

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19981
Docket Number SG-20038

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: {
(Brotherhood of Railroad Signalmen
(Kansas City Terminal Railway Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Terminal Railway Company:

The dismissal of Mr. C. G. McKay, Traveling Signal Maintainer, was unjust and Carrier should be required to reinstate him to service with full seniority rights and pay him for all time lost from the date his doctor releases him for work to the date he is reinstated to the position of Traveling Signal Maintainer. (Carrier's File: SG-3.72.30)

OPINION OF BOARD: Effective February 11, 1972, claimant was permanently dismissed from Carrier's service for performing outside work without Carrier's permission. After hearing on February 9, 1972, Union Station Building, Kansas City, Missouri, the claimant was found guilty of violating Rule I of the Carrier's rules and regulations which reads as follows:

"I. No employe will engage in other employment without permission from proper officer, or be allowed to do any work for himself or for others in working hours, nor in the shops of the Company, except with the permission of the head of the department in which he is employed."

The Petitioner attacks the discipline on the grounds that: 1) the dismissal of claimant was unjust and unreasonable; 2) Carrier did not prove that claimant did not have permission from a proper officer to perform the outside work; and 3) Carrier violated claimant's due process rights in that the same Carrier official preferred the charges, conducted the hearing, and rendered the discipline of dismissal. Carrier's position is that the discipline is supported by the claimant's own admissions and that Petitioner's due process contention was not timely raised on the property.

In the record before us, there is no problem of timeliness in respect to Petitioner's due process contentions; however, neither is there a due process deficiency in the record. Prior Awards have permitted the placing of multiple disciplinary responsibilities in a single Carrier official (see Third Division Award 14573), so we shall proceed to consider the case on the merits.

The hearing record shows that, due to a non-work injury to his back, claimant marked off sick on January 9, 1972. He testified that his doctor advised him not to do any lifting work until his injury healed and, because his Carrier duties apparently involved lifting, he took a sales job with a manufacturing concern. On January 28 and 31, and February 1 and 2, 1972, Carrier's Security personnel observed claimant at the manufacturing concern; on February 2 they questioned claimant who acknowledged that he was working with the concern while off his regular job due to the back injury. At the time of this encounter with the Security personnel, claimant was still marked off sick. In addition to the foregoing, the hearing record shows that the Hearing Officer asked claimant the following question:

"We have information . . . that you have been employed full time with this organization since February 1968. Is this true?"

Claimant denied full time employment but acknowledged that he had worked for the organization (the manufacturing concern) since February 1968. Nothing in the record contradicts claimant's denial of full time work with the outside concern. Claimant also testified that he planned to return to work for Carrier when his back injury permitted. All of the foregoing is clearly established by the hearing testimony. However, the testimony on the issue of permission to perform outside work, though provided only by claimant, is not so clear and, indeed, is somewhat contradictory. Claimant at first said that he obtained permission to work for the outside concern shortly after commencing work there. Subsequently he qualified this statement by saying that he did not receive permission to work for the specific firm involved, but to do part time work. Also he referred to the permission as probably being recorded in Carrier's files and, contrarily, that "I have nothing in writing; it was just verbal."

In analyzing the foregoing, and the whole record, we conclude that the claimant had worked part time for an outside concern for four years. His testimony on the issue of permission was so equivocal as to be disbelieved by Carrier and the record affords no basis for disturbing Carrier's disposition of this issue. Thus, there is substantial evidence to support a finding that claimant worked part time for four years with an outside concern without Carrier's permission. We are concerned, though, that Carrier did not sufficiently take into account several factors which cogently militate against the degree of discipline imposed in this case. First, Carrier did not prove its full charge as stated by the Hearing Officer, namely, that claimant had worked for the outside concern on a full time basis for four years. Moreover, the outside work proved by Carrier's Security personnel was totally irrelevant to the charge; claimant was marked off sick when this encounter occurred and, thus, Rule I could have no application to him until his sick status was terminated. Indeed, the claimant's candid acknowledgement of his part time work for four years is the sole foundation of Carrier's proof of the charge and even here the Carrier made no showing that such work tended to interfere with claimant's duties with Carrier.

It is true that claimant should have obtained Carrier's permission to perform the outside work, or at least have made a request for such permission; also, it is clear that he equivocated on the permission issue in his hearing testimony. Nonetheless, there negatives, and his admission of outside part time work, do not warrant the extreme penalty of permanent dismissal. We therefore, on the whole record, find that the discipline no excessive and we shall reinstate claimant with seniority rights unimpaired but with no pay for time lost.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The discipline was excessive.

A W A R D

Claim sustained in accordance with Findings and Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 12th day of October 1973.