

Award Number 4606

Docket Number MW-4640

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
OF TEXAS**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the Agreement by refusing to grant an investigation to Steel Bridgeman Paul C. Gary when he was dismissed from the Carrier's service in October of 1947;

(2) That Claimant Paul C. Gary be reimbursed for all wages lost as a result of this improper action of the Carrier.

EMPLOYEES' STATEMENT OF FACTS: Prior to October 19, 1947 Mr. Paul C. Gary was employed as a Steel Bridgeman and assigned to Steel Bridge Foreman Turner's Crew.

On Sunday, October 19, 1947, an assigned rest day, Mr. Paul C. Gary was advised orally by Foreman Turner that he was dismissed from service.

On October 23, 1947, Paul C. Gary addressed a letter to Mr. G. L. Staley, Steel Bridge Engineer, Missouri-Kansas-Texas Lines, St. Louis, Missouri in which Gary informed Engineer Staley that he did not consider himself dismissed from service as Article 21 of the Agreement had not been complied with.

Gary was informed by Engineer Staley that he would "look further into the matter." On October 29, 1947 Mr. Gary received a letter from Foreman Turner advising that he (Gary) "was taken out of service on account violating Rule G. Being Drunk on and around steel Bridge outfit cars." On the same day October 29, 1947, Gary acknowledged receipt of Turner's letter and advised that an investigation was desired to establish the facts and a request to be advised of date and location where investigation would be held.

No investigation was held and the progressing of the claimants case was referred to General Chairman E. Jones, who advised the Carrier on November 24, 1947 that they were not in compliance with Article 21 of the effective Agreement. General Chairman Jones then requested that Mr. Gary be returned to service with full seniority rights and compensated for all time lost.

Attention of the Division is also invited to the following statement in Mr. Jones' letter of November 24, 1947 to Mr. Staley, indicating Mr. Gary had written Mr. Staley on October 23, 1947, about the occurrence on October 19, 1947, and would report for work Monday, October 27, 1947, but that he became and continued to be disabled from October 25 through October 30:

"On October 23, 1947, Mr. Gary addressed a communication to you in which he explained briefly what happened and advised you that he would report for service on Monday, October 27. However, in the meantime he had an infection on his hand due to a previous injury which required the services of a professional man in medicine. He was under the care of this physician from October 25 through October 30."

As previously stated, and as shown in Mr. Staley's letter of November 29, 1947 in reply to Mr. Jones' letter of November 24, 1947, and letter of the undersigned dated July 1, 1948 in reply to Mr. Jones' letter of June 11, 1948, Mr. Staley never received Mr. Gary's letter of October 23, 1947, and Mr. Jones' failure to furnish the Carrier a true copy of that letter clearly indicates it contains information adverse to the best interests of Mr. Gary, and supporting the position of the Carrier that this case, under the particular circumstances involved, was handled by the Carrier in accordance with the rules of the agreement so far as practicable to do so, and not in violation thereof as Petitioner is contending. It will also be observed Mr. Gary was disabled for work October 25 through October 30, and although he advised Mr. Staley, according to Mr. Jones' letter he would report for work Monday, October 27, 1947, he did not do so.

Under the particular facts and circumstances in this case as shown in this submission the agreement between the parties involved was complied with by the Carrier and not violated as alleged by the Petitioner, and this claim, should, therefore, be denied.

The Carrier respectfully requests that the Board deny the claim.

Except as expressly admitted herein, the Carrier denies each and every, all and singular, the allegations of Petitioner's claim, original submission and any and all subsequent pleadings. (Exhibits not reproduced.)

OPINION OF BOARD: This claim involves the interpretation and application of Rule 2 of Article 21 of the effective Agreement between the parties, providing as follows:

"ARTICLE 21. DISCIPLINE AND GRIEVANCES.

Rule 2. An individual who has had employe relationship with this railroad more than sixty (60) days and less than twelve (12) months from date of his last being hired will not be disciplined or dismissed without just cause and will be informed in writing of the reason for such action upon action being taken. If the individual lodges with the supervisor or officer assessing the discipline or dismissal within ten (10) days of the notification of the reason of action, a written request therefor, he will be given a fair and impartial hearing within ten (10) days of receipt of request therefor."

We are not passing upon the merits of the dismissal but from the Carrier's submission it appears that the claimant was under the influence of intoxicants on October 19, 1947, when he refused to accept the written notice of and reason for his discharge. Should we say that such refusal precludes him from the benefit of the investigation provided by the rule? We think not. Refusal to accept the written notification required waives such requirement but does not waive the right to an investigation. That is waived only by failure to demand it within the time limited.

However, the Carrier did not rely upon such waiver of notification because on October 27 the supervisor mailed his written notice of and reason

for discharge to the claimant. He received it on October 29 and on the same day mailed to the supervisor "assessing the discipline or dismissal" a written request for an investigation. The rule permits such requests "within ten (10) days of the notification". Under the circumstances here the request for an investigation was made within the time limit of the rule.

The Carrier then had 10 days within which to set the date of the investigation so no violation occurred by the Carrier until 10 days after its receipt of the written request therefor. Since it acknowledged such request on November 3rd it had then received it and the violation occurred by not setting a date for investigation within 10 days thereafter. Hence the claim should be sustained with pay from November 13 to December 17, 1947 only.

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

That both parties to this dispute waived oral hearing thereon;

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 Carrier violated the Agreement.

AWARD

The claim is sustained with reimbursement to claimant for time lost from November 13, 1947 to December 17, 1947 only.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of October, 1949.