



Award No. 17153

Docket No. MW-17713

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert C. McCandless, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
NORFOLK AND WESTERN RAILWAY COMPANY
(LAKE REGION)**

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

- (1) The Carrier violated the Agreement, when, without just and sufficient cause, it dismissed Extra Gang Laborer John McIntyre from service on May 2, 1967 following an investigation which was neither fair nor impartial. (System File 30-20-193)
- (2) Extra Gang Laborer John McIntyre be restored to service with seniority, vacation and all other rights unimpaired; the charge be stricken from his record and he be paid for working hours actually lost in accordance with Rule 22(e)."

OPINION OF BOARD: Claimant, John McIntyre, was dismissed from service after an investigation on the property of the charge that he failed to carry out work instructions given to him by his foreman. It was adduced at the investigation that at the time of Claimant's refusal to work (a) it was raining and (b) Claimant's excuse from following orders was that he had an arthritic condition which would be aggravated by working under such conditions.

The Organization claims that the Carrier violated its Agreement by dismissing Claimant without a fair or impartial trial, relying basically on the positions that the evidence did not sustain the charge that Claimant was insubordinate, that it was up to Carrier to affirmatively show that Claimant did not have an arthritic condition which would have excused him from working while it was raining, and that the Carrier was acting in a retaliatory manner against Claimant for past conduct.

After a careful review of the record the Board concludes that Claimant was afforded a proper investigation.

The Claimant did not meet the burden of proof in developing conclusively that he had the kind of arthritic condition which would become so aggravated by working in the rain that he should have been allowed to lay off. Although it was controverted as to how hard it was raining, the record clearly shows that everyone else was working at the time of Claimant's refusal to do so. Claimant had adequate representation at the investigation and could have asked for a postponement to bring in his doctor or some

substantiating evidence that his condition would mitigate his refusal to work. The burden was his, and he failed to meet it.

Further, the record shows nothing which would lead us to conclude that the Carrier abused its discretion or in any way acted arbitrarily or capriciously in connection with its investigation of the charges or its dismissal of the Claimant.

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 was not violated.

A W A R D

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 May 1969.