Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9199
SECOND DIVISION Docket No. 8866
2-SLSW-SMW-'82

The Second Division consisted of the regular members and in addition Referee Steven Briggs when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
(St. Louis Southwestern Railway Company

Dispute: Claim of Employes:

1. That the St. Louis Southwestern Railway Company violated the controlling agreement, particularly Rules 22 and 24, when they unjustly dismissed Sheet Metal Worker Apprentice R. B. Peyton from service on December 7, 1979, and failed to afford him investigation as provided in the rules of the controlling agreement.

2. That accordingly, the St. Louis Southwestern Railway Company be ordered to compensate Sheet Metal Worker Apprentice Peyton as follows:

   a) Restore him to service with all seniority rights unimpaired;

   b) Compensate him for all time lost from December 7, 1979;

   c) Make him whole for all vacation rights;

   d) Pay the premiums for Hospital, Surgical and Medical Benefits for all time held out of service;

   e) Pay premiums for Group Life Insurance for all time held out of 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 employes 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.

In November, 1979, Claimant was working a training assignment in the Tin Shop of the Carrier's Pine Bluff Car Heavy Maintenance Plant. Due to an alleged injury on November 9, he went on leave of absence effective that date. It was subsequently determined by the Carrier that the Claimant was engaging in other employment during his leave. More specifically, he was allegedly participating in a scrap metal business with his father and working at a local service station as well. The Carrier concluded that the Claimant had violated Rule 14-4, which is quoted below:

"An employee on leave of absence who engages in other employment will forfeit his seniority unless special provision shall have been made therefor with the proper official and Local Committee."

The Carrier holds that Rule 14-4 is self-invoking and that an investigatory hearing is not contractually required. It informed the Claimant in a letter of December 7, 1979, that it had received information about his engaging in other employment on November 26, 1979 and various other dates, and that his name had therefore been removed from the seniority roster. An investigatory hearing was not conducted. The Claimant was reinstated in late August, 1980, without prejudice and with all rights restored but without pay for time lost.

The Organization asserts that the Claimant was dismissed unjustly, without the opportunity for a hearing. It cites Rules 22 and 24 as contractual support of its claim. They are quoted in pertinent part below:

"Rule 22-1. Should any employee subject to this agreement believe he has been unjustly dealt with, or any of the provisions of this agreement have been violated, the case shall be taken to the foreman, general foreman or master mechanic or their representative, each man or master mechanic or their representative, each in their respective order, by the duly authorized local committee and/or their representative, within thirty (30) days and conference granted within fifteen (15) days.

Rule 24-1. No employee shall be disciplined without a fair hearing by a designated officer of the Carrier.

Rule 24-2. At a reasonable time prior to the hearing such employee will be apprised of the precise charge against him.

Rule 24-3. The employee shall have reasonable opportunity to secure the presence of necessary witnesses, and if he desires representation, said representation shall be by the duly authorized local committee or their representative."

The crux of this matter concerns the respective applications of Rules 14-4 and 24-1. The Carrier argues that a seniority forfeit under 14-4 is not "discipline" since it is automatically invoked by the employee's conduct and is therefore not subject to the coverage of Rule 24-1. The Board disagrees. Rule 14-4 is not automatically invoked by employee conduct; rather, it is invoked by the Carrier's determination that an employee engaged in other employment while on leave of absence. To make such a determination, the Carrier gathers evidence in its own investigation of the matter. Then, if the Carrier concludes that such evidence supports a finding that the employee did, in fact, engage in other employment, Rule 14-4 is invoked. The seniority forfeiture is, therefore, the result of a Carrier decision, and is a mere euphamism for dismissal. Dismissal is indeed a form of discipline. Moreover, nothing in the language of Rule 24-1 indicates that there are exceptions to its coverage. Absent such language, and in view of the reasoning outlined above, the Board concludes that Rule 24-1 is applicable to the instant case. Finally, we conclude that the Carrier violated this rule when it denied the Claimant the opportunity for a hearing.

The facts in this case demonstrate the wisdom of conducting a hearing in such matters. First, the Carrier relied on the written statement of a J.H. Wyatt to the effect that the Claimant was working at a service station during his leave of absence. The incriminating portion of the statement was: "It appeared to me that he was working from the conversation I had with him." The Carrier used this statement as part of the evidence against the Claimant yet there is nothing in the record to indicate that the Carrier ever contacted the station owner to verify that an employment relationship existed. The Claimant could merely have been "hanging around" the station that day, or the station owner could have been a friend or relative whom the Claimant was merely giving a helping hand for a few minutes. There are several reasonable interpretations of his presence at the station, but he was not afforded the opportunity of explaining himself during a hearing. In fact, the Organization ultimately submitted a notarized statement from the station owner attesting that no employment relationship existed between the two men during the Claimant's leave of absence. Second, the Carrier relied in part upon a photocopy of a receipt for the sale of scrap metal by a person thought to be the Claimant for its conclusion that he was engaged in a scrap metal business with his father. Again, nothing in the record suggests that the Carrier ever contacted the scrap metal dealer to verify its suspicion. A special agent did interview the scrap dealer, but the Organization later submitted a notarized statement from the dealer attesting that the name on the receipt in question was an error and that the Claimant's father had in fact been the one to sell the scrap that day. Also, the selling of scrap to a dealer doesn't necessarily indicate that an employment relationship exists. On balance, it appears that the Carrier's investigation was less than complete. Perhaps if it had conducted a hearing on the matter, wherein it might have been able to consider such notarized statements as those discussed above, it might have reached a different conclusion regarding the Claimant's alleged employment during his leave of absence.

In summary, we conclude that the Claimant was unjustly denied a hearing in violation of Rule 24-1. He should be reimbursed for any wages lost and made whole with respect to any seniority rights which were impaired. The Board notes, however, that the Claimant was on leave of absence when Rule 14-4 was invoked. Accordingly, he should only receive what would have been his regular pay from the date upon which he was again able to work.

A W A R D

Claim sustained to the extent indicated in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this, 22nd day of July, 1982.