

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21113
Docket Number MW-21174

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Ray Waller on December 21, 1973 was without just and sufficient cause; was based on unproven and disproven charges; was arbitrary and capricious and in violation of the Agreement (System File MW-PO-74-101)

(2) Ray Waller shall be reinstated to service with vacation, seniority and all other rights unimpaired and he be paid for all time lost since September 17, 1974, the date he was physically able to resume his regular duties with the Carrier.

OPINION OF BOARD: Carrier terminated Claimant's employment status for violation of Safety Rules D and H and Operating Rules 403 and 427:

"Safety Rule D: The service demands the faithful, intelligent, courteous and safe discharge of duty. It is the duty of every employee to exercise care to avoid injury to himself and others.

Safety Rule H: Employees who persist in unsafe practices to the jeopardy of themselves and others will be subject to discipline, even if their conduct violates no specific rule.

Operating Rule 403: (Employees) ... must not do any work for themselves or others during their tour of duty or on company property without proper authority.

Operating Rule 427: Negligence in handling company business,...dishonesty,...giving false statements or concealing matters under investigation are sufficient cause for dismissal."

The rather lengthy record details the Employee's fourteen (14) injuries during his tour of service, and contains evidence to demonstrate that Claimant had contracted to perform, and did perform, track repairs on a grain elevator siding owned by Carrier; for which he received \$200.00 from the grain elevator company.

The employee has asserted that he was denied a fair and impartial investigation and that his rights were substantially prejudiced by the fact that the same Roadmaster who initially dismissed him and had placed certain charges against him, was also a witness at the investigation and actively participated in the appellate process. We do not lightly dismiss such an allegation of due process deprivation; however, we find it unnecessary to explore the allegation under this record. The Board finds that even if all of the Roadmaster's testimony and participation is eliminated from consideration, there still remains substantive evidence under this record to uphold a finding of guilt.

Without regard to the quantum of discipline warranted because of the safety questions presented, we find that the Claimant's activity concerning receipt of compensation for performing track work on the industrial siding amounted to fraudulent conduct, and that dismissal was appropriate.

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 Employee involved in this dispute are respectively Carrier and Employee 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:


Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1976.