

The Second Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current Agreement, Electrician J. H. Nyberg was unjustly dismissed from service of the Burlington Northern Inc., following investigation held on date of December 30, 1980.
2. That accordingly, the Carrier be ordered to make the aforementioned J. H. Nyberg whole by restoring him to Burlington Northern Inc.'s service with seniority rights unimpaired, plus compensation for and/or restoration of any lost vacation time, holiday pay, sick pay or hospitalization benefits, railroad retirement benefits and any other rights, privileges or benefits he may be entitled to under schedules, rules, agreements or laws and that all record of this investigation be removed from his personal record. In addition, the Burlington Northern Inc., be ordered to compensate him in the amount of eight (8) hours at the pro-rata rate for each work day lost as the result of the unjust dismissal.

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 were given due notice of hearing thereon.

The Claimant has been employed as an electrician at the Carrier's Superior, Wisconsin, facility since February 1, 1974. By letter he was informed of his dismissal from service effective January 15, 1981, for violation of the Carrier's Safety Rules 667 and 668 in that he was employed as a fireman on the LST&T Railroad without permission and for failure to provide evidence he had resigned his employment with the LST&T Railroad.

It is essential for clarity to outline the prior circumstances which have been raised by the Organization. This Claimant had, at the time of his dismissal in January of 1981, been recently reinstated to service by the Award of Public Law Board 2576, Cases 3 and 4. Those claims involved a suspension and dismissal effective September 11, 1978, for absence from duty without proper authority. The

parties in this case are identical to those in the Award of Public Law Board 2576, and Claimant's employment as a fireman on the LST&T was also an issue.

Herein, the Organization claims the Carrier unjustly terminated Claimant. In support of this position, the Organization views this case as identical to the Award in Public Law Board 2576. The Organization asserts that in that matter the favorable decision on behalf of the Claimant was based on three factors. (1) The Board found there was no denial by the Carrier that the LST&T was a subsidiary of it. (2) There was no Carrier denial that, in fact, Claimant was allowed to continue to work at his position of fireman with the LST&T while concurrently employed by the Carrier as an electrician. (3) Carrier provided no explanation for refusal of Claimant's request for excused absence. This Board is asked to conclude that we are bound to follow that Award and the findings therein. Additionally, the Organization argues the Carrier's instructions to resign his employment was improper and a violation of Rule 30. In support of this contention, the Organization charges the Carrier with knowledge and implicit condonation of employees holding dual employment.

At the outset, this Board does not find this case and the Award of Public Law Board 2576 as being identical. The underlying issue of dual employment is central to both the former Award and this case. However, the facts upon which the Carrier charged Claimant in the respective cases are separate and distinct. The function of this Board is well defined. Our scope of review is limited to the testimony and evidence developed at the investigation. In addition to that record, the Organization would have us superimpose, as factual, certain statements made by the referee in explanation of the Board's decision. In response, this Board underscores the distinction between the statutory, final and binding nature of Board awards and the explanatory text contained therein. Often referred to as dicta, we cannot bind the parties to such statements as uncontroverted fact. To do so denies the possibility of error and would substantially limit the purpose of an investigation, which is to develop all material evidence to be used in assessing the appropriateness of the charges. Facts and circumstances are not frozen in time. They continually develop, and due process requires this Board to reject the Organization's position with respect to certain findings in the Award of Public Law Board 2576.

Carrier's Safety Rule 668 requires an employee to receive written permission to engage in another business or occupation. The Carrier's explanation of this request to the Claimant indicated his employment with LST&T did at times conflict with his employment as an electrician with the Carrier. The record supports that such circumstances have arisen. When asked the question how he chooses in the event both the Carrier and LST&T require his services, the Claimant responded there never was a question. "I chose the LST&T."

Accordingly, we find the Carrier acted properly in denying Claimant's request for permission to engage in another occupation, and the instructions to resign his employment with LST&T reasonable. The Claimant admits he has not complied.

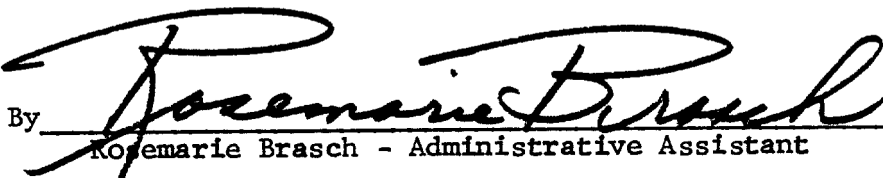
Despite the importance of attempting to establish the Carrier acted in a disparate and/or discriminatory manner in dismissing Claimant, the record is absolutely void of any evidence importing knowledge to the Carrier or its representatives that the Claimant was employed as a fireman on the LST&T prior to July of 1978. Nor does this Board find any evidence to support the Union's contention the LST&T is a subsidiary of the Carrier and, as such, the Carrier cannot now disclaim privity to essential personnel records which impacts the issue of Carrier's knowledge of Claimant's employment with the LST&T. Nevertheless, the Organization contends that once raised, it is the Carrier's burden to introduce evidence pertinent to the issue of knowledge and ownership. This is an improper conclusion. It is the burden of the party making such assertions to come forth and support the allegations with testimony and/or evidence. This was not done, and this Board is powerless to rectify the erroneous belief that in advancing a defense without recourse to pertinent facts, the burden shifted to the Carrier.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 2nd day of February, 1983.