Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9264
SECOND DIVISION Docket No. 8949
2-SLSW-CM-'82

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(
(St. Louis Southwestern Railway Lines

Dispute: Claim of Employes:

1. That the St Louis Southwestern Railway Company violated the terms of the controlling agreement when the name of Robert Nelson, Jr. was removed from the Seniority Roster of Carmen at Pine Bluff, Arkansas, particularly Rule 24, Rule 20 and Rule 14.

2. That the St. Louis Southwestern Railway Company be ordered to restore Carman Robert Nelson, Jr.'s name to the Seniority Roster of Carmen at Pine Bluff, Arkansas, with all rights unimpaired, with pay for all time lost, with vacation rights unimpaired, with retirement credits, health and welfare benefits and all other contractual benefits.

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 jurisidiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon

The Claimant, Robert Nelson, Jr , was employed as Carman Apprentice at Pine Bluff, Arkansas, on December 28, 1970. On November 15, 1971, he was promoted to Temporary Carman and established a seniority date as a Carman November 1, 1974. On June 19, 1979, the Claimant laid off sick alleging he had back problems and was expected to be off two or three weeks On June 27, Foreman R A. Bagley directed the following memo to Plant Manager J. C. Renfrow:

> "T. C. Clement and I observed R. Nelson, Jr. at a new house construction site located next door at 1632 Whipoorwill.
>
> We observed him on June 27, 1979, from 8:55 am until 9:12 am.
>
> During that period two truck loads of cement were unloaded and Mr. Nelson stood at the back of the trucks while they were being unloaded. He left the construction site at 9:12 am.
>
> He was dressed in a tan shirt and pants and was wearing a straw hat."

On July 5, 1979, General Foreman R. A. Bagley and Carman E. C. Thomasson directed the following letter to Mr. C P. Johnson, Asst. Plant Manager:

> "The undersigned observed Mr. R. Nelson, Jr spreading fresh concrete at a new house construction site located between East 38th and East 41st on south side of Ohio Street at 11:30 a.m. July 5, 1979.
>
> Mr. Nelson was using a rake type tool that was approximately 2 feet wide and he was using it to pull and spread the fresh concrete.
>
> Mr. Nelson was wearing tan shirt and pants, straw hat and rubber boots. He was also wearing the same type of welding gloves that are issued to freight car welders at Pine Bluff Car Heavy Maintenance Plant."

On July 24, 1979, Plant Manager Renfrow directed a letter to the Claimant indicating that the Claimant had forfeited his seniority under Rule 14 inasmuch as he was engaged in other employment while off account alleged illness.

This dispute involves the interpretation and application of Carrier Rules 14-3 and Rule 14-5 of the Agreement. Rule 14-3 reads as follows:

> "Employees off due to sickness or injuries shall be considered as on leave of absence."

Rule 14-4 reads as follows:

> "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 Organization argues that the Claimant was unjustly dismissed in violation of Rule 24 (Discipline) when he was dismissed without benefit of a hearing. They believe that Rule 14 is not applicable in that the Carrier is interpreting Rule 14 differently than they have in the past. They do not believe that Rule 14 requires a written leave when an employee is off sick. They believe that Rule 14 refers only to a written leave of absence formally granted in writing. In this regard, they direct attention to Second Division Award 8005 (Weiss) which involves similar circumstances. Particularly applicable is the following statement from the Award: "A leave of absence as used in Rule 21 refers to an absence which is specifically requested by the Employee and formally granted in writing." The Organization also argues that there is no evidence to believe that the Claimant was, in fact, engaged in outside employment. They believe that this is a case of mistaken identity. They believe that the Carrier officials who allegedly observed the Claimant did not observe the Claimant but instead observed his brother. In this regard, they submit photographs of the Claimant and his brother dressed similarly, which they believe show the striking resemblance which would suggest the possibility of confusion. Moreover, they present written statements by the Claimant's brother that he (the brother) and not the Claimant was working at the location in question. Regarding June 27, 1979, the Claimant readily admits that he

