this particular case, was too severe. This Board recognizes that the carrier has broad latitude in assessing the amount of discipline, but we will intervene and modify the penalty where it appears the punishment was unduly harsh and excessive. Second Division Awards 5674 (Ives); Award 5843 (Dorsey). Rule 21(b) does not require mandatory dismissal for an employe who is charged with a violation. In view of the length of the claimant's service and the peculiar circumstances of this case the claimant will be reinstated with all seniority rights unimpaired, but without back pay and without the other monetary relief sought by the claimant.

Form 1
Page 3

Award No. 8330
Docket No. 8209
2-L&N-CM-'80

However, the claimant should realize that he must comply with the carrier's work rules if he is to continue employment. The leave of absence privileges in Rule 21 cannot be abused. We expect the claimant to conduct himself in an exemplary fashion upon his return to service.

A W A R D

The claim is sustained only to the extent stated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of April, 1980.