

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

Parties to Dispute: (Silas Armstrong
(
(Southern Railway Company

Dispute: Claim of Employees:

The claim of Mr. Armstrong is that he was unjustly dismissed from service on the basis of a charge of failing to protect his assignment and that he should be reinstated with all seniority rights and receive back pay from September 8, 1981, the date of his discharge.

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.

The Claimant involved in this case is a Carman employed at what is known as the Inman Yard at Atlanta, Georgia. On date of June 5, 1981, Claimant apparently sustained an injury and thereafter did not work for the Carrier between dates of June 15, 1981, and July 16, 1981. During the same period, he was employed by another Corporation with the exception of three (3) days. He did not, however, work the same hours as when working for the Carrier.

Rule 30 Paragraph (c) reads:

"(c) An employee in service who fails to protect his assignment due to engaging in other employment shall be subject to discipline."

The Carrier contends that since Claimant worked during the period of June 15, 1981, to July 16, 1981, for another Corporation, that he was capable of working for the Carrier; also, that he was offered light duty. Further that, since he had not worked for the Carrier, he had not protected his assignment. He was accordingly, after preliminary, and then formal investigation, dismissed from the service of the Carrier.

The Claimant contends that he could not protect his assignment because the Company doctor disqualified him from service, stating that he was "not able to work". Further, that there is no rule requiring an injured Employee to accept light duty and finally, that Carrier was aware of the fact that the Claimant was working this extra job "possibly as early as 1979." And he cites the provisions of Rule 34, Paragraph (e) that reads as follows:

"(e) No charge shall be made involving any matter of which the carrier officers have had a knowledge for more than thirty (30) days."

On date of October 8, 1981, the Local Chairman filed a claim in behalf of the Claimant asking that he be returned to the service of the Carrier with all rights and backpay from the time of his dismissal.

On date of October 9, 1981, and again on date of October 15, 1981, another claim was filed in behalf of the Claimant by a Mr. Robert G. Young, Attorney at Law, and from the law firm of Young and Murphy, Atlanta, Georgia, contending among other things that:

"Mr. Armstrong values his position with Southern Railway, and we respectfully request reinstatement on his behalf."

The Carrier answered under date of December 8, 1981, denying the claim and also pointing out that it had received claims from Attorney Young and the Local Chairman of the Carmen's Organization, and contending that while it recognized the right of the Claimant to present a claim or have one presented in his behalf, it (the Carrier) was not obligated to give duplicate handling to such a claim. It also requested that Attorney Young and Local Chairman contact the Claimant and have him designate who would subsequently represent him for further handling of this dispute. Under date of December 14, 1981, the Carrier received written confirmation from both Attorney Young and the Claimant that it was Attorney Young who would be the Representative for the purpose of processing this claim. And on date of December 11, 1981, Attorney Young continued the claim but this time with the addition of a request for backpay. On date of February 9, 1982, the Carrier again declined the claim and pointed out the fact that the original claim only requested reinstatement and that under the provisions of Rule 35 "all claims or grievances must be presented in writing...within sixty (60) days from the date of the occurrence on which the claim or grievance is based." Carrier contends that portion of the appeal requesting back pay is barred as not presented and handled on the property as required by Rule 35. No agreement having been reached in further handling the case is now before this Board.

We note in processing this case to this Board that both sides are, to a very considerable extent, relying on assertions usually with little or no proof to sustain them. The Claimant contends that he was injured on the job and in accord with a Company doctor's findings, he was "unable to work" and he provided doctor's reports which back this claim. This argument is, however, at least somewhat flawed by the fact that in a later letter the doctor stated that his report was based on Claimant's statements, and not on any medical findings. The Claimant also contends that in accord with the doctor's findings, that he could not perform any work that required bending, climbing or lifting. However, nothing in the doctor's report even refers to bending, climbing, or lifting. The Claimant also alleges that Carrier knew about Claimant's second job, "possibly as long ago as 1979" and accordingly any penalty was barred under the thirty (30) day time limits of Rule 34. However, he submits no proof as to when Carrier learned of this second job. Claimant alleges that he did report to work on July 15, 1981, but because it was the last day of the pay period, it was agreed that he would begin work the next day, July 16, 1981. Again, no proof of this agreement is submitted.

The Carrier contends that since Claimant did work at least part time for another Company when he was allegedly unable to work for the Carrier that he was in fact able to work for the Carrier and accordingly had not protected his assignment.

This is one of those unfortunate cases wherein neither side has presented any proof to sustain their assertions. The Claimant clearly was off the job for a considerable time. Whether or not he was unable to work for the Carrier at that time and just how light the light duty would have been is not clear. However, this Board cannot overlook the fact that on no less than five occasions the doctor, and a Company doctor at that, did mark his record as "not able to work" and each time also marked that he should "return for treatment".

We also cannot overlook the rules of the Agreement which requires that "all claims and grievances must be presented in writing by or on behalf of the Employee involved, to the Officer of the Carrier authorized to receive same, within sixty (60) days from the date the occurrence on which the claim or grievance is based". The Local Chairman did comply with that requirement. However, the claim was abandoned and only the claim made by Attorney Young was pursued and Attorney Young clearly did not, insofar as backpay was concerned, comply with the sixty (60) day requirements of the Agreement.

Faced with these unproved assertions and the partial noncompliance with the Agreement, we will rule that the Claimant must be returned to his former position with seniority unimpaired, but without backpay.

A W A R D


Claim sustained in accordance with the Findings.

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Award No. 10589
Docket No. 9876-I
2-SOU-I-'85

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of September 1985.