

Award No. 6277

Docket No. TE-6397

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE ATCHISON, TOPEKA AND SANTE FE RAILWAY
COMPANY
— COAST LINES —**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka and Santa Fe Railroad Company that:

- (1) The Carrier acted arbitrarily and capriciously and in a discriminatory manner when it dismissed from its service Telegrapher H. E. Walker who was filling a position of third trick operator at Williams, Arizona, a position included in and covered by the scope of the Telegrapher's Agreement.
- (2) That H. E. Walker be reinstated with his seniority unimpaired.
- (3) That H. E. Walker be reimbursed for all wages lost due to the unfair and improper action taken by the Carrier.

OPINION OF BOARD: This is a discipline matter. Claimant was discharged for alleged violation of Carrier's Operating Rules Nos. 759 and 752. Dismissal occurred on April 26, 1949. Two investigations were held, the first on January 11, 1949 and the second on March 28, 1949.

At the initial investigation grievant was charged with violation of Rule 759, said rule in substance prohibiting any employee from engaging in outside employment or business without specific permission from Management officials. Shortly thereafter on February 10, 1949, Claimant was advised in writing that he was to discontinue his mortuary operations or resign from service with the Carrier.

The second investigation was held on March 28, 1949, the basis of which was the alleged violation of Rule 752, that is, the failure of the grievant to comply with the instructions given by his employer subsequent to the initial investigation. At this hearing it was found and determined that compliance had not occurred, and discharged followed.

The Claimant had been engaged in the mortuary field either as an employee or owner at more or less regular intervals from 1937 to the date of his discharge. He had been advised by his supervisors as early as 1943 that he could

not so continue and remain in company employ. During this time he had progressed from an employe to an owner operator of two establishments.

It is fundamental that an employer retains all of those rights generally defined and considered as prerogatives of Management, save and except as the same may have been abridged by the collective bargaining Agreement, restrictive legislation, and in some instances, public policy.

The operating rule prohibiting outside employment or business is not unreasonable or the enforcement thereof improper. On the contrary, the demand and requirement that this employe divest and disassociate himself from and with any interest or activity in the mortuary business was proper.

This Board has in the past acknowledged the right of a Carrier to promulgate and enforce operating rules, similar to those with which we are here concerned. Award 5536. Likewise this Board will not disturb a disciplinary action of (1) the investigation rules of the effective Agreement have been complied with (2) the action taken is neither arbitrary nor discriminatory, or (3) the penalty invoked is not in the premises, excessive or unreasonable.

That the investigations were full, complete and impartially held cannot be denied. Neither was the action of the Respondent arbitrary. There is not sufficient evidence of record to sustain a charge of discriminatory enforcement of the rule. Thus we come to the question of whether or not the penalty invoked is excessive and unreasonable.

In light of the extenuating and mitigating facts and circumstances we are of the opinion that it is.

These facts are also evident; the Respondent had knowledge of Claimant's activities for a period dating back to 1937, and while warnings were given, no affirmative action was taken until 1949. Likewise after the first investigation was held little time was given Claimant to sell his business. Claimant had thirty-eight years of service of which there was no other complaint made than the subject matter here. Only on one, if any occasion, did Claimant's outside activities interfere with the timely performance of his duties, and one of the establishments operated by the Claimant, namely the one at Ash Fork, was disposed of or closed by him after the investigations.

The Claimant's full knowledge of the existence of the rule, his admitted receipt of various warnings and continued apparent deliberate non-compliance with the rule or instructions nullifies that portion of this claim pertaining to pay for time lost.

The Board is of the opinion and so finds and holds that the Claimant should be restored to service with seniority and other rights unimpaired but without pay for time lost; provided, however, that such restoration to service shall not be effective unless the Claimant shall within ninety days after receipt of this Award completely and finally cease and desist from engaging in the mortuary business.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 disciplinary action here invoked was unjust, unreasonable and excessive.

AWARD

Claim disposed of in accordance with the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of July, 1953.