

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Union Pacific Railroad Company

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

(1) The dismissal of Sectionman S. A. Hewitt for allegedly leaving the job site without proper authority in alleged violation of Rule 604 of Form 7908 was without just and sufficient cause (System File D-115/871209G).

(2) The Claimant shall have his record cleared of the charges leveled against him; he shall be reinstated to the Carrier's service with seniority and all other rights restored and he shall be paid all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance of hearing thereon.

The Claimant was arrested by police while at work on September 17, 1987, and was thereupon taken from the job site. As a result, the Carrier considered the Claimant's employment terminated. On September 23, 1987, the Organization wrote to the Carrier as follows:

"Our office has been advised that Mr. Hewitt is considered as having forfeited all seniority rights in accordance with Rule 28(L) of the Agreement over an incident that occurred on September 17, 1987. Although we have yet to receive a letter from the Carrier confirming this I am advised that Roadmaster J. C. Flynn has issued one in this regard.

Therefore, pursuant to the terms of Rule 48(L) we request that the Carrier schedule and hold an investigation in behalf of Mr. Hewitt. Please advise as to the time, date and location of the hearing concerning this matter."

Apparently, it was not until September 29, 1987, that the Carrier formalized its action, through a letter to the Claimant (with copy to the Organization), as follows:

"It has come to my attention that while you were employed as Sectionman and on duty at Motanic, Oregon, on September 17, 1987, at the approximate hour of 12:45 P.M., you involuntarily left the job site as a result of apprehension by civil authorities for parole violation. Involuntarily leaving your job site as a result of apprehension by civil authorities is in violation of Rule 48(L) of the current Agreement between the Company and the Brotherhood of Maintenance of Way Employees.

You are, therefore, dismissed from the service of the Company. Please deliver all Company equipment, passes and Company material to your nearest Roadmaster's Office."

Rule 48-L reads as follows:

"(L). . . Employees need not be granted a hearing prior to dismissal in instances where they refuse to work, voluntarily leave the work site without proper authority or involuntarily leave their job as a result of apprehension by civil authorities, willfully engage in violence or deliberately destroy Company property. Such employees may, however, make request for a hearing relative to their dismissal and request therefore must be made within fourteen (14) calendar days from the date of removal from service."

Rule 48-L provides for a hearing, upon timely request, concerning action by the Carrier under the Rule. Thus, it is not entirely self-effectuating, even though review is provided after dismissal, rather than prior to such action as in other disciplinary matters.

Following the hearing which had been requested by the Organization, the Carrier wrote to the Claimant on October 26, 1987, once again advising him that he was "dismissed from the service" because he "left the job site without proper authority as a result of apprehension by civil authorities which is in violation of Rule 604." Rule 604 reads as follows:

"604. DUTY - REPORTING OR ABSENCE: Employees must report for duty at the designated time and place. They must devote themselves exclusively to the Company's service while on duty. They must not absent themselves from duty, exchange duties, or substitute others in their place without proper authority."

The Hearing revealed that the Claimant was apprehended for failure to perform certain hours of community service as a result of a previous conviction. The apprehension was not for any new alleged criminal offense. Further, it became known on the following day that the Claimant would have been able to return to work immediately if permitted by the Carrier to do so. Rule 604 specifies the general prohibition that employees "must not absent themselves from duty" and carries no mention of the severity of penalty for such conduct.

The record here is not as clear as the Carrier would view it. Testimony at the Hearing specifically indicates that the Roadmaster was aware that civil authorities were seeking the Claimant and that the Claimant did request permission to leave the property. The Roadmaster testified as follows:

"I think maybe he [the Claimant] did ask me for a ride in and I told him I had other things and places to go, other business to take care of and I didn't have time to do that. I don't really remember for sure. I think that might have been how it happened."

All the circumstances herein fail to justify the penalty of dismissal. The Claimant's Supervisor apparently would have permitted the Claimant to leave the property if it had been practical to arrange to transport the Claimant from the work site. The Claimant would have been available for work on the following day, based on arrangements concerning his work release program.

As part of the basis of the dismissal penalty, the Carrier refers to the Claimant's prior record. As pointed out by the Organization, however, this record shows no disciplinary action in the previous five years.

The Award will direct that the Claimant be offered reinstatement to service. The Claimant, however, is not without responsibility. It was his concern, and not the Carrier's, to see that the terms of his community service were satisfactorily met. There is thus no reasonable basis for retroactive pay or for clearing the Claimant's record of the charge.

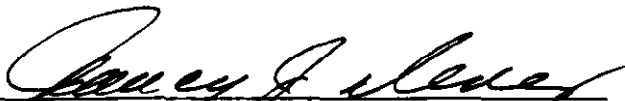
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Claim sustained in accordance with the Findings.

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Award No. 28405
Docket No. MW-28662
90-3-89-3-9

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of May 1990.