

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

FORT WORTH AND DENVER RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5424) that:

1. The Carrier's action in dismissing Mr. B. W. Roach, "Seal Clerk", Amarillo, Texas, was unreasonable and unjust.

2. Mr. Roach now be restored to service of the Fort Worth and Denver Railway with all rights and privileges unimpaired and paid for all wage loss sustained retroactive to April 27th, 1962.

OPINION OF BOARD: The Claimant, a "3rd Seal Clerk" with seniority date of July 17, 1958, was dismissed from service on April 27, 1962.

He was duly notified of the charges against him and appears to have had a fair hearing and investigation.

The charge upon which the Claimant's discharge is predicated is the pretense of illness and during that time, engaging in other business without permission from proper authority as well as participation in sports activities.

The material facts are not in dispute. Essentially, the Claimant requested sick leave due to a severe toothache which condition subsequently was treated by a dentist after the Claimant had been suspended from service, but prior to his dismissal. During the period of time that the Claimant was on sick leave, he was observed working at his filling station and participating in the recreational sport of bowling. However, neither activity occurred or was observed during the same hours as his regular employment with the Carrier.

The Claimant returned to work on April 17, 1962, approximately four minutes before his regular trick and was advised that the extra clerk initially called to relieve him was to work the assignment in the absence of adequate notice that the Claimant would report for duty on that date. The Organization contends that the Carrier violated Rule 28 of the current Agreement between the parties by refusing to allow him to resume duty on April 17, 1962.

Rule 28(a) entitled Discipline and Grievances, in part, reads as follows:

“An employe who has been in service more than sixty calendar days or whose application has been formally approved, shall not be disciplined or dismissed without an investigation.”

This contention of the Organization is without merit in that the Carrier was entitled to reasonable notice from the Claimant that he would return to work on that date and the record shows that no disciplinary action was contemplated at the time. Moreover, he was offered an opportunity to return to work by giving reasonable notice to the Agent that he would work on his next regularly assigned work day. Thereafter, he reported each work day in time for assignment through April 27th, but stated that he was not physically able to perform his assignment during that period.

Whether or not the Claimant was observed working at his filling station during off duty hours in the instant dispute is not relevant in that such observations were made on days during which he allegedly was too ill to perform his regular duties with the Carrier. The basic charge against the Claimant is that he deceived his supervisor by stating that he required time away from his regular duties with the Carrier because of sickness, during which days he appeared fit enough to operate a filling station and engage in active recreation.

Although it is a violation of Carrier policy for employes to secure outside employment without prior agreement as provided in Rule 26(c) of the present working Agreement, the Carrier admits this is not the issue involved in this dispute. Therefore, the Board finds it unnecessary to pass upon this point.

The subsequent offer of reinstatement to the Claimant by Carrier contingent upon the disposition of his outside business, is not a matter bearing upon the merits of this dispute. The undisputed testimony is that the Claimant under the guise of illness failed to perform his regular duties for the Carrier during at least two regular assigned work periods, but did conduct his filling station business and engage in sports activities during the same days in question.

The punishment cannot be said to be arbitrary, capricious or unsupported by the record and in accordance with the broad latitude given Carriers by this Board, in the matter of assessing discipline, we will not upset the punishment decided upon by the Carrier. (See Awards 9049, 9862 and 10430.)

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 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 Contract was not violated.

12438—3

371

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 23rd day of April 1964.