# Award No. 8892
# Docket No. MW-10454

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Howard A. Johnson, Referee**

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**PARTIES TO DISPUTE:**

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY

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

(1) The Carrier has been in continuous violation of the Agreement since February 4, 1957, on which date it refused to permit Section Laborer J. R. Rose to resume service as a section laborer upon his recovery from an injury sustained while in the Carrier's service on December 3, 1956.

(2) Section Laborer J. R. Rose be reinstated and restored to his position as section laborer with seniority, vacation, and other rights unimpaired and that he be paid for all time lost beginning as of February 4, 1957.

**EMPLOYES' STATEMENT OF FACTS:** Mr. J. R. Rose has been employed by this Carrier since 1938, and, prior to December 3, 1956, had suffered only one personal injury, excluding the entry of a foreign body into an eye.

On December 3, 1956, Section Laborer Rose and four other section laborers were engaged on the work of unloading switch ties from a gondola type of car. The four other section laborers handled the front end of each tie; Mr. Rose handled the rear of the tie by himself and, in handling one certain tie, his finger was caught between the tie and the gondola car. This happened at approximately 8:30 A. M. Mr. Rose was taken to Dr. Hamilton (the Company Doctor) at 2:30 P. M. who **ventured the opinion** that the finger was mashed or bruised and that Mr. Rose could continue working.

Therefore, Mr. Rose returned to his job and continued working for seven days, but was unable to work after December 11, 1956 because of the pain in his injured finger.

Mr. Rose, having obtained no satisfaction from the treatment received from Doctor Hamilton, reported to Dr. J. R. Ansley, a "Chiropractic Physi-

The data contained herein has been discussed with the representatives of the employes.

(Exhibits not Reproduced.)

**OPINION OF BOARD:** This is not a discipline case, but arises under Rule 33—Leave of Absence, which reads in part as follows:

"(a) * * *

"(b) Leave of absence for fifteen (15) days or more must be in writing from the supervisory official of the seniority district. A leave of absence for less than fifteen (15) days must be by direct and definite permission of the foreman or other immediate superior. When a leave of absence for less than fifteen (15) days is granted, permission must be obtained in writing to extend such leave beyond the period first requested.

"An employe who does not procure such direct and definite permission for leave of absence and remains away from duty and does not submit a satisfactory explanation for such absence within forty-eight hours from the time he should have reported will be considered out of service.

"(c) An employe who does not reutrn to duty upon expiration of leave of absence or submit a reasonable explanation for such failure will lose seniority and be considered out of the service.

"(d) * * *

"(e) An employe on leave of absence may return to his position or assignment at any time before the period of leave has expired, or may be required to return to service within reasonable time after notified that he is needed, if his circumstances will permit.

"(f) * * *

"(g) * * *

"(h) An employe incapacitated because of personal injury or personal illness shall be considered as being on leave of absence during the period he is so incapacitated.

"It is understood the Carrier may require evidence in the form of a doctor's certificate of such illness, and may require the employes to submit to a physical examination by Company Surgeon before returning to service. Unless the sickness or injury is of a serious nature, the employe must in order to protect his rights under this rule, arrange to notify his supervising officer of the reason for his absence within twenty-four (24) hours of his assigned starting time."

The claim was "that refusal to permit Mr. Rose to work is a violation of Rule 33(h)", and the Carrier held an investigation which developed the following facts.

Claimant Rose was a section laborer on the regular day shift starting at 8:00 A. M. At about 8:30 on the morning of December 3, 1956, while unloading ties, he injured his finger; he reported the injury to his foreman in the afternoon and was taken to the company surgeon who diagnosed the injury as a mashed and bruised finger and after treatment released him for work.

Claimant continued to work until December 11th, mostly on brush burning and other light work. He was then assigned to tamping ties but did not report for work on the 12th or thereafter, for the reason, as stated at the investigation, that he could not use the hand with the injured finger in such work, and could not perform it with one hand. But he did not submit any explanation for his absence until December 18th, when he reported to his foreman with a statement from Dr. J. R. Ansley, a chiropractic physician, to the effect that an X-ray examination showed that the bone in Claimant's injured finger was crushed and that he would not be able to return to work until January 21, 1957.

He was instructed to report to the chief surgeon, who, after an X-ray examination, found him able to return to work. However he told the chief surgeon that he was going to spend Christmas with his sister in Wisconsin because he wasn't able to work, and was told that he would be reported back to duty. Apparently he was expected to resume work not later than the morning of December 26th.

Claimant submitted no further explanation of his absence until 3:45 P. M. on December 27th, when he told the foreman that he would not work until his finger got well. On February 1, 1957, he wired the foreman: "Am able to work after being off injury. Would like to return Monday, Feb. 4th. If OK advise." He was then told that he had voluntarily terminated his employment by not complying with Rule 33.

The Claimant's position is that under Rule 33 he had a leave of absence by reason of inability to work because of his injury.

The Carrier's position is, first, that he was not incapacitated, because he worked until December 11th, and because on the 3rd and 18th two physicians found him able to work; second, that since his injury was clearly not of a serious nature, a leave of absence was not automatic but was dependent upon notification within twenty-four hours of the reason for his absence.

We need not consider the Carrier's first contention, for the second must be sustained. By not explaining his absence from December 11th until December 18th, and again by not reporting until the afternoon of December 27th, he failed to avail himself of the leave of absence provided by Rule 33, and therefore under paragraph (c) of that rule, lost his seniority and must be considered out of the service.

It is too well established to require citation that the Board must accept the Rules as it finds them. Rule 33 affects the rights of all employes covered. Under paragraph (c) Claimant lost his seniority by his failure to comply with the notice requirement; it could not be restored to the detriment of other employes by unilateral action. In Award 3259 it was held that a carrier violated the Agreement when it assumed to restore seniority lost by an employe's failure to comply with the Rules. Certainly we cannot find here that the Carrier violated the Rules by its adherence to them.

This is not an instance in which we may consider that discipline imposed by the Carrier has been excessive or in abuse of discretion. Rule 33 affords the Carrier no discretionary leeway, where by his own failure to comply with the rules, the employe has lost his seniority and is considered out of the service.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July, 1959.