

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

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(Southern Railway Company

Dispute: Claim of Employes:

1. That under the controlling agreement, Laborer L. B. Simmons, I.D. No. 264-31-3918, was unjustly dismissed from the service of the Southern Railway Company on November 12, 1981, after a formal investigation was held on November 6, 1981.
2. That accordingly, L. B. Simmons, Laborer, be restored to his assignment, seniority rights restored unimpaired, vacation, Health and Welfare, Hospital and Life Insurance and Dental Insurance be paid and compensated for all lost time, effective November 12, 1981, at the pro-rata rate of pay, and the payment of 6% interest rate be 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 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.

Mr. L. B. Simmons, hereinafter referred to as the Claimant, was employed as Laborer, by the Southern Railway Company, hereinafter referred to as the Carrier, at Atlanta, Georgia, on date of June 7, 1979. At the time the incidents over which this dispute arose, Claimant's assigned working hours and days were 7:00 A.M., to 3:00 P.M., Friday through Tuesday, with Wednesday and Thursday as rest days.

On date of November 2, 1981 a preliminary investigation was held on Claimant by Mr. R. L. Watson General Foreman. No written notice that this preliminary would be held appears in the record nor any record of what actually occurred at that investigation. However, on date November 3, 1981, the General Foreman advised the Claimant that he had been charged with:

- "1. Loitering in and outside of the diesel shop other than your assigned work area at approximately 1:45 P.M., November 1, 1981.
2. Insubordination in that you refused to submit to instructions from General Foreman C. F. Shoaf to stop and explain your activities at the south end of the diesel shop and why you were carrying a bucket with a journal brass in it at approximately 1:45 P.M., November 1, 1981.

- "3. Failure to protect your job assignment in that you were absent two (2) days, tardy seven (7) days and got off early one (1) day since October 4, 1981."

The General Foreman also advised the Claimant that based on the facts developed during the preliminary investigation that "it is my opinion that you are guilty as charged" and that "for your offence you are dismissed from the service of the Southern Railway Company effective at 10:00 A.M., November 2, 1981". However, that "since you have disagreed with the disciplinary action taken by me and verbally requested a formal investigation--the imposition of the discipline--is being held in abeyance pending completion of a formal investigation".

On date of November 4, 1981, the Carrier's Manager of the Atlanta Diesel Shop wrote Claimant advising him that a formal investigation would be held on date of November 6, 1981. Claimant was also advised that he should arrange for necessary witnesss and duly accredited representatives (Local Chairman or Committeeman). The investigation was held as scheduled and under date of November 12, 1981, the Carrier wrote Claimant and affirmed the discipline assessed at the preliminary investigation.

The Claimant was charged with loitering, insubordination, and failure to protect his assignment. The record does show that Claimant had asked for and received permission to leave his work assignment at approximatley 1:30 P.M., on November 1, 1981 to get a coke. There seems no dispute over the fact that he was gone for approximately one hour and ten minutes and that he did engage in activities other than getting a coke. This is shown in the following testimony. Hearing Officer questions the Claimant:

"Q. Is it true that you didn't return to the filter house until about 2:55 P.M.?"

A. I'd been back to the filter house.

Q. Well what did you do between 1:30 and 2:55 P.M., on November 1?

A. Well like I said, I came up here to get a coke and talked to some of the employes. I went by-to my locker, by way of my locker--to my locker. I even went outside looking for electrician R. C. Jones car a few times which then I didn't see him, and I also... that incident that occurred where I seen him coming one way and I went the other way which is like I said, the first time I knew that I wasn't supposed to be there that it wasn't my assigned area.

Q. What was the purpose of looking for R.C. Jones?

A. It was something I wanted to discuss with him.

Q. Was it of a personal nature?

A. Right.

Q. What would you be doing in that area?

A. I was going out to see if R. C. Jones car was in the parking lot, electrician R. C. Jones car.

- "Q. Why would an electrician be parking in this parking lot?
A. Well there's the times I've known that he has parked here because he worked relief foreman.
- Q. Could you not have handled personal business with R.C. Jones at a time other than when the company was paying you?
A. Mr. Thompson, at that time I could have, right. At that time I was down here at my locker, so I decided that I would look out there to see and like I said I seen him so I went the other way, because I knew I was out of place, I felt the filter house was where I was supposed to be.
- Q. You mean when you saw Mr. Shoaf you went the other way. Because you knew you were out of place.
A. Right."

Claimant was also charged with but denied, being insubordinate in that when found away from his assigned work area by General Foreman, and being told to stop he refused, saying that the General Foreman was "not going to frame him". There is a certain amount of conflict in the testimony as to what actually did transpire in the encounter, but no conflict in the fact that he did not stop and explain his presence in that area.

The final charge against the Claimant was failure to protect his assignment in that he had been absent two (2) days, tardy seven (7) days and off early all in approximately one (1) months time just prior to the investigation. Again, there is a conflict in the testimony as to the reasons for these absences, but no conflict in the fact that they actually did occur.

Claimants record also shows that he had been suspended for two (2) days in July of 1980, for failure to protect his job assignment, suspended for four (4) days in October of 1980, for being away from his job assignment, suspended for five (5) days in May of 1981 for failure to protect his job assignment, and suspended for seventeen (17) days in July and August of 1981, for failure to protect his job assignment, and suspended for three (3) days in September of 1981, for failure to perform his assigned duties and loitering.

In considering this case we also note that Rule 30 of the Agreement between the Carrier and the Organization reads as follows:

"Rule 30. (a) In case an employee is unavoidably kept from work, he will not be discriminated against. An employee detained from work on account of sickness or for other good cause shall notify his Foreman as early as possible.

(b) The provisions of paragraph (a) shall be strictly complied with. Excessive absenteeism (except due to sickness under paragraph (a) above) and/or tardiness will not be tolerated and employees so charged shall be subject to the disciplinary procedures of Rule 30.

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

In considering this case we do not feel that Claimants approximately one (1) hour and ten (10) minutes absence from the job on date of November 1, 1981 nor the degree of alleged insubordination (which could have been simply a misunderstanding) would justify the supreme penalty of dismissal. However, the failure to protect his job assignment (and particularly in view of Claimant's past record which is deplorable) is another matter. No company can exist and give the kind of service needed to stay in business if an employee can work only if and when he chooses. And because Rule 30 is an agreement between the Carrier and the Union representing the Claimant, it is clear that the Union has so agreed. In considering all of the record and all of the evidence presented by both parties, we have no choice but to deny this claim.

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 9th day of May, 1984