

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41694
Docket No. MS-41818
13-3-NRAB-00003-120116**

The Third Division consisted of the regular members and in addition Referee Martin W. Fingerhut when award was rendered.

PARTIES TO DISPUTE: (Monica M. Roberts
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

- “1. The Carrier acted arbitrarily and in a vengeful manner, when on August 23, 2010 in serving me, Clerk Monica M. Roberts, ID#XXXXXX, with notification to attend a formal investigation in Conference Room #3327, third floor at the CSX Customer Service Center, 6737 Southpoint Drive South in Jacksonville, Florida, at 10:00 am on Thursday, August 31, 2010. The purpose of this investigation was to determine my responsibility, if any, in connection with information received on August 16, 2010 that while I was marked off sick, I was engaged in outside employment without permission of management.
2. I, Monica M Roberts, never received notification of this formal investigation and was not aware of any investigation taken (sic) place. I hereby request the opportunity to defend myself against any and all allegations.
3. As a result of the above stated violation, Carrier shall: Clear Claimant's personal record of discipline, compensate me, Monica M. Roberts for all time lost and restore full seniority rights and coverages, plus any benefits I lost.”

FINDINGS:

The Third 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 Petitioner was dismissed following a formal Investigation that was held in absentia. The Carrier had charged the Petitioner with conduct unbecoming an employee when she "engaged in outside employment while marking off sick and marking off sick under false pretenses."

At the outset of the formal Investigation, the Local Chairman of the Organization representing the Petitioner requested a postponement because of the absence of the Petitioner. The Carrier denied the request on the grounds: (1) the Investigation had been postponed on two earlier occasions, (2) no request for a third postponement had been made prior to the Investigation, and (3) the Organization had no information as to the reason for the Petitioner's absence. In addition, the Carrier introduced evidence that all notices had been sent to the Petitioner's last known address and submitted proof that all notices had been successfully delivered to that address.

The Hearing Officer's decision to continue the Investigation in absentia did not violate any Agreement due process rights of the Petitioner. It is well settled that a charged employee cannot evade a disciplinary Investigation by the simple expediency of not attending it. See, First Division Award 25158, Third Division Award 21696 and Public Law Board No. 1760, Award 180. The Board also notes that although a postponement request was made at the Investigation, the issue was not raised at any subsequent level of on-property appeal.

With respect to the merits, the Carrier called three witnesses at the Investigation. The first witness was the Manager of Labor and Manpower. He introduced several printouts from an internet website relating to a company named "Ardyss." In essence, the documents described Ardyss as a company that sells and distributes products in the "Health and Wellness Industry" through the use of independent distributors who market and sell its products. The documents stated that "Monica Roberts" was an "Independent Distributor."

In addition, the documents recited that "Monica Roberts" and her husband were part of the "Ardyss team," describing their activities on behalf of Ardyss. The documents contained photographs of "Monica Roberts," which the witness testified were photographs of the Petitioner. Lastly, copies of documents were introduced by the witnesses that were taken from the Facebook page of the Petitioner. These exhibits showed pictures of the Petitioner that had been taken on "August 12, 2010 in Boca Raton, Florida at a retreat with Ardyss International." The Carrier witness testified that the Petitioner had marked off sick that day, as she had been doing beginning October 21, 2009.

The next Carrier witness was the Manager, Rail Billings and Collections. She testified that the Petitioner had been under her supervision from May 2009 until the Petitioner's last workday in October 2009. She identified the "Monica Roberts" photographs in the exhibits as those of the Petitioner.

The final Carrier witness was the Nurse Manager of the Carrier's Medical Department. She testified that the Petitioner had marked off sick since October 21, 2009. On March 24, 2010, the Carrier had requested the Petitioner's physician to furnish medical information concerning the Petitioner's medical condition. No response was forthcoming. On April 21, 2010, the Petitioner was sent a request to provide an update on her condition. Again, no response was received.

The Organization called as its witness an employee who testified that he had worked in the same department as the Petitioner until February 2009. He stated that he had examined the photographs in the exhibits introduced by the Carrier and he did "not recognize these pictures being [the Petitioner]."

In essence, there are two undisputed facts that were adduced at the Investigation. The first undisputed fact is that at the time the Petitioner was marking herself off sick, a person identified as "Monica Roberts" was employed as an "Independent Distributor" for a company called Ardyss. Second, there was no evidence that, at any time relative to this dispute, the Petitioner had requested a leave of absence to accept employment at the Ardyss Corporation.

The basic issue before the Board is whether the testimony of the two witnesses identifying the Petitioner could be relied upon by the Carrier as constituting substantial evidence that the Petitioner was the very same "Monica Roberts" who was employed by Ardyss. The Board finds that there was substantial evidence for two reasons. To begin with, the settled precedent in this industry is that issues of credibility are within the exclusive province of the trier of facts, not the Board. Where there are conflicting issues of fact, the Board will not substitute its judgment for that of the Hearing Officer unless there is no rational basis to support the Hearing Officer's conclusions. In this case, there is no ground for doing so. Two Carrier witnesses made a positive identification of the Petitioner. The Hearing Officer was in the best position to evaluate the credibility of their testimony and to give greater weight to their testimony than that of the Organization's witness. Furthermore, corroborative evidence that the Petitioner was the "Monica Roberts" portrayed in the photographs and the "Independent Distributor" referred to in the Ardyss exhibits was the Petitioner's Facebook exhibit, which showed her participation in the Boca Raton Ardyss International Retreat. In summary, the Board finds that there is substantial evidence to support the Carrier's conclusion that the Petitioner was guilty as charged.

With respect to the discipline of dismissal, the Board likewise finds no basis to overturn the Carrier's decision. Agreement Rule 41 - Leave of Absence, Part (c) provides, in pertinent part:

"Employees shall not be granted leave of absence for the purpose of accepting employment of any character in outside industry . . . except by permission of the Management and Vice General Chairman."

In this case, there was substantial evidence that the Petitioner not only engaged in outside employment without obtaining a leave of absence, but also did so at a time when she was marked off sick and claimed that she was unable to protect her work

assignment. The discipline of dismissal was not excessive. See, Special Board of Adjustment No. 988, Award 378 and Public Law Board No. 4509, Award 52.

Finally, the Board notes that while the Petitioner did not attend the formal Investigation on the property, she did appear at the Referee Hearing before the Board. At the Referee Hearing, the Petitioner submitted documents which she alleged supported her contention that the Notice of Investigation had not been delivered to her last known address and she had not been employed by Ardyss. The Board informed the Petitioner that it could not accept the proffered evidence. The Board is an appellate tribunal and can consider only the record of proceedings as adduced during the on-property handling of the dispute. In our discussion above, we found convincing evidence by the Carrier that delivery of the Notice of Investigation had been made. The further handling of appeals on the property did not even contend, let alone constitute evidence, which contested the issue. Having found that the Notice of Investigation was proper, it was incumbent upon the Petitioner to present any evidence at the Investigation that would have supported the issue of her employment at Ardyss. Such evidence, of course would have been subject to cross examination by the Carrier. Stated differently, the Board is precluded from accepting de novo evidence not submitted during the on-property handling of disputes. Given the case record established on the property, the claim must be denied.

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 Third Division**

Dated at Chicago, Illinois, this 16th day of September 2013.