

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22618
Docket Number CL-22758

Paul C. Carter, Referee

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
PARTIES TO DISPUTE: (
(Port Terminal Railroad Association

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8747) that:

(1) Carrier violated the rules of the current Agreement between the parties, including but not limited to Rule 26, when it arbitrarily and capriciously dismissed Clerk Felix E. Bradford from its service effective 5:00 p.m., March 10, 1978, without just and sufficient cause.

(2) Carrier further violated that same Agreement when it did not prove its arbitrary and capricious charges at the hearing held on March 29, 1978, and continued to hold Claimant out of service.

(3) Carrier shall reinstate Claimant to its service with his seniority, vacation, insurance and all other employe rights restored unimpaired and his record cleared of the charges and discipline assessed and shall compensate him for one (1) day's pay at the UTIC Position N-391 for March 10, 1978 and each subsequent work day thereafter until restored to service.

OPINION OF BOARD: The record shows that claimant was employed by Carrier on April 10, 1965. His regular assignment was clerk in Carrier's Pasadena Yard, with assigned hours 11:00 P.M. to 7:00 A.M., with rest days on Wednesday and Thursday.

On March 10, 1978, claimant was notified that he was dismissed from service because "...you were engaged in (working in) your real estate business - Ingalls-Bradford on the date of March 6, 1978, while being marked off as an employee with this Association." and also alleged misrepresentation in connection with a letter claimant had written Carrier's Superintendent on October 31, 1977, wherein he stated:

"...Let me further add that your statement of me owning and operating a real estate firm is not correct. The true fact is that my wife and I together own a real estate firm. We purchased it as an investment, as anyone else would invest in stocks, bonds, etc. The statement that I operate it is totally false."

Claimant and his representative, in accordance with the provisions of the Agreement, requested a hearing. The hearing was, by agreement, conducted on March 29, 1978. Claimant was present throughout the hearing and was represented.

In the hearing Carrier presented a "Surveillance Log" made by W. Kent Ferguson, on March 6, 1978. It developed that Ferguson was an investigator for the Carrier's Claim Department. In the "log" Ferguson related an alleged telephone conversation that he had with claimant at the real estate office at about 2:30 P.M. on March 6, 1978. The investigator gave a fictitious name, and what appears to be a fictitious story about being in the process of moving to the Pasadena area, having a house for sale in Orange, Texas, and his desire to find a suitable house. He stated that claimant asked him a few questions and then told him that he would assign him to one of the salespersons. There was no actual recording of the conversation, but, according to the investigator, the "log" was an account of the conversation written by him from memory immediately after the conversation ceased.

The claimant admitted that he owned the real estate firm, but contended that the firm was actually operated by his wife, an office manager and a group of salespersons. The claimant admitted being in the real estate office on March 6, 1978, but contended that he was there for a birthday celebration and not for the purpose of performing work. He submitted a statement dated March 21, 1978, signed by seven employees of the firm reading:

"March 21, 1978

To Whom It May Concern:

"On the day of March 6, 1978, Mr. Bradford was in the office of Ingalls-Bradford Real Estate, 'not working in' real estate, but as a result of a birthday party given him in which we had birthday cake, cards, and fellowship with the agents of the firm."

Many awards of this Division have upheld the admissibility of written statements, especially from non-employees, in disciplinary investigations without the presence of the authors.

There was also introduced an affidavit signed by Carmen Schutt, reading:

"THE STATE OF TEXAS

A F F I D A V I T

COUNTY OF HARRIS

I, CARMEN SCHUTT, hereby testify that I operate INGALLS-BRADFORD REAL ESTATE COMPANY, as Office Manager, on a percentage basis. Due to this Agreement, Mr. Felix E. Bradford does not maintain fixed, day-to-day, hours to maintain operation of this firm. I further testify that Mr. Felix E. Bradford does not solicit for listings and does not show property to prospective buyers.

/s/ Carmen Schutt
CARMEN SCHUTT

SUBSCRIBED AND SWORN TO BEFORE ME, A NOTARY PUBLIC, in and for the County of Harris, State of Texas, to certify which witness my hand and seal of office, this the 24th day of March, 1978.

/s/ M. A. Prestridge
NOTARY PUBLIC in and for
Harris County, T E X A S "

The Board considers the proof presented by the Carrier in this case, consisting primarily of the "Surveillance Log" of the investigator for the Claim Department, to be weak. It was brought out in the handling on the property, however, that claimant's work attendance record had been poor for some time, it being shown that he worked only 45 days in the year 1977. It is entirely proper for an employee's past work record to be considered in a dispute of this kind.

After very careful consideration of the record properly before the Board, the Board concludes and will award that claimant be restored to service with seniority and vacation rights unimpaired, but, due to his poor work attendance record, we will deny any claim for pay for time lost while out of the service. Claimant is cautioned,

however, and he should so understand, that his work attendance record must improve. In reaching our decision we have considered only the material timely presented and considered on the property.

Our attention has been called to the fact that the Carrier's submission and some of its exhibits have not been presented in accordance with instructions of the Board. Instructions For Preparing Submissions to the Third Division, National Railroad Adjustment Board, revised October 1, 1976 provide in part:

"All submissions must be in eight (8) identical and equally legible copies, typewritten or machine prepared, and should be double-spaced, preferably in black type, on one side of paper, size not to exceed 8-1/2 x 11 inches...." (Emphasis added).

It is the intent of the Board that its instructions be complied with, and the Carrier is cautioned in this regard if other disputes are submitted to the Third Division.

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 violated to the extent indicated in Opinion.

A W A R D

DEC 14 1979

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1979.