

The Second Division consisted of the regular members and in addition Referee Edward M. Hogan when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Southern Railway Company

Dispute: Claim of Employees:

1. That the Southern Railway System violated the current agreement when Electrician L. E. Broome was not afforded a fair and impartial hearing.
2. That the Southern Railway System further violated the current agreement when they unjustly dismissed Electrician L. E. Broome from service on April 11, 1980 at Chattanooga, Tennessee.
3. That accordingly, Electrician L. E. Broome be restored to service with seniority rights and all other rights unimpaired and be compensated for all wages lost, vacation and all other rights and benefits lost account of the improper 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 employes 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.

Claimant was dismissed from the service of the Carrier on April 11, 1980, following a preliminary investigation. A formal investigation held on May 20, 1980, upheld the previously imposed dismissal. The Organization contends that the formal investigation held on May 20, 1980, was not fair and impartial in that the charge was not precise and that no dates, time or other information was sufficiently stated in the charges. Further the Organization contends that the hearing itself and the subsequent dismissal were arbitrary, capricious and an abuse of managerial discretion in that the hearing officer was prejudiced as he took part as a witness and at times lead the Carrier witnesses. Lastly, the Organization argues that the Carrier failed to meet its burden of proof with respect to the charges placed against the Claimant.

The Claimant had been charged with failure to protect his assignment, a violation of Rule 30(c) of the controlling Agreement. The Carrier contended that the reason that the Claimant was unable to protect his assignment was that he was engaging in outside employment and that he had failed to comply with verbal instructions in authorizing the release of his medical records for review by the Carrier's Chief Surgeon.

The Carrier argues that the Claimant received all of the rights due him under the controlling Agreement, that the Claimant failed to comply with instructions to have medical information relating to the most lengthy period of his absenteeism furnished to the Carrier's Chief Surgeon, that the Claimant failed to protect his assignment, and that dismissal was an appropriate and reasonable assessment of discipline.

The record indicates that on April 11, 1980, the Shop Manager of the Carrier conducted a preliminary investigation. Rule 34(b) of the controlling Agreement states that a preliminary investigation is "the discussion of events leading to any disciplinary action." Prior to the commencement of the preliminary investigation, the Claimant was afforded the opportunity to secure representation. The Claimant requested that the Local Chairman and another co-employee be present at the preliminary investigation. Although it was the Local Chairman's rest day, the preliminary investigation was postponed until he could arrive. At the conclusion of the preliminary investigation the Claimant was advised that he was dismissed from the service of the Carrier. The Claimant and his representative advised the Carrier that they disagreed with this action and were requesting a formal investigation. As the Carrier considered this case involving a major offense, it did not hold the discipline in abeyance pursuant to permissive provisions of Rule 34(c) of the controlling Agreement.

Prior to the formal investigation, the Claimant was notified of the specific reasons for the Carrier's action stemming from the preliminary investigation:

"... you were charged with failure to protect your assignment in violation of Rule 30, specifically paragraph (c) thereof, due to engaging in other employment. During that Preliminary Investigation you were reminded of your failure to comply with past written instructions to give good cause for your absence. In this regard, you were further specifically charged with failure to comply with the most recent verbal instructions given you on March 12, 1980, to sign a release authorizing the doctors who allegedly treated you to furnish Southern Railway Company's Chief Surgeon, Dr. M. P. Rogers, with information regarding medical records and history including diagnosis and treatment, etc."

We cannot concur with the contention of the Organization that the notice as recited above was not specific and that it did not afford the Claimant an opportunity to defend himself against identifiable charges. This Board has ruled in numerous decisions that the notice of allegations and charges to be given any claimant will be sufficient if it reasonably apprises the claimant of the circumstances or factual occurrences which are subject to the formal investigation inquiry in order that the claimant can prepare his/her defense. (See also Second Division Award 5542 and Third Division Award 17998.)

