

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21541
Docket Number MW-21745

Robert W. Smedley, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees**
(The Denver and Rio Grande Western Railroad
(**Company**

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

(1) The Carrier has **improperly** withheld **Trackman** Joe
Rodriques from service on and ever since May 5, 1975 (**System** File
D-21-75/MW-15-75).

(2) The Carrier shall be required to return **Claimant**
Rodriquez to service, with seniority and all other rights and benefits
unimpaired

and

(3) **The** Carrier shall allow **Claimant** Rodriquez eight hours
of pay for each work day and holiday in the period beginning with
May 5, 1975 and continuing until he has been restored to service.

OPINION OF BOARD: The contract requires an **employee** to report for
service within 15 calendar days of recall **or** lose
all seniority rights. Claimant was notified of recall April 13 or 14,
1975. **He** went to the doctor for the required medical examination on
April 16. On April 30, he notified the foreman that his uncle had
died on April 29 and asked leave. This was granted. **Oral** leave of
absence up to 7 days is allowed by the contract. The funeral was **May**
2. On **May** 2 claimant was informed not to return to work Monday, **May**
5, as planned.

The **recall** date is uncertain. One version would pinpoint the
date as April 17, that being the first day he could have worked since he
got the prerequisite medical exam on April 16. Carrier argues the recall
was April 14 and that the 15 days **expired** April 28. The rule, however,
starts the count the day after recall and ends the 15th day. (Awards
21550, 10420, 5187 and 3545) Thus, if April 14 was recall day, the
time would expire April 29.

While the board recognizes the **importance**, reasonableness and self-executing character of the **15-day** time limitation, in a very close case, such as this, doubt should be resolved **for** the worker. Had the carrier set a definite recall date, the result would **be** different. Notification **and recall** cannot be synonymous. Notice could **come** at any time and any manner, oral or written. Most of the gang started work April 16. **One man** reported April 17.

At the **same** time, **claimant** was lax **in** going to the brink. He pressed his luck and dealt loosely with his own rights. He delayed fill of the crew and **harmed** those queued behind him. This is a form of **misconduct**, and although this is not a discipline case, the **Board** chooses not to reward **claimant** unduly. Claimant's seniority shall be restored, but his **claims** for back pay and other benefits are denied.

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

The Agreement was violated.

A W A R D

Claim sustained to the **extent** indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 19th day of May 1977.

