

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13924
Docket No. 13813
07-2-06-2-24

The Second Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Kansas City Southern Railway Company)

STATEMENT OF CLAIM:

- “1. That the Kansas City Southern Railroad Company violated the Controlling Agreement, particularly, but not limited to, Rule 29, when Shreveport, Louisiana, Electrician Robert Wolfe was unjustly and arbitrarily dismissed from the service on November 22, 2005 following the investigation held on November 8, 2005.
2. That, accordingly, the Kansas City Southern Railroad Company make whole Electrician Wolfe as follows: (a) reinstate him to service with seniority rights unimpaired; (b) compensate him for all wages lost at the prevailing electrician's rate of pay and all applicable overtime, including interest at the judicial rate; (c) compensate him for, and restore, all vacation rights; (d) compensate him for, and restore, all health and welfare and insurance benefits; (e) compensate him for, and restore, any and all other benefits including Railroad Retirement and Unemployment Insurance; (f) compensate him for, and restore any and all other benefits that he would have earned during the time withheld from service, and; (g) any record of this arbitrary and unjust disciplinary action be expunged from his personal record.”

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.

On September 29, 2005, Carrier notified Claimant to appear for a formal Investigation on October 19, 2005, which was postponed and held on November 6, 2005, to ascertain the facts and determine Claimant's responsibility, if any, in connection with his alleged failure to comply with instructions, concealing facts, dishonest misconduct and engaging in another occupation that created a conflict of interest with his employment with the Carrier on September 27, 2005, while being off work due to an alleged on-duty injury.

On November 22, 2005, Claimant was notified that he had been found guilty as charged and was dismissed.

It is the position of the Organization that Claimant was deprived of a fair and impartial Investigation as the charges were not precise and that the Carrier erred in its dismissal because it did not prove its charges. Last, it argues that the Carrier attempted to get a "second bite of the apple" because it recognized that its previous attempt to dismiss Claimant in Award 13923 was so flawed that it needed to try again. It suggests that this case is "double jeopardy" and because of that the Board should rescind the dismissal.

It is the position of the Carrier that Claimant deserted his job and engaged in other employment while feigning disability due to an alleged on-duty injury. In

light of the seriousness of these actions, his short length of service its assessment of dismissal was appropriate and should not be disturbed.

The Board has reviewed the transcript and record of evidence and is not persuaded by the Organization's procedural arguments. The dispute will be resolved on its merits.

This case is a companion case to Award 13923. The prior case involved the same parties and same Claimant and dealt with the Claimant's culpability for alleged unsafe work behavior that resulted in an on-duty injury of his right shoulder on August 13, 2005. The instant case deals with the allegation that Claimant was working as an Electrician on another job while he was unavailable for work on the railroad due to his shoulder injury. The conduct which gave rise to the second set of charges occurred while Claimant was still an active employee and before the discipline was issued in Award 13923. Contrary to the Organization's suggestion this was not a "second bite of the apple" and it is not "double jeopardy" as it is a distinctly different dispute.

The record indicates that Claimant chose not to appear at the Investigation and it was held in absentia. There is no requirement that an accused must attend his/her formal Investigation, but when a charged employee chooses not to attend, he does so at his own potential peril because he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360 and 13491.

At the Investigation the Carrier presented its evidence that Claimant was instructed by General Director S. Slattery to provide medical documentation justifying his continued absence. Supervisors testified that Claimant did not comply and he failed to communicate with the Carrier about when, if ever, he expected to return to work. Testimony indicated that because Claimant continued to be absent the Carrier hired a private investigator to determine his whereabouts and activities. On September 27, 2005, Claimant was observed by that investigator driving what appeared to be a work vehicle. The vehicle was a van loaded with electrical equipment, supplies and ladders on the roof. On that date the Claimant was followed to a business location where he was observed working. He carried tools and equipment from the van into the building. He also removed a ten foot ladder from an overhead rack, with both arms, and he then carried the ladder with his

right (injured) arm into the building. Those activities were videotaped and the investigator also made a written report of his observations. Based upon the evidence produced at the Hearing the Board is in agreement with the Carrier's conclusion that Claimant performed work as an Electrician for someone other than the Carrier while alleging that he was not fit for its service.

Because the Claimant elected not to attend the Investigation the evidence which was substantial stands un-refuted. Therefore, the Board finds and holds that the dismissal is appropriate as it was not arbitrary, excessive or capricious. The discipline will not be set aside.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 6th day of August 2007.