

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25265
Docket Number MW-25335

Paul C. Carter, 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 violated the Agreement when it improperly closed the service record of Trackman H. J. Martinez (System File D-2-82/MW-7-82).*

(2) *Trackman H. J. Martinez shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.*

OPINION OF BOARD: *The record shows that Claimant was previously employed as a laborer in Carrier's Mechanical Department at Grand Junction, Colorado. On June 14, 1981, he resigned his position as a laborer in the Mechanical Department as follows:*

"Please accept this as my resignation as laborer, Mechanical Dept., Grand Junction, Colo., in order to transfer to the section at Austin, Colo, effective 730am June 14, 1981."

The Organization contends that on August 9, 1981, Claimant suffered an off-duty injury to his shoulder and, on January 25, 1982, contended that subsequent to his injury, Claimant made Carrier aware of his situation and "has since been on sick leave". The Organization went on to contend:

"While on sick leave, on or about January 6, 1982, and while attending a doctor's appointment made with Dr. Fisher, in Montrose, Colorado, the doctor's receptionist told the claimant that the Hospital Association contended his application for employment had been disapproved, whereupon he contacted this office."

Rule 7(a) of the applicable Agreement reads in part:

"An employe who enters the service of the Company shall be accepted or rejected within sixty (60) days from the date he entered service. If not notified to the contrary within such sixty (60) day period it shall be understood that he becomes an accepted employee..."

The Organization went on -

"In reviewing our records we find that the carrier's letter dated August 28, 1981, received in this office September 1, 1981, claimant was 'dismissed 8-12-81 (Appl. Dis.).'

"The first hint that claimant had that his application had been disapproved was when the doctor's receptionist had mentioned this to the claimant. To date the carrier has not notified the claimant that he has been dismissed."

Under Rule 7(a) the Carrier had sixty days from June 15, 1981, to notify Claimant of the rejection of his application. Claimant's prior service in the Mechanical Department gave him no rights under the Agreement covering Maintenance of Way Employes. However, when challenged, the burden was on the Carrier to prove that Claimant was notified within sixty days from June 15, 1981, that his application was rejected. In the considered opinion of the Board, the Carrier has not met that proof. In its Submission to the Board the Carrier has submitted two undated and unnotorized statements, one from a Foreman and one from a relief Foreman, that on August 12, 1981, Claimant was told by the relief Foreman that he was "fired". The Organization contends that the two statements were never made a part of the handling of the dispute on the property and may not be properly presented for the first time before the Board. We have reviewed the correspondence covering the on-property handling of the dispute and find no reference to the statements of the Foreman and the relief Foreman. It is so well settled as to require no citation, that issues and defenses may not be raised for the first time before the Board. The statements must, therefore, be disregarded.

In the claim on the property the Organization requested that Claimant be restored to his last regular position "when he receives a medical release". As there is no evidence of a medical release being presented by the Claimant, there is no proper basis for the claim that he be compensated for all time lost.

The time limit argument and other contentions raised for the first time by the Carrier in its Rebuttal Submission must be disregarded.

We will award that Claimant be restored to his former seniority as laborer, and restored to service provided he presents proper medical release and can pass satisfactory physical examination that may be required by the Carrier. The claim that Claimant be compensated for all wage loss suffered is 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 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; and

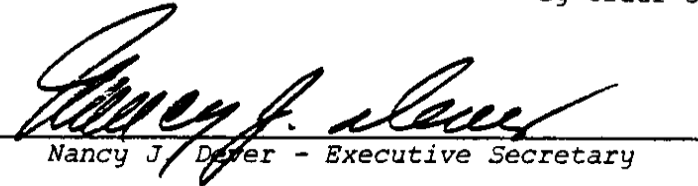
That the Agreement was violated.

A W A R D

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1985.