

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21541
Docket Number MW-21745

Robert W. Smedley, Referee

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employes
(
(The Denver and Rio Grande Western Railroad
(Company

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

(1) The Carrier has improperly withheld Trackman Joe Rodriquez from service on and ever since May 5, 1975 (System File D-21-75/MW-15-75).

(2) The Carrier shall be required to return Claimant Rodriquez to service, with seniority and all other rights and benefits unimpaired

and

(3) The Carrier shall allow Claimant Rodriquez eight hours of pay for each work day and holiday in the period beginning with May 5, 1975 and continuing until he has been restored to service.

OPINION OF BOARD: The contract requires an employe to report for service within 15 calendar days of recall or lose all seniority rights. Claimant was notified of recall April 13 or 14, 1975. He went to the doctor for the required medical examination on April 16. On April 30, he notified the foreman that his uncle had died on April 29 and asked leave. This was granted. Oral leave of absence up to 7 days is allowed by the contract. The funeral was May 2. On May 2 claimant was informed not to return to work Monday, May 5, as planned.

The recall date is uncertain. One version would pinpoint the date as April 17, that being the first day he could have worked since he got the prerequisite medical exam on April 16. Carrier argues the recall was April 14 and that the 15 days expired April 28. The rule, however, starts the count the day after recall and ends the 15th day. (Awards 21550, 10420, 5187 and 3545) Thus, if April 14 was recall day, the time would expire April 29.

While the board recognizes the importance, reasonableness and self-executing character of the 15-day time limitation, in a very close case, such as this, doubt should be resolved for the worker. Had the carrier set a definite recall date, the result would be different. Notification and recall cannot be synonymous. Notice could come at any time and any manner, oral or written. Most of the gang started work April 16. One man reported April 17.

At the same time, claimant was lax in going to the brink. He pressed his luck and dealt loosely with his own rights. He delayed fill of the crew and harmed those queued behind him. This is a form of misconduct, and although this is not a discipline case, the Board chooses not to reward claimant unduly. Claimant's seniority shall be restored, but his claims for back pay and other benefits are denied.

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

The Agreement was violated.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulke
Executive Secretary

Dated at Chicago, Illinois, this 19th day of May 1977.

