



Award No. 5927

Docket No. 5799

2-C&O-EW-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 41,
RAILWAY EMPLOYEES' DEPARTMENT, A.F.L.-C.I.O.
(ELECTRICAL WORKERS)**

THE CHESAPEAKE & OHIO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

- 1 - That the Chesapeake and Ohio Railway Company violated the current agreement when it unjustly dismissed Electrician Randolph Vance from service on July 30, 1968.
- 2 - That accordingly the Chesapeake and Ohio Railway Company be ordered to restore Electrician Vance to service and compensate him for all time lost subsequent to and including July 30, 1968; and restore all other benefits he would have had if he had remained in service.

EMPLOYEES' STATEMENT OF FACTS: Electrician Randolph Vance, hereinafter referred to as the claimant, was employed by the Chesapeake and Ohio Railway Company, hereinafter referred to as the carrier, at Russell roundhouse shops at Russell, Kentucky.

The claimant had been reported off sick since January 28, 1968, and under doctor's care. The carrier cited claimant for an investigation, charging him with violation of rule 21 of the shop crafts agreement in that he did not receive permission to engage in business of selling various and sundry merchandise at the Ashland Swap Meet while absent account personal illness from his regular assignment at Russell Roundhouse, Russell, Kentucky.

The investigation was held as scheduled. As a result, claimant was dismissed from service effective July 30, 1968.

The dispute has been handled up to and including the highest officer of the carrier designated to handle such matters and all have declined making a satisfactory settlement.

The agreement of July 21, 1921, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: Under the provisions of rule 35 captioned "GRIEVANCES" in pertinent part reading:

"(a) Should any employe subject to this agreement believe he has been

The carrier was actually under no actual obligation to hold an investigation as was done in this case. However, it is the policy of the carrier in such instances to give the employe involved every opportunity to show cause why his name should not be removed from the roster. It is the carrier's wish in seniority matters to establish the facts by the hearing method before action is taken and this was what was done in the Vance case.

It was clearly shown that Vance was engaged in self-employment in specific violation of the provisions of rule 21. Vance's self-serving statements are not to be believed, but even if they were subject to belief, this would not change the fact that he was engaging in other employment while alleging sickness and by so doing, he lost his employment relationship with the railway company. This issue has been previously ruled on by this board in a case covered by same System Federation in its award no. 4912, docket no. 4849, Referee Johnson, which award held that rule 21(b) was mandatory and self-executing and also cited Second Division awards 111, 509, and 2394, issued without referees, and awards 1581, 3268 and 4088. The award further held that the rule could not be unilaterally waived by carrier since the prior permission must be obtained from the organization as well as the carrier. The evidence brought forth at the investigation clearly shows that no such prior permission was received by Vance, either from the carrier or from the organization, and certainly it cannot be argued that he was free to engage in self-employment.

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 waived right of appearance at hearing thereon.

Claimant had been reported off sick since January 28, 1968. The record shows that he had been continuously under doctor's care.

On Saturday, June 15, 1968 a Carrier official and a Carrier detective went to a place called the Ashland Swap Meet and observed Claimant sitting at a display table (which was rented by Claimant's teen-age son). The Carrier detective then purchased 4 coins (dated pennies) for the sum of 50 cents.

From the record it appears that the Ashland Swap Meet is a building where members of the community meet to trade and sell various items of merchandise. Display tables are available for rental. The Ashland Swap Meet is open only on week-ends.

Claimant was charged with violation of Rule 21(b) of the Agreement which provides:

"An employe absent on leave, who engages in other employment, will lose his seniority unless special provision has been made therefor by the proper official and committee representing his craft.***"

At the hearing Claimant contended that he was not employed at the Ashland Swap Meet, that his teen-age children displayed various items that they wanted to swap or sell, and that he went there "to watch the table for them, and to watch over them while they were there."

Under the facts and circumstances presented in this record, we find the rule 21(b) was in no way violated.

A W A R D

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1970.

CARRIER MEMBERS' DISSENT TO AWARD 5927, DOCKET NO. 5799

Referee Zumas

The Claimant in this dispute is the same Claimant as involved in the dispute in Award 5923. He would, of course, not be entitled to recover twice and what was stated in our Dissent to Award 5923 regarding the limitation on his recovery is applicable in this case.

For these and other reasons we dissent.

/s/ **J. R. MATHIEU**
J. R. Mathieu

/s/ **H. S. TANSLEY**
H. S. Tansley

/s/ **H. F. M. BRAIDWOOD**
H. F. M. Braidwood

/s/ **W. R. HARRIS**
W. R. Harris

/s/ **P. R. HUMPHREYS**
P. R. Humphreys