

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25522
Docket Number MW-25689

Paul C. Carter, 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 Carrier violated the Agreement when it improperly closed the service record of Mr. L. P. Anderson (System File D-43-82/MW-4-83).

(2) The claimant shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered beginning February 22, 1983.

OPINION OF BOARD: The record in the dispute before us is far from clear. The Claimant had been employed as a Bridge and Building carpenter since October, 1974. On March 7, 1981, he was placed on sick leave. Under Rule 25(d) of the Agreement employees sick or disabled are not required to obtain leave of absence.

Carrier allegedly received an inquiry dated November 13, 1981, from the Division of Personnel Investigations of the United States Government advising Claimant was seeking employment, or had been appointed to a position of House Keeping Aid with the United States Government, and requesting certain employment information on behalf of Claimant. The Carrier returned the inquiry form on December 1, 1981, and showed Claimant as on sick leave.

The Carrier has attached as its Exhibit "B" an unsigned note bearing date of 1-19-82, reading:

"Bob:

Betty in Personnel at the VA Med Center advises that Leo Peter Anderson was hired by the VA November 8, 1980 and resigned November 23, 1981 to seek other employment.

Cameron 1-19-82"

It seems that as a result of the above note, Carrier notified the General Chairman of the Organization in letter of January 20, 1982 (incorrectly dated January 20, 1983):

"In compliance with provisions of Memorandum of Agreement dated April 12, 1972 (Appendix O) the following dropped account failure to report:

Leo P. Anderson - SSA No. 528 42 7774 - dropped
1-20-82 last day worked 3-07-80."

In its Submission to the Board Carrier raises, for the first time, under the time limit rule that the instant claim was not timely filed. It is well settled that a time limit issue not raised prior to the filing of Notice of Intention to File an Ex Parte Submission, may not properly be raised before the Board. The defense may have been valid, if timely raised, but, as stated, may not be raised for the first time before the Board.

Rule 25(e) of the applicable Agreement reads:

"In Writing - (e). Leaves of absence (except in cases of bonafide sickness) must be arranged and approved in writing. However, employees desiring to lay off for a period of not in excess of seven (7) calendar days may do so by verbal arrangement with their foreman or local officer."

and Rule 25(f) provides:

"Outside Employment - (f). Employees on leave of absence who engage in other employment will lose their seniority unless they have secured permission through the proper officials of the Company and General Chairman."

Rule 25(d) provides:

"Sickness or Disability - (d). Employees sick or physically disabled will not be required to obtain leave of absence. They may, however, be required periodically, either prior to and/or upon their return to service to furnish satisfactory evidence of such sickness or disability."

We consider that the rules clearly distinguish between a person being off sick or disabled and other types of leaves of absence. In the present case Claimant was clearly absent because of sickness. He was on sick leave when he accepted what the Organization refers to as "temporary therapeutic employment at the hospital."

We conclude that more evidence than contained in Carrier's Exhibit "B", heretofore quoted, was needed to justify the closing of Claimant's record. It would seem logical that a more thorough investigation would have been made before closing any employee's record.

Based upon the record, we consider Carrier's action in closing Claimant's record as unjustified. We will award that he be restored to service with his former seniority, provided that he can satisfactorily pass physical examination that may be required by the Carrier. We will not award any compensation for time Claimant may have lost while out of service.

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

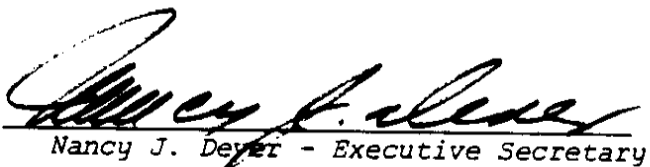
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

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