was at this site but states that he and his father were simply visiting his brother who was working at the location in question. The Claimant did not perform any duties but simply visited his brother, according to the Organization. In this regard, they direct attention to the statement of the Claimant and the Claimant's father that "On June 27, while I, Robert Nelson, Sr., and Robert Nelson, Jr., were riding in Pine Bluff we decided to visit my son Eddie Nelson who was working at Whipoorwill. We stayed there 20 minutes and returned home. The Claimant's brother, Eddie Nelson, also submitted a written statement which corroborates that of the Claimant and his father. Also regarding the July 5 date, the Organization presented a statement from the owner of the property at that location which stated that he did not employ Robert Nelson, Jr., for any type of work or duties and that Robert Nelson was not present at July 5, 1979, the date that the concrete work was done. They also submit a statement from a neighbor who indicated she did not see the Claimant at the work site July 5, 1979. The Organization also submits separate statements signed by the Claimant's brother which indicates that he, when working, usually wears khaki pants and shirts and a straw hat. The Organization suggests this supports their defense of mistaken identity in that the Carrier officers seemed to primarily identity the Claimant from a distance based on the Claimant's dress. Moreover, the Organization believe it is significant that the Carrier officers did not confront the Claimant on either day to verify that he was in fact employed. They also suggest that the Claimant's termination was motivated as a matter of retaliation for the Claimant having filed a personal injury report.

The Carrier argues that the Claimant clearly violated Rule 14 and that the discipline rule was not applicable. They argue that Rule 14 is self-executing and that no hearing is required under Rules such as Rule No. 14. They believe that the evidence is clear that Claimant Nelson was the person obeerved performing work on the dates in question. In this regard, they rely on the statements by the Foreman involved. In respect to the Organization's argument that this was a case of mistaken identity, they submit that Foremen Bagley and Thomasson were quite positive in their identification of Mr. Nelson and advised the Organization during the handling of the case on the property that such identification was made from the Claimant's facial characteristics and not simply clothing. They believe that Mr. Nelson has a rather distinctive face, long and narrow, and is easily identified and that Mr. Bagley and Mr. Thomasson were both well acquainted with the Claimant. In addition they submit a copy of a memo which they purport is from the Pine Bluffs Sand and Gravel Company which lists six dates and locations of cement orders called in to them by Robert Nelson, Jr. They note that the order on June 27, 1979, was on Whipporwill St. which is the same street that Messrs. Bagley and Clement observed Robert Nelson and that the order called in on July 5, 1979, was delivered to 3802 Ohio St. which is the same street Messrs. Bagley and Thomasson allegedly observed the Claimant. The Carrier also notes that the Claimant previously forfeited his seniority for engaging in other employment while on a leave of absence. They note that he was reinstated on a leniency basis September 22,1977.

There are a variety of arguments advanced by both parties regarding the application and interpretation of Rule 14. For instance, the Organization suggests that it does not apply in this case because the Claimant was off due to sickness and that the parties had previously interpreted Rule 14 to mean that a formal request for a leave of absence due to sickness is not required. They referred to Second Division

Award 8005 seems to support their position. We agree with the reasoning in Second Division Award 8005 that normally speaking an absence due to sickness does not necessarily constitute a leave of absence. However, in this case, Rule 14 is specific in that it states in clear, unambiguous and unequivocal terms that employees absent due to sickness are considered as being on a leave of absence. This coupled with the clear and unambiguous language of Rule 14-4 clearly establishes that anyone engaged in other employment while on a leave of absence will forfeit their seniority. This Board has previously stated that Rules such as Rule 14-4 are self-executing rules and that when an employee violates such a rule he is automatically forfeiting his seniority and is not entitled to a hearing under discipline rule. The practices referred to by the Organization are not necessarily clear in their application to this case and moreover do not overturn the clear and unambiguous language of the rule.

The real issue in this case is not a matter of interpretation of Rule 14 but is a factual one. The issue is a matter of evidence and the Board will concentrate its analysis on the question of whether, in fact, the Claimant was engaged in outside employment. If it is found that factually speaking he was, Rule 14 is clear that the Claimant's forfeiture of seniority would have to be upheld. If it is found that the Claimant was not engaged in outside employment, it must therefore be concluded that he did not forfeit his seniority and thus is entitled to reinstatement and back pay.

