

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24562

Docket Number MS-24586

**Tedford E. Schoonover**, Referee

(Mildred K. Humphrey

PARTIES TO DISPUTE: (

(Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Written notice is hereby served of my interest to file **Ex-Parte** Submission with your Division of the Board within thirty (30) days after this notice covering the following unadjusted dispute between myself and The **Chesapeake** and Ohio Railway Company.

Statement of Claim

"(a) The Carrier violated provisions of the Clerks' General Agreement and Supplements thereto, when on October 25, 1978 it's Officers wrongfully, capriciously, and arbitrarily dismissed M. K. Humphrey from Service.

"(b) That **the** Carrier shall be required to cancel such dismissal and rights and benefits associated with such employment restored.

"(c) That the Carrier shall be required to compensate M. K. Humphrey for all wages, and other benefits lost as a result of such wrongful **dismissal**."

OPINION OF BOARD: On October 12, 1978, claimant was sent the following by D. **J. Schisler**, Asst. Regional Supervisor of Materials, **Raceland** Car Shops:

"**Please** arrange to attend a Board of Inquiry to be held at 1:00 p.m. on October 20, 1978 in the office of Mr. K.B. Cobb, Regional **Supvr.** of Materials, Raceland, Kentucky.

You are hereby charged with responsibility in connection with your failure to properly protect your assignment, marking off under false pretenses, and accepting **other** employment without written permission of the proper officer and local chairman, when you laid-off account of sickness during **the** period from September 6, 1978 to and including October 12, 1978.

Please arrange for representatives and witnesses of your choice if desired."

At the hearing held on October 20, 1978, claimant was represented by Guy Evans, Local Chairman, BRAC and also F. E. Clark, Local Representative, both of whom participated in the hearing by questioning witnesses.

Prior to her dismissal, claimant was employed as a steno-clerk. On September 5, 1978, she was at **work** at her regular position but went home early from work with permission. On September 8, she called in and marked up for work on the following Monday morning, September 11. **On** the morning of September 11, she reported off work due to personal illness, more particularly as personal injury due to a fall in her bath tub. She remained off work due to illness until October 11, 1978. **During** the period of her absence she was employed by the Lawrence County Joint Vocational School where she **worked** as a teacher on October 3, 5 and 10. Claimant did not secure written permission to accept other employment while laying off due to illness as required by Rule **28(e)** of the labor agreement. Rule **28(e)** provides as follows:

**"Employees** on leave of absence, or laying off account of sickness **or** injury, accepting other employment without written permission from the proper officer of the department in which employed and the Local **Chairman** of the employees in the seniority district affected, will be considered out of service."

**During** the period of claimant's employment from 1964 until her suspension she compiled an irregular attendance record as follows:

<b>Year</b>	<b><u>Sick Days</u></b>	<b><u>Leave Days</u></b>
1964	124	
1965	23	
1966	95	
1967	59	
1968	21	
1969	120	
1970	43	
1971	19	24
1972	120	16
1973	84	
1974	254	
1975	42	
1976	208	
1977	65	

Due to claimant's absenteeism record her supervisor questioned the influence of her outside activities on her employment with the Carrier. Receiving information she was employed at the Lawrence County Vocational School, her supervisor together with the Captain of Police went to the school where they found her employed as a typing instructor.

Claimant admitted she had outside employment during the period she was marked off as stated in the charge. She also admitted she had not secured permission for such employment in writing from the **Union** and the Carrier as required by Rule **28(e)**, **giving** as a reason that she did not know of the requirement. At the same time, however, claimant admitted having been employed by the **Carrier** some 21 years.

The evidence that claimant had outside employment while marked off due to **sickness** is clear and unrefuted. The requirement of Rule **28(e)** for **written** permission is likewise clear. The penalty is automatic in that such infractions result in the **employee** being "considered out of service".

Evidence shows claimant had ample time to prepare her defense and, was given due notice of the offense and was vigorously represented at the hearing by representatives of the Union. There is no claim that she did not receive a fair and impartial hearing. The evidence in support of the Carrier charges is clear and convincing. In view of these facts and the self executing provisions of Rule **28(e)** we find no basis for sustaining the claim. As stated in First Division Award 16785, Referee Charles **Loring** held:

**"In** these investigations as to whether a discharge was wrongful, the Carrier is not bound to prove justification beyond a reasonable doubt as in a criminal case or even by a preponderance of evidence as does the party having the burden of proof in a civil case. The rule is that there must be substantial evidence in support of the Carrier's action.\*

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


That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 17th day of November, 1983.