

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25339
Docket Number MW-24597

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Union Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it failed to recall furloughed Machine Operator M. A. Kerns to service on and subsequent to February 1, 1980 (System File 7-26-13-14-54-2).

(2) Machine Operator M. A. Kerns be allowed eight (8) hours of pay for each work day sixty (60) days retroactive from June 13, 1980 and continuing until he is recalled and reinstated as machine operator with seniority as such unimpaired as of April 1, 1974.

OPINION OF BOARD: Claimant acquired and held seniority as a track Machine Operator on the Idaho Division Seniority District on April 1, 1974. He was regularly assigned to operate Ballast Regulator No. 52 and worked under the supervision of Nampa, Idaho Roadmaster K. E. Youngblood.

On June 13, 1980, the Organization's Vice General Chairman filed a formal claim with the Division Engineer which asserted that Carrier violated the controlling Agreement when it laid off Claimant on or about August 22, 1978, and in the interim period used less senior employees to operate T.M.O. equipment. The claim noted that Claimant worked on a system gang in the Spring of 1979 on the Oregon Division operating a Ballast Regulator and returned to Nampa, Idaho about February 1, 1980. This claim was filed when Carrier apparently did not respond to the Vice General Chairman's inquiry letter of April 22, 1980, wherein the Vice General Chairman asked for information to determine if Claimant was laid off on September 1, 1978, and the date of Claimant's seniority. A complaint letter written by Claimant dated April 21, 1980, was appended to the April 22, 1980, letter.

On August 12, 1980, Carrier declined the claim on the grounds that Claimant never filed his name and address in writing with the appropriate Foreman or Supervisor pursuant to the requirements of Rule 23(a) - Restoration of Force. This Rule states in part that:

"Furloughed employees, or employees working in a lower class, who desire to avail themselves of the provisions of this rule must file their address in writing with the foreman or supervisor notifying them of the reduction, advising promptly of any change."

In the Organization's appeal letter of October 7, 1980, the General Chairman indicated that according to Claimant's best recollection, Claimant checked or inquired about his employment on numerous dates between February 4, 1980, and July 8, 1980. The specific dates, locations and supervisory personnel concerned were listed. In addition, Claimant asserted that he filed his name, address and phone number with the several Roadmasters' offices.

Carrier pointedly denies that he complied with Rule 23(a), since it argues that it has no evidence that he filed such data. Instead, it maintains that he was not furloughed because of force reductions, but furloughed by his own voluntary actions. It asserts that when the Ballast Regulator which he operated was destroyed by fire on September 2, 1978, Claimant had the right to displace junior employees operating such type of equipment elsewhere on the Idaho Division, but he did not exercise displacement rights within the required ten (10) calendar period. It avers that he was singularly responsible for his own predicament and contends that his petition is without merit or Agreement support.

Moreover, it asserts that the June 13, 1980, claim is untimely and procedurally defective since it was filed some four (4) months after the alleged occurrence. It argues that in view of the unresolvable conflict in the circumstances surrounding the dispute, the instant claim should be dismissed.

In our review of this case, we find it exceedingly difficult to establish conclusively that the Agreement was violated. This is particularly evident with respect to determining the precise cause of Claimant's furloughed status, or whether he complied with Rule 23(a). Analysis of the supporting documentation or the logical nexus of the contending arguments does not establish that the Agreement was clearly violated or that Carrier consistently acted in a proper manner. The record, at best is confused and contains errors on both sides. As a rule, in the face of such conflicting and irreconcilable evidence, we would be constrained by the precedential force of our decisional law to dismiss the claim completely, but we believe that the obfuscated record should not totally preclude a constructive remedy. If anything the record shows that Claimant was genuinely interested in securing regular employment and this sincerity should be properly weighed. This is especially so where there is some inferential indication that both sides herein were partly responsible for the events contested. We cannot award monetary damages in the absence of a specific, clearly proven Rule violation, but we can reinstate Claimant to his position without back pay for the reasons aforesaid.

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 Agreement was not violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of March 1985.