Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8974
Docket No. 8534
2-CMStP&P-CM-'82

The Second Division consisted of the regular members and in addition Referee Francis X. Quinn when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company did improperly dismiss Carman A. McMillian from the service of the Carrier without first having given him a hearing, in violation of the controlling agreement.

2. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to:

   a. Restore Carman A. McMillian to the service of the Carrier.

   b. Make payment to Carman A. McMillian in the amount of one days pay for every day from June 26, 1978 until he is restored to service.

   c. Make Carman McMillian whole for all benefits that are a condition of employment such as, but not limited to, seniority rights, vacation, holidays, dental, medical, surgical, and all group insurance benefits.

   c. Award Mr. McMillian interest at the 6% rate per annum for any payment he may receive as result of this claim.

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 Claimant in the instant case, Mr. A. McMillian, was hired in the Car Department on May 15, 1974, as Carman Helper and continued in service until March, 1977, when he was laid off due to force reduction. During his lay-off period, he was hired by the Locomotive Department on June 17, 1977, to work as a Machinist Helper. While he was employed in the Locomotive Department, he retained his rights as a Carman Helper.

During the period he was employed as a Machinist Helper in the Locomotive Department, he became an habitual offender of absenteeism. Progressive steps were taken to correct the situation, which ultimately led to the holding of a final hearing on March 7, 1978, for which he was subsequently notified that his services with the Company were terminated effective March 23, 1978, due to absenteeism.

There was no claim filed by or on behalf of Mr. McMillian as a result of his dismissal from the services of the Company effective March 23, 1978. On June 26, (the beginning date of the instant claim), McMillian was recalled to service to work in the Car Department. When it was discovered on that day (June 26) that McMillian had no employment relationship with the Company by virtue of his services with the Company being terminated on March 23, 1978, he (McMillian) was advised of the situation and told not to report back for any future service.

The Petitioner here contends that Claimant McMillian was "dismissed" from service on June 26 without the benefit of a fair and impartial hearing, allegedly in violation of Rule 34 (g) of the parties' agreement. Thus, the issue here in question is whether the Carrier violated the provisions of the disciplinary rule when it inadvertently recalled the Claimant on June 26 to work in the Car Department and then later that day, realizing it made a mistake, advised the Claimant that he had no employment relationship and not to report back for any future service.

Rule 34 (g) reads as follows:

> "An employe who has been in the service thirty (30) days shall not be disciplined or dismissed without first having been given a fair and impartial hearing. Suspension, in proper cases, pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe will be apprised of the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses. An employe involved in a formal investigation or hearing will be represented thereat, if he so desires, by the duly authorized craft committee, or their representative."

Prior to June 26, Mr. McMillian did not have an employment relationship with the Carrier. His status prior to that date was that of a dismissed employee. When he was inadvertently called to work on June 26, he was, for all intents and purposes, an employee who had been in service only one day. Under the circumstances, the Carrier was not required to hold another investigation in his particular case.

The principle issue here is whether the Carrier's action in dismissing Mr. McMillian's services with the Company on March 23, 1978, for justifiable cause, completely terminated his employment relationship with the Carrier, or if it terminated only his employment while working in the Locomotive Department.

To hold that an employee may only be removed from a particular branch of the service when discharged for a justifiable cause is not consistent with proper employer-employee relationships. When an employee is properly discharged, as in the case here, it severs his employment relationship entirely.

This position is supported by rulings of this Board.

In Award 13322 of the First Division (Referee Harold M. Gilden), this Board held:

> "The Claimant's right to exercise seniority as a switchman vanished at the moment he conceded his discharge as assistant yardmaster to be for justifiable cause. When, as a consequence of such a discharge, he ceased to be an employe of the D&RGW, he also ceased to be among those included within the scope rule of the prevailing Switchmen's Agreement. Therefore, he was not entitled to the investigation provided in Article XVI of that contract."

In Award 1484 of the Second Division (Referee Carter), this Board held:

> "The dismissal of claimant from the service on November 9, 1949, had the effect of completely severing his employment relationship with the Carrier. Claimant had no rights with the Carrier on May 28, 1950, as engine watchman, coach cleaner, or otherwise...."

In Award 18426 of the Third Division (Referee Franden), the Board held:

> "The right of the Claimant to exercise his seniority rights under any agreement depends on there being in existence an employe-employer relationship between Claimant and the Carrier. A procedurally correct and substantively well based dismissal of Claimant effectively severed that relationship. A condition precedent to the right to invoke the discipline rules of the Clerks' Agreements was extinguished with said dismissal."

The Claimant, while he worked in the Locomotive Department as a Machinist Helper, was subject to the same set of rules as are applicable to Carmen. One common rule is Rule 34 (g) of the disciplinary rules. This rule is applicable to both Carmen and Machinists and their Helpers. When the Claimant was discharged for cause on March 23, 1978, the provisions of Rule 34 (g) were adhered to in that he was afforded a fair and impartial hearing which was held on March 7, 1978.

There was no claim filed by or on behalf of Mr. McMillian as a result of his dismissal from service effective March 23, 1978. Inasmuch as no claim or grievance was filed for reinstatement within the prescribed time limits on claims rule (60 days), Mr. McMillian had no enforceable rights to be reinstated or rehired thereafter.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of March, 1982.