

The Second Division consisted of the regular members and in addition Referee Raymond E. McAlpin when award was rendered.

PARTIES TO DISPUTE: ((International Brotherhood of Firemen and Oilers
(Southern Railway Company

STATEMENT OF CLAIM:

1. That under the current and controlling agreement, Service Attendant W. F. Brooks, S. S. N. 587-28-0363, was unjustly dismissed from service on August 16, 1989 after a preliminary investigation was held on August 16, 1989 by General Foreman George Eagle.

2. That accordingly, Service Attendant W. F. Brooks, be restored to his position with Southern Railway System, be made whole for all lost time, with seniority rights unimpaired, vacation, health and welfare, hospital and life insurance benefits be paid effective August 16, 1989, the payment of 10% interest rate added thereto, and his personal record expunged of any reference to this discipline.

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 waived right of appearance at hearing thereon.

The Claimant was in service with the Carrier since October 10, 1981. He was dismissed from service effective August 16, 1989. On August 16 he was charged with conduct unbecoming an employee of the Carrier. The Claimant requested a formal investigation by letter on August 17, 1989. The investigation was scheduled for 9:00 A.M. on August 22, 1989. On August 21, 1989 the Carrier postponed the investigation without consulting with the Claimant or the Organization and without specifying the date for the hearing. On September 6, 1989, the Claimant was notified of a formal investigation that was rescheduled for September 13, 1989. As a result of that investigation, the Carrier reaffirmed the Claimant's assessed discipline of dismissal by letter dated September 18, 1989.

It is the Organization's position that there is a procedural violation. There was no mutual agreement to postpone the Investigation, and on Page 3 of the transcript the Carrier representative states in pertinent part: "...I postponed the investigation because of those reasons and I did not get compliance with any of you, Mr. Benton or yourself, and your objection will be so noted in this investigation." It is the Organization's opinion that the hearing must be held within a five day limit. The notice for the reconvened hearing was not until 16 days after the original investigation was scheduled. Rule 34(d), states that formal investigations "shall be held within five days from the date request therefor is made and it shall be conducted by a carrier officer superior in rank to the officer assessing the discipline to determine the propriety thereof." Also, Rule 34(k) of that same rule states the time limits provided in the rule may be extended by mutual agreement. The Organization cited numerous awards upholding this procedural claim.

Regarding the merits of the case, the Organization stated the Carrier has not been harmed and that the case is on appeal and it may be that the Claimant will be exonerated.

The Carrier argued that the Claimant is guilty as charged. He was tried and convicted of a felony by the appropriate court in the State of Mississippi. Contrary to the Organization's contention, there is no appeal pending and the Carrier has been informed by the Claimant that he would not fight the charges because of the cost. The Carrier cited a number of cases wherein referees have upheld dismissals under such circumstances.

Regarding the procedural aspects to the case, the Claimant received all of the contractual rights to which he is entitled. Rule 34 requires that a notice of investigation be held within 30 days of the involved officer's first knowledge of the incident, and the notice of the investigation was promptly issued 14 days after the Carrier's first official knowledge of the Claimant's conviction. This is well within the requirements set forth in Rule 34, and there are numerous awards which have supported the Carrier's application of these time limit rules. The Carrier is not required to cite an employee to an investigation until the cause for one is made known. Even if the Board should not uphold this argument, this should not prove fatal to this case in light of the Claimant's proven guilt of a grave infraction. Even though the Carrier did unilaterally postpone the informal investigation, the Organization did acquiesce in the postponement and the delay did not violate the Claimant's rights. The claim was progressed properly, and the Claimant was not prejudiced in any way by this postponement. The Carrier noted that, if anything, it gave the Organization and the Claimant more time to prepare his defense. In any event, when the investigation was held, it was conducted in a fair and impartial manner and the Carrier asked that its position be upheld in full and the dismissal be upheld.

Upon complete review of the evidence, the Board finds that the Carrier has committed a procedural infraction in this case. By its own admission, the Carrier did unilaterally postpone the hearing well beyond the five day time limit that is contained in Rule 34(d). Also, as noted above under Rule 34(k), time limits may only be extended by mutual agreement and there was no argument by the Carrier that there was any mutual agreement to extend the time period. The Board finds that it does not matter that the Claimant was ultimately afforded an appropriate investigation. The time

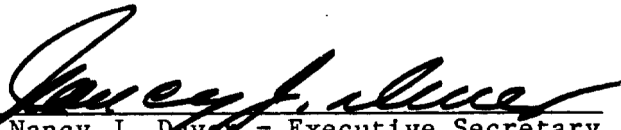
limits are placed in the rules for good and serious reasons and they must be upheld when there are violations of them without good and sufficient cause. No such good and sufficient cause was shown in this case and, therefore, the Board will find that the Carrier's case is procedurally defective. With respect to backpay, the Board finds that the Claimant was charged with a very serious offense, one that would undoubtedly have resulted in his discharge being upheld had the merits of this case been reviewed. Therefore, the Board will find that it would be inappropriate to award any backpay in this case. The Board will order the Carrier to return the Claimant to service with seniority rights unimpaired but without pay for time lost. All other claims are specifically denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Devos - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of October 1991.