

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

Parties to Dispute: { International Brotherhood of Firemen & Oilers
{ Southern Railway Company

Dispute: Claim of Employees:

1. That under the current and controlling agreement, Laborer, J. E. Jennings, Sr., was unjustly dismissed from the service of the Southern Railway Company on September 20, 1978, after a preliminary investigation was held in the office of Mr. W. R. Johnson, General Foreman, Danville, Virginia.
2. That accordingly, J. E. Jennings, Sr., Laborer, be restored to his regular assignment at Danville (Virginia) Shops with all seniority rights unimpaired, vacation, health and welfare, hospital and life insurance be paid and compensated for all lost time effective September 20, 1978, and the payment of 6% interest rate added thereto.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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, a laborer, who performed duties of cleaning, fueling and sanding diesel locomotives, and related work, and with seniority date of December 1, 1975, was discharged from service on September 20, 1978 for alleged violations of Rules 30(a) and 39(b) relating to excessive absenteeism and the need to notify a Foreman in a case where an employee will be detained from work. Such discharge was by letter of September 20, 1978, signed by the General Foreman, transmitted subsequently to a preliminary investigation held with the General Foreman, also on September 20, 1978. The facts directly underlying this discipline are that on June 22, 1978 a woman telephoned Claimant's work place and stated that Claimant would be unable to work that night because he had to go out of town on an emergency trip. She stated that the Claimant would be in the next day but he was not heard from again, or seen, by Carrier personnel until September 20, 1978 when he came in to inquire when he could take his vacation.

At the outset, Carrier asserts that this claim should be dismissed because Claimant, subsequent to the preliminary investigation, failed to request the formal investigation which Rule 34 (c) provides may be requested by a Claimant if he disagrees with the disciplinary action assessed against him pursuant to the preliminary investigation. Carrier contends that such failure amounts to a waiver of Claimant's rights, therein provided, since, if the formal investigation afforded is not requested it must be assumed that Claimant concurs in the discipline assessed at the preliminary investigation. Consequently, Carrier contends that Claimant has no right to pursue this matter any further.

To such effect it cites past Awards: Award No. 5936, Third Division: "Inasmuch as Claimant failed to adhere to the mandatory requirements of ... (the) Rule ... by not making a written request for a hearing within ten days from notice of dismissal ... we are compelled to dismiss this claim." Award No. 5208; "Time limit requirements agreed upon by the parties must be strictly enforced and we have no alternative ... but to dismiss the claim. A contrary result could be reached only by doing violence to the plain language ... of the Agreement ..." Award No. 8843, Third Division; "The Board finds that since Claimant ... did not comply with the provisions of Rule 40 requesting the investigation there provided within the five days specified he is assumed to have waived all his rights ... thereunder ...".

The Organization, however, contends that there is nothing in Rule 34 (c), or elsewhere, which explicitly states that failure to request the formal investigation specified by Rule 34 (c) results in a waiver of Claimant's ability to protest, and object to, discipline which may have been assessed against him at a preliminary investigation. Additionally, it could be pointed out that failure to request the formal investigation stipulated under Rule 34 (c), even when Claimant was clearly dissatisfied with discipline assessed against him at a preliminary investigation might result from some totally untoward event such as Claimant's death immediately subsequent to the preliminary investigation. In such an instance, the Organization alleges, it would hardly be likely that Claimant's failure to ask for a formal investigation, within the time period specified by Rule 34 (c), would be considered a waiver of rights to further dispute the propriety of the discipline assessed, against Claimant, at the preliminary investigation.

In any event, in this case, in view of our decision, as enunciated below, it is unnecessary to resolve these competing views.

The Organization contends that Rule 34 (b) by its language "Any discipline assessed at the preliminary investigation will be confirmed by letter ... within five (5) days from the date thereof ..." requires that any discipline assessed pursuant to the preliminary investigation be levied right at the investigation itself. Since, in this case, the General Foreman did not assess discipline directly at the conclusion of the September 20, 1978 investigation, but only subsequent thereto, in a letter dated September 20, 1978, it became improper to assess any discipline at all and, therefore, the subsequently assessed discipline was invalid.