It is the conclusion of the Board that the evidence as contained in the record does not establish that the Carrier has sustained its burden to show that the Claimant was engaged in "other employment". The Carrier has alleged that the Claimant was engaged in outside employment on two dates, June 27, 1979 and July 5, 1979. They rely on the observations and statements of the Carrier officers involved and the alleged memo from the cement company. Regarding June 27, the Board does not believe that the statement of the Foremen involved establishes that the Claimant was engaged in "other employment". The statement indicated that the Claimant "stood at the back of the trucks while they were being unloaded". Taking this statement at face value, does not indicate that the Claimant was engaged in any work activities that might be construed as employment nor does it establish that the Claimant was present at this work site by virtue of an employment relationship. Regarding the alleged memo from the concrete company, the Board does not believe that this memo deserves any probative value as evidence. This is for several reasons. First, the statement is unsigned and gives no indication as to who prepared it and under what circumstances it was prepared, Moreover, we note that it is made on a blank sheet of paper, which gives no suggestion as to its source. Most importantly, in dismissing this alleged memo, is the Organization's Exhibit O. In Exhibit O, there is a letter on the stationery of the Pine Bluff Sand and Gravel Company signed by Scott McGeorge, General Manger. The letter is a response to a letter directed to McGeorge by the Organization asking for verification of the alleged memo as presented by the Carrier. Mr. McGeorge states in his letter, "we maintain no record of who actually calls in orders and with the thousands of orders that normally come in during a year, it would be unlikely that one of the dispatchers could actually recall who placed an order after sometime had passed." The lack of indication of the source of the alleged memo in conjunction with the statement of Mr. McGeorge highly dilutes the veracity of this alleged memo.

Inasmuch as we cannot find the evidence regarding the 27th persuasive and that the alleged memo from the gravel company is not deserving of much weight, we are left with considering whether the statements of the foremen regarding July 5, standing

alone, is enough to constitute a violation of Rule 14-4 by the Claimant. It is the conclusion by the Board that there is not enough evidence in the record to convince us that it was the Claimant observed at the location in question and even if we were to conclude he was at the location, there is not enough evidence to convince us that he was engaged in outside employment within the meaning of the rule. The evidence presented by the Organization outweighs singificantly that submitted by the Carrier. The photographs submitted by the Organization, even though it cannot be determined that they were taken from the same distance as the Carrier officers observed the Claimant, do in fact show a resemblance in height, stature and weight between the Claimant and his brother. This coupled with the unrefuted statements of the Claimant, his brother and his father, owner of the property, and the neighbor established a very plausible defense of mistaken identity. Even if we were to assume that the Claimant was, in fact, raking cement on July 5, it does not establish that the Claimant was "employed" within the meaning of the Rule. The rule does not prohibit raking cement but prohibits "other employment". There is no evidence of an employment relationship between the Claimant and a contractor or between the owner of the house and the Claimant as contractor. To show that the Claimant is engaged in outside employment within the meaning of Rule 14, the Carrier would have to show the Claimant was employed within the meaning of the term as it is normally used. The plain meaning of the term "employment" would suggest a verifiable employment relationship for which labor is exchanged for money. There is no evidence of this in the record. While the observations of the Foremen standing alone as evidence, coupled with the past record of the Claimant might have established a presumption that he was employed, this presumption is not strong enough to establish as fact that he was engaged in outside "employment". Forfeiture actions under Rules such as Rule 14 must be based on more than speculation, particularly when such actions are not subject to the discipline rule. We, also find significant the fact that the Foremen did not confront the Claimant at the locations in question at the time they observed him nor did they seek to verify by any other means that the Claimant was present at the locations by virtue of an employment relationship. If the Carrier wishes to invoke the self-executing provisions of Rule 14, then they have an obligation to prove that the Claimant was engaged in employment. Moreover, if they doubted the veracity of the Claimant's statement that he laid off because he was sick, then they could have proceeded on the discipline rule.

Inasmuch as there is not enough evidence in the record to conclude that the Claimant was engaged in outside employment, we will sustain the claim to the extent of ordering the Carrier to reinstate the Claimant with all rights unimpaired and pay for all time lost. We note in this regard that although the Carrier forfeited the Claimant's seniority July 24, 1979, that he did not submit medical evidence that he was fit for service until September 4,1979.

A W A R D

Claim sustained to the extent indicated in the 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 28th day of July, 1982.