

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22813
Docket Number **MW-22846**

Paul c. carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(St. **Louis** Southwestern Railway Company

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

(1) The dismissal of Extra Gang Laborer D. P. Johnson was without just and sufficient cause (System File **MW-78-1-CB/53-653**).

(2) The **claimant** be reinstated with pay for all time lost, with vacation, seniority and all other rights unimpaired and the charge against him be stricken from his personal record.

(3) The claimant be reimbursed for personal expense incurred, including automobile mileage incurred, attending his hearing held on December 12, 1977."

OPINION OF BOARD: Claimant was employed as a laborer on Carrier's Extra Gang **34**, headquartered at **Hornersville**, Missouri.

On November 7, 1977, claimant was notified by the **Roadmaster** of his dismissal from service, with no reason given. On November 10, 1977, claimant requested a hearing under the provisions of the applicable Agreement. In scheduling the hearing, which was postponed and held on December 12, 1977, the Division Engineer referred to claimant's dismissal on **November** 7, 1977, as -

"~~xxxxxx~~ for your violation of General **Rule 'F'** of Uniform Code of Safety **Rules** when you failed to report injury **you** allegedly sustained on October 13, 1977."

On December 23, 1977, claimant was advised by **the Division** Engineer that his dismissal was sustained.

General **Rule 'F'** of the Uniform Code of Safety **Rules** reads:

'F. Accidents, failure in the supply of water or fuel, defects in track, bridges, signals, or any unusual condition which **may** affect the movement of trains, must be promptly reported by wire to the proper authority."

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A copy of the transcript of the hearing conducted on December 12, 1977, has been made a part of the record. Based upon our review of the record, the Board does not find substantial evidence to support dismissal of **claimant** for alleged violation of **Rule "F"**. It is our view that claimant made every reasonable effort to report the injury to the foreman and to obtain necessary forms for **medical** attention. We find, therefore, that his dismissal was improper.

Having found that the charge against claimant was without **foundation and** not substantiated by the evidence of record, we come to that part of the claim requesting compensation for all time lost in accordance with Rule 6-5, which provides, in relevant part:

"If, by reason of such unsustained charge, the employee has been removed from the position held, reinstatement will be made and payment allowed for earnings lost, less any amount earned during the period **he** is held out of service."

Carrier calls our attention to, and we take notice of, a law suit which claimant has filed subsequent to his discharge alleging, in two separate counts, that by virtue of injuries sustained during claimant's employment relationship, claimant sustained severe and **permanent** injuries to his back and legs resulting in disability and disfigurement **and** which has caused him and will cause him to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injury, etc. Thus, says Carrier, claimant would not have been in a position to work and could not have sustained lost earnings.

At this point, we note from the record that the lawsuit has not been concluded and no determination has been **made** concerning **claimant's** alleged inability to work during this period. **Under** the provisions of Rule 6-5, **claimant** is entitled to payment for earnings **lost**, less any amount he earned during the period he was out of service. The question of whether he was physically able to work and thus incur "earnings lost" during the claim period, given the record as it now exists, cannot be resolved by the Board at this time.

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 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 Agreement was violated to the extent **shown** in Opinion.

A W A R D

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD **ADJUSTMENT BOARD**
By Order of Third Division

ATTEST:

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1980.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO **AWARD** NO. 22813

DOCKET NO. M-22846

NAME OF ORGANIZATION: Brotherhood of **Maintenance** of Way Employees

NAME OF CARRIER: St. Louis Southwestern Railway Company

Upon application of the representatives of the Employees involved in the above Award, that this Division interpret the **same** in light of the dispute between the parties as to the meaning **and** application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

Award No. 22813 was rendered on April 18, 1980. Claimant had been dismissed from service on November 7, 1977, for failure to report a **personal injury** that he allegedly sustained on October 13, 1977. The concluding paragraph of Award No. 22813 read in part:

"... Under the provisions of Rule 6-5, claimant is entitled to payment for earnings lost, less any amount he earned during the period he was out of service. The question of whether he was physically able to work and **thus** incur 'earnings lost' during the claim period, given the record as it now exists, cannot be resolved by the Board at this time."

Following the issuance of Award No. 22813 on April 18, 1980, the record now shows that Claimant Johnson was examined by the Carrier's physicians and released to return to **work** on April 30, 1980.

The record now also shows that following Claimant's alleged injury on October 13, 1977, he submitted statement from his physician, dated November 2, 1977, reading:

"**The** above named patient may return to work on November 3, 1977."

Claimant did return to work for two days, November 3 and 4, 1977, prior to his dismissal on November 7, 1977.

The record also now contains a statement from Dr. **George R. Schoedinger** to the effect that he first saw Claimant on January 19, 1978. There is no record that Claimant's doctors released him to return to service from January 19, 1978, to the time that Carrier's doctors released him to return to work on April 30, 1980. In Award No. 22813 we held Claimant's dismissal on **November 7, 1977**, to have been improper.


Considering the medical evidence now before the Board, Claimant is entitled to be paid under Rule 6-5 of the Agreement, for the period November 7, 1977, to January 19, 1978.

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Referee Paul C. Carter, who sat with the Division as a neutral member when Award No. 22813 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 19th day of October, 1983.

