Award No. 4794

Docket No. MW-4727

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

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

(1) That the Carrier violated the agreement by discontinuing in their employ Section Laborers Everett W. Teter and Elmer Rowe on May 28, 1947, without a fair and impartial hearing as provided for in Rule 17 of the effective agreement.

(2) That Section Laborers Everett W. Teter and Elmer Rowe be returned to the Carrier's service with seniority rights and vacation privileges unimpaired, and be paid for all compensation lost since May 28, 1947, because of the Carrier's violation of the agreement.

OPINION OF BOARD: On May 28, 1947, about 10:00 A.M., claimants, who were unloading cinders on the Indianola Branch of Carrier's Des Moines Division, left their work and went to the work train caboose. Employes assert that they left their work as a matter of health protection because it was raining and raw. Carrier asserts that they deliberately walked off the job. In any event, claimants were notified of the termination of their employment by a notice from the section foreman, reading as follows:

"May 28, 1947

"Mr. Everett Teter
Carlisle, Iowa
"Mr. Elmer A. Rowe
Carlisle, Iowa

"You are hereby notified that your employment as Section Laborer with this Company, and seniority in that position, have been terminated as of this date, account you walked off the job, while unloading ballast with work train.

/s/ Glenn Crooks
Section Foreman, Sec. 9."

The employes were not given any notice of charges or hearing within twenty days after May 23, 1947. Rule 17(a) of the Agreement provides as follows:

"An employe who has been in the service ninety (90) days will not be disciplined or dismissed without a fair hearing, at which hearing he may be represented by one or more representatives of

his own choice. He may, however, be suspended pending such hearing, which will be held within a period of twenty (20) days from date when charged with the offense, or suspended from service. A decision will be rendered within ten (10) days after the completion of the hearing."

Of paramount importance in considering this docket is the validity of Carrier's contention that the claimants voluntarily terminated their service with the Carrier or, in other words, resigned. If it be determined that the action of the claimants, in effect, amounted to a resignation then, of course, it logically and reasonably follows that Carrier was under no obligation to afford them a hearing under the provisions of Rule 17(a) above quoted. The Employes assert, and it is not denied by the Carrier, that after the episode of May 28, 1947, on the following day both claimants were refused an opportunity to return to work, and were then ordered to move out of the bunk car. This is some indication of the fact that they did not consider their refusal to work on the 28th as a final withdrawal from the service of the Carrier. The letter of the section foreman above quoted is unequivocal in stating that claimants' employment has been terminated **"account you walked off the job."** The report of the track supervisor says that these men were not discharged, they quit **because it was raining.** Cumulatively, these facts point to the conclusion that there was something conditional about the claimants' leaving the job on May 28, 1947, and that was because they refused to work in the rain. Whether or not they were justified in so doing is not of particular importance at this point. The question to be decided is whether or not a refusal to work in the rain is tantamount to a resignation. Under the facts and circumstances appearing in this docket, we hold that clearly it was not and that the employes were discharged because they refused to work in the rain. That being so, even though the claimants may have been subject to discipline, the Carrier was obligated to apply the Agreement and hold a hearing within twenty (20) days from March 28th. That, Carrier did not do. The fact that after the twenty-day period Carrier offered to hold such a hearing does not cure the violation.

In the view we take of this matter, we are precluded from any determination of the matter on the merits. A sustaining Award is in order. The compensation shall be less amount earned while engaged in other employment, as provided in Rule 19.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes 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

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of March, 1950.