Award No. 13300
Docket No. MW-13043

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it furloughed Extra Gang Laborer Roger Miller on September 23, 1959 and returned junior employes in service.

(2) Extra Gang Roger Miller be restored to service with seniority, vacation and all other rights unimpaired and that he be compensated for all wage loss suffered because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The claimant holds seniority as a track laborer as of April 15, 1957 and was employed on Extra Gang No. 1 under the supervision of Extra Gang Foreman Frank Sawicki at Cicero, Illinois.

On Friday, August 28, 1959, Foreman Sawicki informed the claimant that he (claimant) would have to start his vacation on Monday, August 31, 1959. The claimant then advised Foreman Sawicki that, since his vacation would end immediately preceding the Labor Day weekend, he (claimant) would be off for the four work days following the Labor Day holiday and would return to service on September 14, 1959, thereby being on vacation from August 31 through September 4, 1959, then off duty on the three day holiday weekend, followed by being off duty for four work days and two rest days.

Inasmuch as Foreman Sawicki did not object to such leave, the claimant naturally assumed that permission to be absent was thereby granted on the theory that "silence gives consent." Therefore, at the close of work on August 28, 1959, the claimant left for his home at Milladore, Wisconsin for a visit during his one week of vacation plus the one week of leave which had been tacitly granted to him.

However, upon reporting for service on the morning of September 14, 1959, he was not permitted to work. He was permitted to resume service on September 15, 1959.

At the close of the day's work on September 23, 1959, the claimant was

rules, if any, so as to provide that extra gang laborers shall accumulate seniority and retain such seniority when laid off in force reduction, in accordance with uniform principles generally applicable to other classes of employes."

No agreement has been reached on the above proposal made by the Petitioner, but, as usual, Petitioner is progressing the instant claim just as though the proposal had been accepted and placed in effect. Of course, if the Petitioner's proposal were accepted by Carrier, which it has not been, then the instant claim would have some merit. However, being based on a proposal, rather than on an agreed upon rule, the claim is without merit contractually or otherwise.

The Carrier has refrained from citing any awards or other precedents in support of its position in this case, because the Carrier firmly believes that this is the first time the Board has been asked to grant seniority to an extra gang laborer in contravention of the rules of the controlling collective agreement. That the Board cannot do so is not open to question.

It must be remembered that:

1. Claimant was dismissed from service on September 10, 1959 for being absent without permission on and subsequent to September 8. (See Carrier's Exhibits 1 to 4 inclusive).

2. Claimant was hired as a new employe on September 15, 1959. (See Carrier's Exhibit #1).

3. He had no seniority to assert on September 23, 1959, because he could not establish any seniority under the provisions of Rule 5 (d) in the 8 days from the date hired.

4. There were no employes junior to claimant when he was laid off on September 23, 1959, because he was the youngest laborer on the gang with only 8 days of continuous service.

With these facts firmly established, and when consideration is given to Petitioner's request for a revision of rules which would, if agreed to, validate the claim, there can be no decision except denial of the claim in its entirety.

(Exhibits not reproduced).

OPINION OF BOARD: The evidence in this case is conflicting as to essential facts. Claimant alleges that his Foreman informed him that he (Claimant) would have to start his vacation on Monday, August 31, 1959. He further states that, he advised his Foreman since his vacation would end immediately preceding the Labor Day weekend, he (Claimant) would be off for the four workdays following the Labor Day holiday and would return to service on September 14, 1959. Thus, he would be on vacation from August 31 through September 4, 1959, then off duty on the three day holiday weekend, followed by being off duty for four workdays and two rest days. He further contends that inasmuch as the Foreman did not object to such leave, he (Claimant) assumed that permission to be absent was granted on the theory that "silence gives consent." He reported for work on September 14th, but was not permitted to work. He did go back to work on September 15th, and was laid off on September 23, 1959.

The Foreman categorically denies that he told the Claimant that he would

have to take his vacation from August 31st to September 4th. Rather, the Claimant advised him that this was the period he would prefer for his vacation, and the Foreman gave his consent. The evidence indicates however that the Foreman did not give him permission to absent himself until September 14th. When Claimant did not return to work on September 8th, he was discharged from service on September 10th, was re-hired as a new man on September 15th and subsequently was laid off on September 23rd as a result of a reduction in force. Claimant alleges that employes junior in service to him, were retained by Carrier subsequent to September 23rd.

A review of the evidence in this case fails to reveal that the Claimant was ever advised by appropriate authorities that he had been discharged from service because of his failure to report back to work upon the expiration of his vacation. The first day that he should have reported for work was September 8th. Failing to make an appearance on that date, Carrier contends he was discharged on September 10th, re-hired as a new employe on September 15th and laid off on September 23rd. Since he was hired as a new employe on September 15th, his seniority, Carrier submits, consisted only of 8 days. The above actions took place without notice to the Claimant and without any investigation.

Such a procedure seems strange indeed, and one, which we must say in all candor, taxes our credulity insofar as our knowledge of the conduct of everyday business affairs, is concerned. To dismiss a man from his job one day, and re-hire him 5 days later without his knowing of his newly acquired status, is incredible. Reading between the lines of the exchanges of correspondence, it becomes apparent that the Claimant, having worked through 1957, 1958 and 1959, was not regarded as one of Carriers' most effective employes. However that may be, there are appropriate methods available to the Carrier to remedy situations which might demand the invoking of certain disciplinary measures or even eventual dismissal from the service. Proper notice however to the employe is essential. Here, we have a case in which, from the available evidence presented to us, this Claimant never was informed that he was fired and then re-hired as a new employe.

It is fundamental that the Claimant must always present to this Board a preponderance of evidence to sustain his claim. Although we find it most difficult to lend credence to the Claimant's original story with reference to his vacation, we feel that in the circumstances of this case, the Carrier should have provided us with documentary evidence to show conclusively that he was properly dismissed on September 10th. On the other hand, we feel constrained to say that in a review of the handling of this dispute on the property, the Petitioner never once specifically controverted the Carrier's statements that the Claimant had been discharged on September 10th. In view of the conflicting evidence and the failure of both sides to present this Board with competent evidence upon which to render a just decision as to the actual merits, we will render neither a sustaining nor denial award, but shall dismiss this case because of a lack of the requisite body of evidence essential for a sound adjudication of the basic issues.

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 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 over the dispute involved herein.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMEN TBOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of February 1965.