

The Second Division consisted of the regular members and in addition Referee Theodore H. O'Brien when award was rendered.

Parties to Dispute: (System Federation No. 2, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company violated the controlling agreement, particularly Rule 32, when they removed Carman Jimmie Lee Powell, Jr.'s name from the seniority roster, closed his record as an employe and thus terminated his employment relationship.
2. That accordingly, the Missouri Pacific Railroad Company be ordered to return Carman Powell to service and compensate him in the amount of eight hours (8') per day, five (5) days per week, at the pro rata rate beginning August 15, 1975, until returned to service.

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

The facts giving rise to the instant claim are as follows: On March 30, 1971, the Claimant allegedly sustained an injury while performing his duties as a carman in the employe of the Carrier. After March 30, 1971, the Claimant performed no service for the Carrier, although his name was carried on the seniority roster until 1975. The removal of his name from the roster in 1975 is the subject of the instant dispute.

On December 2, 1971, following the Claimant's alleged injury, he filed a law suit against the Carrier under the Federal Employees Liability Act, and on December 3, 1973, the court found for the Carrier. Claimant, through his attorney, then appealed the decision of the District Court and on January 22, 1975, the Claimant's appeal was dismissed for want of prosecution. During this time the Claimant never attempted to return to work or exercise his seniority as a Carman. However, during the course of the court proceedings, evidence was developed which revealed that Claimant was engaged in employment

elsewhere during this period, i.e. he was driving a taxi under a lease arrangement with the Yellow Cab Company.

The Claimant made no attempt to return to service until August 15, 1975. When the Claimant made this attempt to return, the Carrier refused his request on the basis that his name had been removed from the seniority roster because he had not performed service for over four years. Moreover, during the period of his absence, the Claimant had engaged in employment elsewhere and, in effect, had voluntarily resigned from his position with the Carrier.

The Organization has progressed the instant claim asserting that the Claimant was unjustly dismissed from service without the benefit of a fair and impartial hearing as required by Rule 32 of the applicable Agreement.

Certain procedural arguments have been raised by the parties to this dispute relative to time limits. It is the Carrier's position that the claim should be dismissed because it was not filed in a timely manner. However, we have carefully reviewed the procedural arguments, and it is our opinion that, under the facts and circumstances of the instant claim, we cannot dismiss the claim based on the time limits argument. We will thus proceed to a consideration of the merits of the claim.

It is uncontroverted that for a period of over four and one-half years Claimant performed no service for the Carrier, nor did he at any time during that period attempt to return to work. In fact, as developed during the court proceedings, the Claimant was engaged in employment elsewhere. Further, Claimant has presented no medical evidence which would establish that he was physically unable to return to the service of the Carrier. It is a well established maxim that, under such circumstances, Claimant has the burden to come forward with such evidence. It is the opinion of the Board that under the provision of Rule 16(b) of the applicable Agreement, Claimant, by his own actions, caused his seniority and employment relationship with the Carrier to be terminated. Rule 16(b) states in pertinent part, as follows:

"(b) An employes on leave who engages in other employment will lose his seniority, unless special provisions shall have been made therefor by the proper official and committee representing his craft."

Under these facts and circumstances the claim shall be denied.

A W A R D

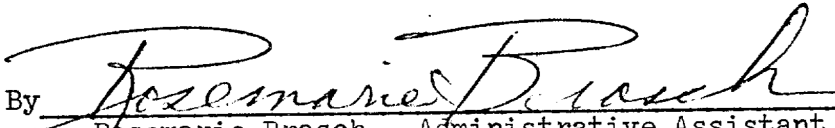
Claim denied.

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Award No. 7515
Docket No. 7371
2-MP-CM-'78

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 21st day of April, 1978.