This matter, which was the subject of a full Referee Hearing, was extremely well argued on behalf of the Organization and Claimant as well as by the Carrier. During the hearing as well as in their submission, the Organization strongly argued that the formal investigation was neither fair, nor impartial. Although this Board has thoroughly reviewed the record, we are not of the opinion that

the Carrier engaged in activities which would support such a finding by this Board. It is the long standing policy of this Board that, absent arbitrary, capricious or discriminatory behavior on the part of the hearing officer, this Board will not upset the findings as adduced therefrom. This Board has also held that to the degree the Carrier engages in a multiplicity of roles at the formal investigation, it does so at its peril. However, we do not find sufficient conduct on the record to warrant our overturning of the findings in the case before this Board.

In reviewing the substantive basis of this dispute, we do not find it unreasonable that the Carrier requested that the Claimant submit himself for a physical examination and tender his past medical records, especially given his history of medical absences. Indeed, the Carrier had an obligation to seek this information and examination in order to protect not only the Claimant upon his return to work, but also to protect the general public and the Claimant's co-workers. In Second Division Award 7087, this Board stated:

"The Carrier has an obligation to all of its employees, including the Claimant, to take reasonable measures to make reasonably certain that an employee is physically capable of performing his duties. We find that the Carrier may set physical standards for its employees."

In fact, the record indicates that the Claimant was advised of the Carrier's policy in January of 1980, and this policy was explained to him at that time. It should be noted that at this point, the Claimant had been absent from work for over five months. Upon these facts and circumstances, we do not find it unreasonable that the Carrier had requested that the Claimant submit himself to a physical examination and that he release his medical records for his most recent illness. To do less could be construed as gross negligence on the part of the Carrier and certainly possibly subject the Claimant's co-workers and the general public to unreasonable risk.

Additionally, the Claimant was charged with a violation of Rule 30(c) of the controlling Agreement in that he failed to protect his assignment. During the course of the events which are described above, the Carrier conducted a review of the Claimant's employment records for the previous five years. Those records indicate that the Claimant had worked 81 days in 1975, 0 days in 1976, 29 days in 1977, 26 days in 1978 and 117 days in 1979. Because of this record, the Carrier secured the services of a private investigation firm to delve further into possible reasons for the Claimant's absenteeism. At the formal investigation, testimony was introduced by the private investigator which showed that the Claimant during this same period was engaged in another business. While there are certainly circumstances which would permit an individual to participate in two employment relationships, given the evidence which exists on this record, we cannot concur with the position of the Organization. Although the Claimant suggests to this Board that his other business relationship amounted to nothing more than a "hobby", we are not persuaded that the hearing officer reached an improper conclusion. This Board has consistently held that absent evidence of arbitrary, capricious or discriminatory behavior on the part of the hearing officer, this Board will not upset the findings as adduced from the formal investigation. We find that the evidence existing on the record before us is more than sufficiently credible to support the findings rendered by the hearing officer. Thus, in reviewing the

objections of the Organization, we concur with determinations of the hearing officer in that the Claimant was guilty of violation of Rule 30(c) of the controlling Agreement and that he failed to comply with reasonable instructions of the Carrier requiring him to furnish the Carrier with medical information regarding his most recent illness.

Lastly, we do not concur with the argument of the Organization that the dismissal was inappropriate given the findings of the formal investigation. We concur with the level of discipline as imposed by the hearing officer. In Award 4088 of this Division, we stated:

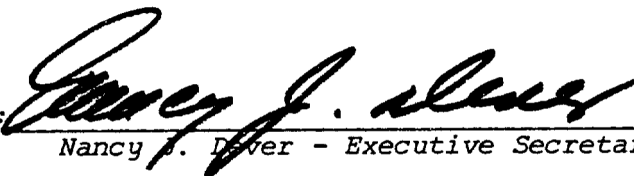
"The investigation clearly showed that the Claimant was absent without leave and was engaged in other employment without authority.... Carrier properly dismissed Claimant from its service for being absent without leave and engaging in outside employment without authority."

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 6th day of June, 1984