

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20772
Docket Number MW-20569

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: ((Brotherhood of **Maintenance** of Way **Employes**
(Bessemer and Lake Erie Railroad Company

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

(1) The suspension and **dismissal** of Carpenter T. A. **Solla** was without just and sufficient cause, and on the basis of unproven and **un-**founded charges and therefore in **violation** of the Agreement (System Case 320 (1-10-73 ~~and~~ 2-22-73)).

(2) The Carrier shall **reinstate** Mr. T. A. **Solla** to service and compensate him for wages lost ~~in~~ all in **conformance** with **Rule** 29 (d) of the Agreement between the parties **hereto**.

OPINION OF BOARD: Carrier has raised a **number** of procedural objections to this Board's consideration of the merits of the dispute. The Carrier claims that this dispute should be dismissed because the Claimant, as an individual, brought the case to the Board in Docket No. MS-20558 and the Board dismissed the **matter** in Award No. 20627. The Carrier asserts that the present dispute amounts to "**double jeopardy**", and cites numerous Awards in that regard.

Without disturbing the cited **Awards**, we feel that under the facts and circumstances of this case, an Award on its merits may be rendered.

The **notice** to this Board in Docket No. KS-20558 spoke in terms of an "unfair labor practice", and the Carrier, **in** the prior docket, urged that no dispute **involving an** alleged "**unfair** labor practice" had been handled on the property. Bather the Carrier urged that the dispute handled and progressed **on** the **property** was the **same** one which is **now** before us **in** this Docket.

The Board, in Award No. 20627 dismissed the claim because it was:

"...**novel** or new to Carrier in that the theory of violation it expresses has not **been proffered** to Carrier in Conference on the property so that Carrier has had an opportunity **to** consider and respond or react to it. The opportunity to adjust grievances on the property is a central part of the statutory design. When that opportunity has not been **presented**, this Board has no **alternative** to a **dismissal** of the claim."

It is interesting to note that the final paragraph of the Opinion of the Board in Award No. 20627 contemplated Carrier's defense in this dispute. That paragraph stated:

"Nothing said here is intended to have any affect on Case 320 [MW-20569], referred to above, should it reach the Board for adjudication."

Concerning the merits, we note that on a number of consecutive work days, Claimant refused to perform certain climbing-on a bridge - **which** was necessary in order to perform his work. Although the record **contains** suggestions that Claimant's refusal dealt with matters of safety, we are compelled to hold that the prime cause for Claimant's refusal dealt with a fear of working in the open at significant heights. The initial refusals to work resulted in varying degrees of suspension and the final refusal resulted in the termination now before us. The record indicates that there had been refusals previous to the consecutive work days material to this dispute, and that Carrier had suggested to Claimant that he be concerned with his inability to climb.

It is, indeed, **unfortunate** that an individual may develop an **acrophobia** which **interferes** -with his **ability** to perform his services. However, it appears that Claimant's duties **required** periodic climbing, and he was aware of that fact when **he assumed employment**. Under the circumstances, we have no **alternative** but 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 was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST:

A. W. Parker
Executive Secretary

Dated at Chicago, Illinois, this 18th day of July 1975.