

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRDDIVISION

Award Number 23039
Docket Number **MW-23169**

A. Robert **Lowry**, 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 Laborer Albert **Morehead** for alleged absence 'from duty on December 8, 1978, without authority', was without just and sufficient cause and arbitrarily and capriciously imposed (System File **MW-79-6-CB**).

(2) Laborer Albert **Morehead** shall be reinstated to his former position, **with** pay for time lost and with vacation, seniority and all other rights unimpaired."

OPINION OF ROARS': Mr. Albert Morehead, the claimant, **was** employed by the Carrier on October 4, 1976 as a laborer. On December 11, 1978, the **Carrier** addressed a letter to claimant dismissing him from service account being absent from duty Friday December 8, 1978, without authority as required by Rule 810 of Carrier's Rules and **Regulations** for the government of Maintenance of Way and Engineering Department **employees**. In accordance with the rules of the Agreement between the parties, claimant requested and was granted a hearing on the charges on December 27, 1978. A copy of the transcript of the hearing was made a part of the record. On January 2, 1979, in a letter to claimant Carrier sustained its earlier decision **of** dismissal.

The record is **clear** that claimant was absent from his employment on Friday December 8, 1978 without authority. However, the record shows claimant called Foreman Smith's home between 5:30 and 6:00 AM on that morning and was informed by Smith's mother that he was **in** bed asleep. Foreman Smith confirmed the telephone call but stated his mother did not understand what he wanted. Smith also testified that he left borne **after** the call had been **made** to his mother.

Carrier's Rule 810 reads as follows:

"**Employees** must report for duty at the prescribed time and place, remain at **their** post of duty, and devote themselves exclusively to their duties during their tour of duty. They must not absent themselves from their employment without proper authority. They must not engage **in** other business which interferes with their performance of service with the Company unless advance written permission **is** obtained from the proper officer.

"Continued failure by employes to protect their employment shall be sufficient cause for dismissal.

"An employe subject to call for duty **must** not leave his usual calling place without notice to those **required** to call him.

"**Employes** must not sleep while on duty. **Lying** down or assuming a reclining position, with eyes closed or concealed, **will** be considered sleeping."

While the rule clearly requires an employe to obtain authority prior to being absent, it also obligates his supervisor to be available to receive such requests. Foreman Smith testified that his mother knew **it** was claimant **Morehead** who called and she should have been advised by her son that such calls, even at **5:30** in the morning should be given to him. **Claimant can** not be held responsible for this failure on the part of the foreman.

The record shows claimant has a history of absenteeism. In his two years **of employment** he was absent without authority on the following occasions; he was absent on February **17** and March **17, 1977** and was counseled for violation of Rule **810**, on May **3, 1977** he was suspended for being absent on April **29** and **May 2nd**, he was reinstated on a leniency basis on May **23, 1977**. Two months prior to this incident he was also suspended for five days for **the** same offense.

The **Board**, in view of the **circumstance** prevailing here, awards reinstatement of claimant with seniority and all other rights unimpaired. However, his past record calls for the "without back pay" penalty. This award should be made a part of claimant's personal record.

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

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That the discipline imposed was excessive.

A W A R D

Claim sustained in accordance with Opinion.

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

ATTEST:


Executive Secretary

Dated at Chicago, -Illinois, this 28th day of October 1980.