

 Award No. 15152
Docket No. MW-15531

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE COLORADO AND SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it cut off regularly assigned Section Laborer Eugene E. Martinez on January 21, 1964, without giving him the required five (5) working days' advance notice. (Carrier's File MW-247, General Chairman's File C-4-9.)

(2) Section Laborer Eugene E. Martinez now be allowed three (3) days' pay at his pro rata rate, for January 22, 23 and 24, 1964, account of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant was employed as a regularly assigned section laborer in the gang assigned to Section No. 29 at Speer, Wyoming, and worked under the supervision of Section Foreman Ley. He holds seniority rights as a section laborer as of August 28, 1961.

Section Foreman Ley was scheduled for and did receive his annual vacation during the period from January 6 through 24, 1964. Before his vacation, Foreman Ley advised the claimant and the other section laborer assigned to his gang that they would work under the supervision of a relief foreman during his absence. The claimant and the other section laborer reported for work at Speer on Monday, January 6, 1964, and awaited the arrival of the relief foreman. Later that day, Foreman Ley came to the tool house and advised them to report to Section No. 31, Cheyenne, Wyoming. He informed them that he had received these instructions in a telephone conversation with the supervisor.

The claimant did as he was instructed and reported for work at Cheyenne on Tuesday, January 7, 1964. He attempted to determine the duration of his assignment at Cheyenne from Section Foreman Walling. However, Foreman Walling disclaimed any knowledge of the duration or nature of the claimant's assignment. Because he was unable to find out what his status was, the claimant filed his name and address with Roadmaster Kaparos on January 10, 1964, to insure himself against any possibility that the Carrier might subsequently assert that he had been laid off and had forfeited seniority for failure to file his name and address.

nated officer of the Carrier for handling such matters, and, in such appeal, the General Chairman merely reiterated the position previously taken with the Roadmaster and Superintendent. (Carrier's Exhibit H.)

The Assistant to Vice President, Mr. R. D. Wolfe, replied to the General Chairman on August 7, 1964, and therein furnished a complete history of the transaction made subject of dispute, all of which functions to refute the allegations of the Petitioner that the claimant, Eugene E. Martinez, was a regularly assigned Laborer on Section 31, Cheyenne, but, instead, was merely working in an extra or casual capacity. Such record also shows that there was no position abolished nor was there any reduction in force on Section 31 on January 21, 1964, (Carrier's Exhibit I).

(Exhibits not reproduced.)

OPINION OF BOARD: Before discussing the merits of the current claim, we must dispose of a procedural question urged by Carrier in its request for a dismissal of the claim because there is a substantial variance between the claim handled on the property and the one presented to this Board. The alleged variance, obviously, is that on the property Claimant asked compensation for the loss of five (5) days' pay due to Carrier's failure to give proper notice of force reduction and that before this Board Claimant has asked for only loss of three (3) days' pay. In our judgment this cannot constitute a substantial variance and Carrier's request for a dismissal of the claim on that basis must be disallowed.

It appears that Claimant was a regularly assigned section laborer in a gang assigned to Section No. 29 at Speer, Wyoming prior to January 6, 1964. The Section Foreman was scheduled for and did receive his annual vacation during the period January 6 through January 24, 1964. On January 6 Claimant was advised to report to Section No. 31, Cheyenne, Wyoming, and did report for work there. On January 10, 1964, while employed at Cheyenne he addressed the following letter to Roadmaster Kaparos:

"This letter is to inform you that I was laid-off from Speer Section on January 6, 1964. At the present time I am working at the Cheyenne Yard. This is my address:

1008 O'Neil Ave.
Cheyenne, Wyoming"

This letter would seem to indicate that while he was employed at Cheyenne he was on furlough from Section No. 29, Speer. Claimant contends that he had never been told what his status was on Section 31 and he simply wrote this letter to protect himself. Carrier contends that while Claimant worked on Section 31 he was serving on vacation relief and as a casual employee. Claimant to the contrary claims he was acting as a "regular" employee on Section 31 and was told on January 21 he was being laid off on a force reduction, without proper notice having been given as set forth in the Statement of Claim. Carrier denied that he was laid off on a force reduction or that he was ever told any such thing. Claimant was called back to Section 29 on January 27.

Though the facts in Award 8486 — Vokoun are not analogous to the facts in this case it contains a statement which is quite pertinent to the matter in hand:

"The Railway Labor Act did not design that proceedings before the several divisions of the Adjustment Board should be technical but some actual proof besides uncorroborated statements which have been denied at least by implication in contrary statements is necessary to assist the Board in a proper decision."

Claimant had the burden of proving that on January 21, 1964, he was a regular employe on Section 31, Cheyenne, Wyoming before his claim could be allowed. This he has failed to do. Consequently, the Board has no other alternative than to deny the claim.

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

That the parties waived oral hearing;

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 Agreement has not been violated.

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 19th day of January 1967.