

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25682

Docket Number MW-25691

David P. Twomey, Referee

(Brotherhood Maintenance of Way **Employees**

PARTIES TO DISPUTE: (

(**The** Kansas City Southern Railway Company

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

1. The Carrier violated the Agreement when it improperly closed the service record of Track Laborer D. W. **Payton** (Carrier's File 013.31-269).

2. Track Laborer D. W. **Payton** shall **be** returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.'

OPINION OF BOARD: The Claimant, D. W. **Payton**, entered the Carrier's service as a Track Laborer on May 18, 1981. He was regularly assigned as such until he was furloughed in connection with a general force reduction on December 31, 1981, at which time he filed his name and address with the Carrier in order to retain his seniority. On February 17, 1982, while he was still furloughed, he was involved in an automobile accident and suffered injuries as a result. He was hospitalized for a brief period and thereafter remained under his doctor's care. Mr. **Payton** was sent Bulletin No. 18 dated April 27, 1982 advertising Track **Laborer's** position on Extra Gang 500. He timely submitted an application and he was subsequently notified, by Bulletin No. 22 dated May 11, 1982, that he had been awarded a Track Laborer's position on Extra Gang 500. **Mr. Payton** did not immediately report to work and fill the Track Laborer's position to which he had been assigned. In his letter explaining what had happened to Mr. R. T. Arnold of the Maintenance of Way Organization, Mr. **Payton** wrote in part:

"...I called Miss Billie and told her about the matter and at the time, she told me I had my job and go ahead and get my business together..."

"**Miss Billie**", referred to above, is General Clerk Billie **Abrahams** at the Carrier's Maintenance of Way Office in Shreveport, Louisiana. **Mr. Payton** had been on furloughed status for four months and did not have a regular foreman or supervisor to report his situation of an automobile injury and resulting judicial proceedings and insurance business, and his need for time off to complete this personal business. When he completed his business he **again** called Clerk **Abrahams** to return to work, and he was advised by her that he had been fired. **Mr. Payton** contacted the attorney representing him in the auto accident case, who wrote the Carrier by letter dated June 9, 1982,

concerning **Mr. Payton's** desire to return to work. This letter was not answered by the Carrier. By letter dated July 14, 1982 **Mr. Payton** was advised that his seniority was terminated under Rule 5 of the Agreement. **Mr. Payton** immediately contacted **Mr. Arnold**, and **Mr. Payton's** statement referred to above was submitted to the Division Engineer by letter dated July 20, 1982.

The Organization's contentions that the Carrier failed to hold a hearing to determine the facts as required by Rule 13-2 is rejected. The Carrier's action under Rule 5 of the Agreement was not discipline. It was up to either **Mr. Payton** or the Organization to ask for a hearing under Rule 13-2. The record does not disclose that such a hearing was requested.

The Carrier's Division Engineer, in his August 11, 1982 letter stated in part:

"I believe we were exceedingly lenient to wait until July 14, 1982 before finally concluding that he did not intend to comply with either the organization's agreement rules **or** with the Company's rules:

The record disclosed that the Carrier did not give **Mr. Payton** until July 14, 1982 as set forth above, for **Mr. Payton** was notified by Clerk **Abrahams** of his termination which led to Attorney J. W. Wiley's letter to the Carrier of June 9, 1982 seeking **Mr. Payton's** return to work.

Based on, and strictly limited to, the narrow facts of the record now before this Board, we shall sustain this Claim to the limited extent that **Mr. Payton's** name shall be restored to its proper position on the seniority roster, with his seniority and all rights unimpaired. The portion of the Claim for **backpay** in this case is declined.

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 discipline was excessive.

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*Claim sustained in accordance with the Opinion.*

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1985.