

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24838
Docket Number CL-24447

Edward M. Hogan, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9576)
that:

(1) Carrier violated the effective Agreement, particularly Rule 21, when it dismissed Mr. W. R. Campbell, Administrative Clerk, Chadron, Nebraska, from service effective December 30, 1980, and

(2) Carrier shall now be required to reinstate Mr. Campbell to service with all rights unimpaired, and compensate him for all time lost, including all fringe benefits, from December 30, 1980 forward until the violation is corrected.

OPINION OF BOARD: Claimant was dismissed from the service of the Carrier on December 30, 1980, following a formal investigation held on December 28, 1980, on the charges of failing to protect his assignment as administrative clerk December 8-12, 15-19, and 22, 1980. The Organization contends that the Carrier violated Rule 21 of the controlling Agreement insofar as Claimant was not in attendance at the hearing for the failure of his receiving notice of the hearing. The Carrier attempted to hand-deliver the notice to the Claimant's wife, but she refused acceptance. The Claimant was in Federal prison following his conviction for income tax evasion. Claimant was to have reported on December 8, 1980, the date immediately following a 60-day suspension on the same charges. The Organization was not present at the hearing, not having received notice of the investigation from the Carrier or the Claimant (who also had not received notice).

In essence, the position of the Organization is that the Carrier violated the intent and purpose of the controlling Agreement in that Claimant's dismissal followed a formal investigation at which time the Claimant was not present due to the Carrier's failure to properly notify him of said investigation. The Organization further contends that this denied the Claimant a fair and impartial investigation. The Organization cites numerous Awards of the various Divisions of this Board holding that failure of the Carrier to give written notice to the Claimant "... renders the discipline proceedings void ..." (First Division Awards 11879, 6272, 5166; Third Division Award 2806.).

The Carrier claims that there is no dispute that the Claimant failed to protect his assignment during the dates covered by the charge as the Claimant was incarcerated at this time. The Carrier acknowledges that it would have been impossible for the Claimant to protect his assignment. The Carrier further states that the Claimant's imprisonment was a result of his own actions, and that under no circumstances would this relieve him of his responsibility to protect his assignment. The Carrier, citing Second Division Award No., 8315, states that this Board has upheld the right of a Carrier to discipline or dismiss an employee who was absent as a result of imprisonment. With respect to the instant matter, the Carrier states that the Claimant had been sentenced since September 26, 1980.

Upon our review of the entire record, we must deny the claim of the Organization for we find that the instant dispute is virtually on point with other decisions of this Board. Third Division Award 20294 (Referee Sickles) states:

"We have no difficulty in issuing a denial award under this record because Claimant himself, by his own misconduct in perpetrating a number of severe crimes of violence, affected his contractual right to be present at the investigation. There is absolutely no evidence of record to suggest that Carrier was a motivating factor in precluding Claimant's attendance.

At the same time, we note that which appears to be an underlying concern by the Organization that, in some manner, Rule 27 (a) may be diluted by this Award. Such is not the case. We feel that the mandates of Rule 27 (a) are quite significant, and this Board would not condone any deliberate Carrier action which would deprive a Claimant of his right to be present at his investigation, unless he waives that right or his deliberate action affirmatively precludes such attendance. We do not mean to suggest that Carrier has urged that the impact of Rule 27 (a) be relaxed, but merely point out that each individual case must be viewed upon its own merits."

See also Third Division Award 22368 (Referee Roukis).

We find no Carrier action upon our review of the record that indicates Carrier's participation in Claimant's dilemma or any action which would indicate that the Carrier precluded Claimant's attendance. Lastly, in complete concurrence with the two prior Awards cited, we find that the Claimant's incarceration was due to his own misconduct, the result of which has affected his contractual right to be present at the investigation.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Devol - Executive Secretary

Dated at Chicago, Illinois, this 8th day of June, 1984