

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30441
Docket No. SG-30254
94-3-91-3-737

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Burlington Northern Railroad

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Railroad (BN):

Claim on behalf of E.D. Burns, for reinstatement to service with all lost wages and benefits beginning October 26, 1990 and continuing until this dispute is adjudicated or settled, account of the Carrier violated the current Signalmen's Agreement, as amended, particularly, Rule 54, 1990." Carrier File No. SI-91-3-04B. GC File S-43-90. BRS Case No. 8530. BN.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute and respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were advised of hearing thereon.

By letter dated September 18, 1990, Carrier notified Claimant to attend an Investigation scheduled for October 1, 1990, for the purpose of:

"Ascertaining the facts and determining your responsibility, if any, in connection with your being engaged in other business or occupation without having received permission from the proper authority."

Following the Investigation and by a letter dated October 26, 1990, Carrier informed Claimant that he was dismissed from service. On January 9, 1991, and July 3, 1991, the Carrier offered Claimant reinstatement with seniority unimpaired under certain conditions. The Claimant rejected the Carrier's offer of reinstatement.

Claimant's procedural defense that the Carrier violated Rule 54 by its failure to comply with the fifteen (15) day time limit for conducting an Investigation "from the date of the occurrence" is not supported by the record. Although Carrier officials inquired into Claimant's alleged affiliation with an outside business approximately one year prior to the Investigation, Claimant's position that the business belonged to his wife rather than him delayed the investigatory process. Claimant continued to deny ownership of Railroad Signal Inc. (RSI) at the October 1, 1991, Investigation, testifying instead that his wife owned it until it was sold to his parents "over a year ago" in February, 1989.

Until the Carrier obtained documentary evidence, one a signed contract between RSI and the Arkansas and Missouri Railroad and the other a credit application to Burlington Northern Railroad to purchase scrap material, it lacked knowledge of an occurrence upon which to conduct an Investigation. Given Claimant's denials and obfuscation of the facts, the Carrier was not in possession of tangible evidence as opposed to anonymous tips tantamount to the occurrence which could set in motion the Investigation requirement under Rule 54. The Special Agent completed his inquiry on September 17, 1990, leading to the Investigation held on October 1, 1990. A similar situation was addressed in Fourth Division Award 4647:

"A single episode standing alone, consisting of a call Claimant to the Terminal Manager, mentioning that he was suspected of being involved in a missing check matter, which had occurred over a year earlier, without something more of substance, can hardly be deemed 'knowledge of...(an) offense' sufficient to start time limits running for holding investigation under Rule 22A. The phrase 'knowledge of such offense' as used in the Rule, in our judgment requires more than mere mention by a yardmaster to a supervisor that he was a suspect in a year old municipal police investigation. Accordingly, it is our view that the investigation was timely held."

Claimant further maintains that the lack of specific charges impaired his ability to mount an effective defense. In support of his position, Claimant cites Board decisions such as Third Division Award 2535 which have held that the Notice of Charges should provide an "unequivocal and definitive statement of the offense... to enable him to prepare whatever defense or defenses." The instant notice is deemed "vague and imprecise" because Claimant could not have known from the "general charge that Claimant was allegedly engaged in other business or occupation" that the Carrier was alluding to RSI.

The Board finds the Notice of Charges sufficiently clear to apprise Claimant of the scope of the Investigation and thus enable him to prepare a defense. Although the RSI business was not specifically identified, unless Claimant had extensive business interests, he knew or should have known that the reference to "other business or occupation" pertained to the activities about which he was previously questioned. As a result, the Board finds that Claimant was afforded sufficient notice to develop a defense and should not have been surprised by inquiry into details of his business activity.

In addition, Claimant acknowledged that he received timely Notice of the Investigation and at the Investigation his representative was given an opportunity to question Carrier witnesses and produce witnesses for his defense.

With respect to the merits, the Carrier has provided substantial evidence that Claimant had a continuing financial interest in an outside business in violation of Rule 532 (C) which states:

"532 (C). OTHER BUSINESS OR OCCUPATION:

Employees must not engage in other business or occupation unless they have applied for and received written permission from the proper authority."

The Carrier's Investigation revealed that on July 25, 1990, Claimant and his wife submitted a credit application to the Carrier for the purchase of scrap. Claimant is listed in that document as the Vice President of RSI, an affiliation that Claimant did not deny.

At the Investigation, Claimant testified that RSI had been sold to his parents in February, 1989; that he could provide documentation for the sale, but did not; that while his wife was President of RSI, he had no connection with the company but served instead as an unpaid consultant to the owners, his parents. His testimony that he occasionally accompanied his father, also a Signalman, on weekend trouble calls contradicted his testimony that he served only in an administrative capacity. He further testified that his employment was not covered by Rule 532 (C) and that during the three years he was employed as a Vice President, he was not working for the Railroad.

Claimant admitted his signature appeared on the contract between RSI and the Arkansas and Missouri River Railroad involving the Ft. Smith bridge but testified that it was a proposal which was never approved. Moreover, while Claimant acknowledged the signature, Eddie D. Burns, to be his on the contract "proposal" between RSI and the Arkansas and Missouri River Railroad (Ft. Smith bridge), he denied that the signature, Eddie D. Burns, was his on the May 18, 1990, contract between the same parties but speculated that his father of the same name may have signed the latter document.

Since Claimant maintained that he and his wife were the principal owners on the July 25, 1990, credit application, it is illogical that his father became the owner one year earlier as Claimant testified.

It was also developed at the Investigation that while Claimant denied having an employment relationship with RSI in October, 1989, his address listed on the credit application was the same address of record the Carrier maintained for him in its personnel files.

As a final matter, the testimony of Claimant's supervisor provided ample evidence that Claimant's outside employment had been economically detrimental to the Carrier.

The contradictory testimony of Claimant combined with his failure to provide exculpatory evidence once the Carrier established a prima facie case persuades the Board that the Carrier's finding of guilt was based on substantial evidence.

The Board considers the Carrier's offers of reinstatement without back pay as indicative of Claimant's ongoing value as an employee as well as recognition of his fifteen years of service devoid of prior discipline. Having found that the Carrier met its burden of proof regarding the instant charges, the Board nevertheless finds the penalty of dismissal excessive. Claimant clearly erred in not accepting the offer of leniency reinstatement with seniority unimpaired albeit with specified conditions. The Board concludes that the Carrier's offer was the appropriate penalty. And while the Board cannot apply leniency, Claimant shall be reinstated without back pay and with his seniority unimpaired.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois this 8th day of August 1994.