

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21756
Docket Number MW-21636

Robert M. O'Brien, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(The Denver and Rio Grande Western Railroad Company

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

(1) The Agreement was violated when Extra Gang Laborer Rafael Jiminez, SS #140-44-7309, was dismissed on Friday, November 15, 1974 without being given a fair and impartial investigation as stipulated within Agreement Rule 28(a) [System File MW-5-75/D-10-74/.

(2) Claimant Jiminez shall be restored to service with all seniority and benefits intact and payment be allowed for all time lost, including holiday pay.

OPINION OF BOARD: The issue to be decided herein is whether the Claimant was dismissed from the service of the Carrier on November 14, 1974 without being accorded a fair and impartial investigation as required by Rule 28. The Employees contend that on November 14, 1974, Foreman Archuleta dismissed Claimant from service effective at the end of the day, November 15, 1974 without affording him an investigation as required by Rule 28. The Carrier, however, denies that Claimant was dismissed from service. Rather, they state that he and Foreman Archuleta had engaged in an argument on the afternoon of Thursday, November 14, 1974, during which Archuleta advised the Claimant that if he was going to argue instead of work, not to show up for work anymore. However, the Carrier maintains that at the end of the day, Archuleta told Claimant to report for work the next day, which he did. The Claimant, in a letter to the General Chairman, declared that Archuleta told him to report for work the next day, Friday, November 15, 1974, but not to report thereafter. In any event, the facts evidence that Claimant did not report for work after November 15, 1974. He was subsequently dropped from Carrier's employment rolls as a result of his failure to report for work.

It is readily apparent that before Carrier can dismiss any employee covered by the Employees' collective bargaining Agreement who has been in Carrier's service more than 60 calendar days, Rule 28(a) requires the Carrier to accord the employee a fair and impartial investigation. This Board has carefully studied the evidence of record, but unfortunately we are unable to determine therefrom whether Claimant was dismissed by

Foreman Archuleta on November 14, 1974. Claimant contends that he was fired while Archuleta maintains that he told Claimant to report for work the next day. Unfortunately, no other employees were present on November 14, 1974 when Claimant and Archuleta engaged in their verbal altercation. Neither Mr. Morgan nor Mr. Pittman, both of whom offered their version of what transpired, could offer any first hand knowledge of the incident.

In the light of this state of the record, this Board is simply unable to determine whether the Claimant was or was not dismissed from Carrier's service on November 14, 1974. The evidence is too conflicting to enable us to make this determination. Accordingly, we are left no alternative but to dismiss the claim based on this dispute in facts which facts we deem crucial to a proper disposition of the issue before us.

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 claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of October 1977.