

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21453  
Docket Number MW-21515

Robert M. O'Brien, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(Norfolk and Western Railway Company (Western Region)

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

(1) The dismissal of Section Laborer James Dyson was without just and sufficient cause.

(2) The hearing held on July 31, 1974 was not held as required under Agreement Rule 20(a).

(3) For the reasons set forth in either or both (1) and (2) above, the claimant shall be **allowed** the benefits prescribed in Agreement Rule 20(g) [System File MW-DEC-73-40].

OPINION OF BOARD: Effective December 10, 1973 Claimant, Section Laborer James Dyson, was dismissed from Carrier's service. On December 20, 1973 Claimant's General Chairman requested that a hearing be held pursuant to Rule 20 of the effective Agreement to develop the facts surrounding Claimant's dismissal. The hearing was postponed on several occasions by agreement between the Carrier and the General Chairman as allowed by Rule 20(a). Under date of May 31, 1974 the General Chairman wrote Carrier requesting that a **hearing** be held during the first two weeks of June, 1974. In his letter, the General Chairman further advised Carrier that he was not agreeable to extending the time for holding the hearing beyond June 12, 1974. Carrier responded by requesting **additional** time in order to secure further information relative to the matter. No postponement was agreed to by the General Chairman, however. Rather, on June 21, 1974 he instituted the instant claim alleging a violation of Rule 20 and requesting Claimant's reinstatement. Carrier subsequently held a hearing on July 31, 1974.

Following the hearing, Carrier made the determination to reinstate the Claimant but without **any** pay for time lost, provided he pass a physical examination administered by Carrier's doctor. Claimant underwent said -physical examination on August 12, 1974 and was returned to service on September 9, 1974. Claim is before us herein for pay while held out of service during the period December 10, 1973 to September 9, 1974.

The unique claim before us is actually multi-faceted. For example, one issue raised by the dispute is whether the Carrier violated Rule 20 when they failed to accord Claimant a hearing prior to June 13, 1974 as requested by his General Chairman in his May 31, 1974 letter to the Carrier?

The record reveals that the General Chairman had **previously** agreed to postpone the hearing beyond the time period prescribed by Rule 20(a). Yet he notified Carrier that no **further** extensions beyond June **12**, 1974 would be agreed to. Accordingly, it was incumbent on the Carrier to accord Claimant a hearing on or before June **12**, 1974. Inasmuch as they failed to do so, this **Board** finds that they thereby violated Rule **20(a)**. We therefore order Claimant compensated for the period June **13**, 1974 to July **31**, 1974, the date on which the hearing was finally held, in **accordance** with the provisions of Rule **20(g)**.

A separate **and** distinct issue involved herein involves the period from the time Carrier determined to return Claimant to service (August 8, **1974**) until he was actually returned to service (September 9, **1974**). The issue, of course, is whether this is an unreasonable period of time? It is axiomatic that Carrier has the right to determine **whether** its employes are physically qualified to return to service. Thus, Carrier could properly require Claimant to be **examined** by a Company physician, and we hold that the period involved in effecting said physical herein was not unreasonable. Thus, Claimant is not entitled to compensation for the period August 8, 1974 to September 9, 1974.

Finally; we **are** compelled to conclude that Claimant is not entitled to any compensation for the remaining time that he was held out of service. Rule **12(f)** requires that an **employee** who is detained from work on account of sickness shall notify his supervisor "as early as possible". It is apparent from the record before us that Claimant did not fully comply with **Rule 12(f)** when he was absent from service during the period November **14**, 1973 through December 10, 1973. Accordingly, **Claimant** was disciplined for just cause as a result of his failure to comply with **Rule 12(f)**.

It should be noted that due to the peculiar facts involved in the instant claim the conclusions reached herein should not be considered as a precedent in any future claims between the parties.

**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 in part.

A W A R D

- (1) **That** the Claimant violated Rule 12(f).
- (2) That the Carrier violated Rule 20(a) when they failed to accord Claimant a timely hearing. Claimant **shall** therefore be compensated pursuant to the provisions of Rule **20(g)** for the period **June** 13, 1974 to July 31, 1974.
- (3) Carrier acted within: its rights when they required Claimant to undergo a physical examination to determine his physical ability to return to **service**.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, **Illinois**, this 18th day of **March** 1977.