

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24870
Docket Number MW-24657

Robert W. McAllister, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Escanaba and Lake Superior Railroad Company

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

(1) The Carrier violated the Agreement when it dismissed Track Foreman Robert Villeneuve without benefit of a fair and impartial hearing as required by Rule 51(a) (System File ELS-1395).

(2) The claim as presented by General Chairman W. C. Jorde on October 3, 1980 to General Manager John Larkin shall be allowed as presented because said claim was not disallowed by General Manager John Larkin in accordance with Rule 52(a).

(3) As a consequence of either or both (1) and/or (2) above

'Claimant Villeneuve must be returned to his former position with all rights unimpaired and compensated at his applicable rate for all time lost.'

OPINION OF BOARD: The dismissal of Robert Villeneuve is protested by the Organization on the grounds the Claimant was a track foreman and was not afforded a fair and impartial hearing as required by Rule 51 (a). A claim was filed on October 3, 1980, and was not answered. The Organization, relying on Rule 52 (a), asserts that, since the claim was not answered, it shall be allowed as presented. The Carrier, in its response to this claim, contends the Claimant was employed on August 4, 1980, as a General Foreman in charge of a rehabilitation gang comprised of fifty-five or more employes.

The Organization believes the Carrier's failure to answer its claim establishes, as fact, its unrebutted description of the Claimant as track foreman. Since the Carrier did not raise the issue of "scope" in connection with the Claimant's classification, that issue, according to the Organization, is not properly before the Board.

This Board does not agree with this argument as applied herein. In order for the provisions of applicable agreements to be properly invoked on behalf of an individual, that individual must be subject to the rules governing the hours of service and working conditions. If he is excluded, the failure to answer such a claim cannot change his factual status notwithstanding unanswered assertions to the opposite.

This Board finds the Organization, as the moving party, has not substantiated through substantive evidence that Robert Villeneuve was an employe within the scope of the agreement between the parties.

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

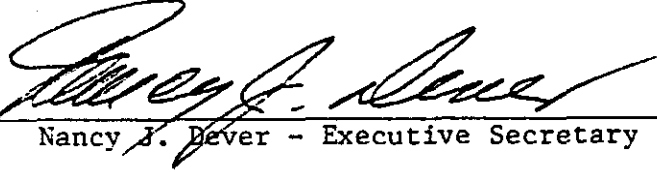
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984.

