

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32482
Docket No. MW-32807
98-3-96-3-129

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Montana Rail Link, Inc.)

STATEMENT OF CLAIM:

"Claim of System Committee of the Brotherhood that:

(1) The discipline (30 working days' suspension, which was to commence the Monday following his return to work in 1995) imposed upon employe D. G. Privett, Jr. for alleged "... violation of General Safety Rule 535 and Maintenance of Way Rule 1.18...." was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MRL-115).

(2) As a consequence of the violation referred to in Part (1) above:

'... claimant's record be immediately cleared, without impairment. Restoration of loss is to include, but not limited to, wages loss, overtime opportunities lost, promotional opportunity and all fringe benefits lost such as insurance, railroad retirement contributions, ect. (sic).'"

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.

failed to make himself available
for work.

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

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

The Claimant was a Laborer on Gang 1953 at Clarkston, Montana, when, on or about July 28, 1994 he was displaced from his position. Two days later, the Claimant was advised that other positions were available to him, but he chose, as is his right under the governing collective bargaining agreement, to go on furlough status and he was placed in furlough status on or about August 5, 1994. At or around this same time Carrier needed additional employees, but attempts to reach the Claimant were unsuccessful. On or about August 23, 1994 the Claimant ran into Roadmaster Woodruff and told him that he had been working for the United States Forest Service as a Firefighter since August 1, 1994. Roadmaster Woodruff told the Claimant to contact the Administrative Assistant as he was needed for employment by the Carrier. The Claimant failed to do so. Upon subsequent investigation, initiated by a Notice of Hearing dated August 30, 1994, the Claimant was charged with violating rules prohibiting conflicts of interest with employment by the Carrier and requiring the Claimant be available for service once employed by the Carrier. Ultimately, a 30 working days' suspension was assessed against the Claimant.

The Organization first claims that the discipline is procedurally flawed because the Carrier issued its notice to the Claimant more than 30 days after the Claimant told the Carrier that he was to be placed on furlough status. In the alternative the Organization contends that if that date is not the operative date on which to commence the notice period the only other date is the date on which the Claimant was indeed placed on furlough status, i.e. August 5, 1994. We disagree. The alleged misconduct was not the fact that the Claimant placed himself on furlough status, but that he did so when he was otherwise employed. More importantly however, it seems hardly reasonable that the Carrier can be charged with an obligation to act with regard to some alleged misconduct unless and until it knows that the misconduct has taken place. On the basis of this record it is clear that the Carrier had no such knowledge until Roadmaster Woodruff and the Claimant had their conversation on August 23, 1994. At that point the necessary time period for giving notice of any alleged rule violation commenced and the Carrier's notice was within that time frame.

On the merits the Organization vigorously contends that the Carrier simply disciplined the Claimant for exercising his contractual right to go on furlough status. Although we agree with the Organization that the Claimant had this right, and indeed that the Carrier could not take action against him for exercising that right, we do not agree that invoking the right was the cause of his discipline. Rather, the cause of his discipline was that during a period that the Carrier needed his services the Claimant absented himself and did so in order to work elsewhere. Thus, he was not available and acted in conflict with the Carrier's legitimate expectations of him as an employee. Finally, we see no distinction that the Claimant was not actively employed at the time of his work elsewhere for the Forest Service. First, the record is clear that at that time he still held seniority. Second, and more importantly, the record reflects that once Roadmaster Woodruff learned of the Claimant's employment elsewhere, and therefore that he was able to work, he instructed the Claimant to contact the Carrier and he failed to do so. There can be no clearer indication that the Claimant thus intended to make himself unavailable for work with the Carrier so that he might work elsewhere. Such conduct clearly falls within the prohibition set forth in the relevant rule and is a legitimate basis for discipline.

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 23rd day of February 1998.