

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22870
Docket Number MW-22960

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Chicago, Milwaukee, St. Paul and Pacific
(Railroad Company

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

(1) The dismissal of Track Laborer Floyd J. Cox was without just or sufficient cause and in violation of the Agreement (System File C# 13/D-2152).

(2) Claimant Cox shall be restored to service with seniority and all other rights unimpaired and with pay for all time lost."

OPINION OF BOARD: Prior to his dismissal, claimant was employed as a track laborer in Gang No. 4615, under the supervision of Foreman Paul C. Christenson.

On December 23, 1977, the foreman wrote claimant dismissing him from the service for violation of Rule M-702, which reads in part:

"They (employees) must not absent themselves from duty, exchange duties with or substitute others in their place, nor engage in other business without proper authority."

and other instructions dated November 5, 1975, pertaining to absenteeism. In his letter of dismissal the Foreman referred to prior warnings given to claimant concerning absenteeism.

Upon receipt of the letter of dismissal, the claimant sent it to the General Chairman with his comments. The General Chairman then proceeded to handle the matter as a grievance up to and including the highest officer of the Carrier designated to handle disputes. In the course of handling, other matters were injected, which are not before the Board.

The record shows that as of the date of the letter of dismissal, December 23, 1977, claimant had not performed service for the Carrier since November 18, 1977, with no notice to his supervisor or foreman concerning his reason for not protecting his assignment. Following his dismissal, the claimant and the Organization contended that claimant was absent because of illness and that under Rule 17 of the Agreement seniority is not to be affected when absent because of illness.

In its submission to this Board, the Carrier calls attention to Rule 18(b) of the Agreement, which provides the manner in which a disciplined employee is to handle his case if the discipline is not accepted. However, a review of the on-property handling does not reveal that Rule 18(b) was mentioned by any Carrier official in the handling of the dispute. We would agree that Rule 18(b) would have been applicable had the issue been timely raised. However, we consider it too late to raise a procedural issue of this nature for the first time before the Board.

Based upon the state of the record before it, the Board concludes and will award that claimant be restored to service with seniority and other rights unimpaired, but without any compensation for time lost while out of service, provided that claimant can pass satisfactory return-to-work physical examination.

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 discipline imposed be modified to the extent shown in Opinion.

A W A R D

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 18th day of June 1980.