NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24261
Docket Number MW-23991

Robert E. Peterson, Referee

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

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

(1) The Agreement was violated when the Carrier terminated its employment of Laborer Daniel R. Sanchez on July 23, 1979 (System File D-43-79/MW-15-80).

(2) The claimant shall be reinstated with seniority, vacation and all other rights unimpaired and he shall be compensated for all wage loss suffered, including overtime, beginning September 4, 1979."

OPINION OF BOARD: The basic issue in dispute revolves around a question as to whether or not Carrier's actions in terminating Claimant from its service effective July 23, 1979, without benefit of formal hearing were taken pursuant to a proper application of Agreement rules.

According to the record as developed and presented on the property, Claimant was employed as a Section Laborer by the Carrier on March 24, 1977. Subsequently, on June 4, 1979, he voluntarily left such position to enter Carrier's train service as a Fireman-Trainee, a position in Carrier's operating department and not covered by the collective bargaining agreement under which Claimant had worked while in the maintenance of way department. Thereafter, when Claimant failed to pass an open book of rules examination for the position of Student-Fireman he was, according to the Carrier, dismissed or dropped as a Fireman-Trainee and, at Claimant's request, was re-employed as a Section Laborer, both happenings being effective June 26, 1979.

Claimant apparently resumed work as a Section Laborer and worked through July 9, 1979. We say "apparently" because Carrier correspondence of record asserts Claimant last worked as a laborer July 9, 1979, whereas Organization correspondence of record asserts that subsequent to returning to his position Claimant sustained an off-duty injury on July 10, 1979 while moving his personal effects from one residence to another. In any event, when Claimant failed to report for work on or after July 10, 1979 and, according to the Carrier, but refuted by the Organization, failed to notify any of his supervisors as to why he was absent, he was dropped or dismissed from service on July 23, 1979.

Carrier submits its dismissal of Claimant was in pursuance of Appendix "O" of the applicable Agreement, which stipulates such action when an employe has been absent ten working days or more.

On September 4, 1979, Claimant presented himself for work with an undated note from his physician which stated: "May return to work Sept. 4, 1979". Claimant was not permitted to return to work, being advised that he had meantime been dismissed or dropped from service account his absenteeism.

In addition to its contentions relative to Appendix "O", it is the Carrier's further position that under Rule 7(a) of the applicable Agreement it likewise had the right to accept or reject Claimant as an employe within 60 days from the date it maintains he was re-employed, it being Carrier's contention that under Rule 7(a) Claimant acquired a new entered service date as a probationary employe. In this regard, the Organization submits this Rule stipulates that if an employe is not notified of his rejection within the 60-day period it shall be understood that such probationary employe becomes an accepted employe, and as an accepted employe would be entitled to a hearing for any alleged violation of the Agreement. It maintains that as Carrier did not notify Claimant of his rejection he was, therefore, entitled to benefit of a hearing to present his reasons for being absent.

We find no need to pass judgment in this dispute on Rule 7(a) and the question of whether or not an employe transferring or being re-employed to another department is to be treated or considered as having gained a new entered service date. Certainly, to properly do so would require production of sore documentation than we have before us, e.g., whether the employe was properly or duly notified of the ramifications of a move from one craft or class of employment to another; whether a formal resignation was required, submitted, or acknowledged; seniority rosters and other documentation concerning treatment accorded other employes similarly situated; the method by which benefits eligibility was handled, etc.

We do find, however, that we may address ourselves to the principal issue in dispute, for whether Claimant was or was not a probationary employe, Appendix "O" does support a finding that under its self-executing provisions when an employe absents himself from his assignment, without permission, for ten working days or more such employe may be dropped from service without the necessity of an investigation. It is to be noted that under this memorandum of agreement, in cases where an employe has been unable to notify his supervisor that he would be unable to report for work because of personal illness or other justifiable cause, such employe may within thirty calendar days from the first day of the unauthorized absence wake written request to the proper Carrier officer for a formal investigation. Here, in the instant dispute, it is unquestioned Claimant had absented himself from his assignment for ten working days or more. And, as concerns whether such absences were with or without permission, it must be assumed, absent probative support, that Claimant did not in fact have permission to be absent. His assertion that, "being unable to locate either of (his supervisors) he left a message for them", must be treated as a self-serving statement, particularly in view of the length of time he was subsequently absent and the apparent fact he was not so disabled as to have precluded a further direct contact to ascertain if he had requisite permission to absent himself or to request a formal investigation. Accordingly, under the circumstances of record, 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 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 wet 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: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of March 1983.