

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32437
Docket No. MW-31138
98-3-92-3-973**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly withheld Machine Operator G. L. Johnson from service following the August 19, 1991 Agreement to reinstate him to service (Carrier’s File 920075 MPR).**
- (2) Claimant G. L. Johnson shall be reinstated to service with vacation and seniority rights unimpaired, as stipulated in the August 19, 1991 Agreement, and shall be compensated for all wage loss suffered beginning September 16, 1991 and continuing until he is reinstated to service.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Prior to the date of this dispute, Machine Operator G. L. Johnson (Claimant) was involved in an altercation with a fellow employee. As a result of that altercation, Carrier dismissed Claimant from service. However, subsequent to an appeal from the General Chairman, Carrier offered, on March 5, 1991 a reinstatement. Pertinent portions of that reinstatement offer stated:

"Without waiver to the Carrier's position above, I am agreeable to returning Mr. Johnson to service on a leniency basis with vacation and seniority rights unimpaired, and reducing the degree of discipline to an actual suspension. Mr. Johnson will also be considered to be on a six month probationary reinstatement in that if he incurs any discipline in the probationary period he will revert to the status of a dismissed employee. It is further understood that there will be no compensation due Mr. Johnson for the time of dismissal from service and any present claims pending on this individual's behalf will be withdrawn in its entirety.

The above is contingent upon Mr. Johnson's ability to pass any examinations, as required, prior to returning to service, and, in addition, that Mr. Johnson will meet with the designated Carrier manager prior to returning to service to reach a full and complete understanding as to the terms of this reinstatement agreement as well as future conduct and compliance with the Carrier rules.

If Mr. Johnson and you are agreeable to the provisions contained herein, please so indicate in the spaces provided below, thereafter returning one original copy to my office for further handling. If the terms of this reinstatement are unacceptable, then the claim is considered to be declined. Please return one signed original to this office and a copy to Maintenance Engineer W. E. Smith at Dennison, Texas if the offer is acceptable.

It is understood that this letter may be used in the measure of any discipline which may be assessed Mr. Johnson in the future, however, this offer will not be cited in similar claims or grievances (sic) which may arise."

Claimant agreed to Carrier's conditions, and signed the Reinstatement Agreement on August 19, 1991. However, for reasons not indicated on this record, Carrier did not receive the signed Agreement until October 23, 1991. A certified letter was sent to Claimant on October 23, 1991, advising him that he was reinstated to service. The letter was sent to two different addresses, one in Louisiana and the second in Texas. Carrier received the certified return receipts indicating that Claimant had signed for both letters.

On October 25, 1991, NPS Specialist Naomi Larsen left a message with Claimant's father indicating that he should call her regarding his return to work. On October 28, 1991, Claimant returned the call and was instructed to report for a return to work physical examination. Following that examination, on November 13, 1991, Carrier again contacted Claimant, leaving a message with Mr. Johnson's mother that he had been cleared to return to work. On November 15, 1991, Claimant phoned Ms. Larsen and was again verbally notified that he was "ok'd" for service.

When Claimant had not returned to work by December 6, 1991, however, Ms. Larsen again initiated telephone contact to ascertain his intent. Ms. Larsen phoned the Claimant's father to find out why he had not returned to work. No reason was given. On December 10, 1991, Director of NPS Zabawa notified Claimant, by certified mail, that his name was being removed from the seniority roster for his failure to respond to recall.

The Organization submitted a claim alleging Claimant was not "properly" recalled to work. The Organization maintained that Carrier had based its decision on conversations "which allegedly took place on certain dates between October 25, and December 6, 1991." The General Chairman noted that: "The Organization has no way of knowing if these conversations actually occurred and Carrier did not furnish any substantiation other than statements in letter of February 19, 1992." With regard to the certified letters which Carrier alleged it had sent, the General Chairman stated that: "The copies of letters and receipts which Carrier offered cannot be accepted as proof." For its part, Carrier maintains that it "expeditiously moved" to bring Claimant back to work, but could not do so until the signed reinstatement was returned on October 23, 1992. According to Carrier, Claimant "knowingly" signed the letter of reinstatement, but simply "elected" to not return to service.

There is no dispute that Claimant did not return the signed leniency reinstatement letter until October 23, 1991. We conclude that Carrier did make every effort to return Claimant to service as expeditiously as possible. Further, we must note that Carrier went the "extra mile" with Claimant. Carrier sent proper notification to each of the two addresses which Claimant provided, in addition to numerous phone calls to apprise Claimant of his reinstatement. Aside from speculation founded on suspicion, the Organization presented no evidence to refute Carrier's evidence that repeated telephone communication was made to Claimant regarding his return to work. The record supports Carrier's conclusion that Claimant simply elected not to return to service. We cannot find that Carrier violated the Agreement as alleged by the Organization. Based on the foregoing, this claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of January 1998.