Carrier urges that since the Organization did not raise this procedural

objection at the preliminary investigation itself it has been waived and may not now be asserted. Be that as it may, in view of our decision, as stated below, on the other issues involved in this matter, it is not necessary to here pass on this contention.

The Carrier also argues that the just cited language of Rule 34 (b) does not mandate the assessment of discipline at the preliminary investigation but merely permits it. It does not read Rule 34 (b) as precluding the levy of discipline, based on the preliminary investigation, at a reasonable time after the preliminary investigation has concluded.

Rule 34 (c) following directly upon the Rule 34 (b) language just quoted above states: "If ... employee disagrees with the disciplinary action taken, he may ... request a formal investigation; such request shall be submitted ... within five (5) days from the date of written confirmation of the assessment of discipline ..." Since there is no other referent, in Rules 34 (a)-(c), to which "the disciplinary action" in Rule 34 (c) can apply, other than the "Any discipline assessed at the hearing" language of Rule 34(b), logical textual analysis seems to compel an interpretation which contemplates that discipline will be assessed at the preliminary investigation.

However, as can be seen, the purpose of Rule 34(c) is to provide Claimant with an opportunity to appeal disciplinary action by requesting a formal investigation within a specified time from the assessment of discipline. In this case the General Foreman sent out a letter, advising of the discipline he was assessing against Claimant, based on the September 20, 1978 preliminary investigation. This letter itself was dated September 20, 1978. (It is alleged that he did not assess discipline directly upon conclusion of the hearing so that he might review Claimant's prior service record in order to best determine appropriate disciplinary action in the instant matter. To this point Organization responds that such review of Claimant's past record should have been conducted prior to holding the preliminary investigation so that appropriate discipline could have been determined immediately upon the preliminary investigation's conclusion.) Thus, in substance, Claimant was rapidly advised of the discipline assessed against him as a result of the preliminary investigation and, upon receipt of such advices, could have pursued his rights of appeal under Rule 34 (c). As long as the notification of discipline, subsequent to the preliminary investigation itself, does not impair Claimant's rights to have five days to appeal for a formal investigation, as provided by Rule 34 (c), as it did not here, and could not have ~~done~~ since Rule 34 (c) measures the five days from "the date of written confirmation of the assessment of discipline," no violence is done to the substantive spirit of the apparatus provided by Rule 34 to protect Claimant's rights. A slight technical departure in time from when Rule 34 (b) prescribes that discipline, based on a preliminary investigation, should be assessed should not, in and of itself, invalidate discipline administered pursuant to a preliminary investigation, so long as the spirit of Rule 34, regarding the protection of Claimant's rights has been accorded compliance.

On the merits, it should be observed that it is uncontroverted that at the preliminary investigation neither Claimant nor his representative offered any explanation for Claimant's extended period of absence from June 22, 1978 through September 20, 1978. Claimant simply inquired of the General Foreman what amount

of discipline the latter intended to assess "this time". Carrier contends this is tantamount to a clear recognition on the part of Claimant that he had failed to properly protect his assignment and was guilty of being excessively absent, as charged. Carrier further asserts that, pursuant to Rule 30 (a) and (b) the Carrier has a right to expect and require that an employee will honor his commitment to perform his duties and to notify his supervisors if unable to do so. Additionally, Carrier points out that the facts of the instant matter represent just one more in a series of all too frequent occasions on which Claimant failed to protect his assignment. On August 26, 1977 Claimant was suspended for five working days for violating Rule 30. On January 26, 1978 Claimant was suspended for thirty days for violating Rule 30. On May 12, 1978 he was suspended ten days for violating Rule 30. Additionally, as of September 20, 1978 he had only worked 63 days in 1978.

On the evidence in this matter, as well as based on Claimant's prior service record, the disciplinary action taken by Carrier, in this matter, was well warranted.

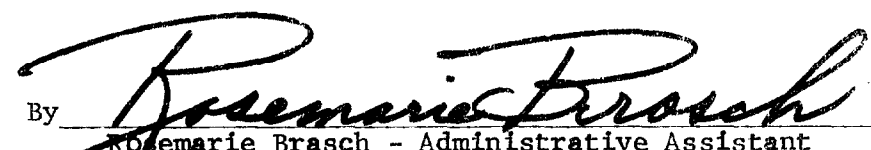
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of February, 1982.