

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
 { and Canada
 { Burlington Northern Inc.

Dispute: Claim of Employees:

1. That Burlington Northern, Inc. violated the terms of the controlling Agreement when Division Superintendent G. W. Saylor did not set forth his reasons for denying this claim in letter to Local Chairman Bullock dated September 12, 1978.
2. That in violation of the current Agreement, Upgraded Carman M. D. Kastanek, Alliance, Nebraska, was unjustly suspended from service for a period of five (5) days, August 4 through August 8, 1978, and a mark of censure was placed on his personal record following hearing held on July 7, 1978.
3. That accordingly, Burlington Northern, Inc. be ordered to compensate the above named upgraded carman eight (8) hours pay at the pro-rata rate for each of the above mentioned five (5) days, August 4 through August 8, 1978. Further, that the Burlington Northern, Inc. be ordered to remove the mark of censure from Upgraded Carman M. D. Kastanek's personal record.

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Following an investigative hearing, Claimant was given an "entry of censure" on his record and a five-day disciplinary suspension for the following reasons:

"Violation of Rules 535(e) and (f) and 537 of the Burlington Northern Safety Rules for your failure to operate vehicle in safe manner, failure to exercise care to prevent accident and failure to comply with posted signs by operating vehicle in red flagged area, resulting in Vehicle 5601 being struck by Switch Engine 6194 at approximately 3:45 A.M., June 26, 1978 at Alliance, Nebraska while assigned as Carman at that location, as disclosed by investigation accorded you July 7, 1978."

The Rules referred to above read as follows:

"535. Driver must:

- e. Exercise care to prevent accident and injury to driver and others by observing all conditions.
- f. Comply with legal posted speed, signs, and signals, and make complete stop at all stop signs."

"537. Motor vehicles must be operated in a safe manner regardless of the urgency, or importance, of the mission."

The undisputed facts are that the Claimant, a Carman who was "doubling over" for a second successive shift to work as a Coach Cleaner, drove a Carrier vehicle around a red-flagged gate and across a track. The vehicle was struck by an oncoming switch engine, causing damage to the vehicle.

The Organization raises two procedural matters in this dispute which require resolution prior to consideration of the merits of the claim. These have to do with the Carrier's alleged failure to comply with Rule 34(a) in respect to the Carrier's initial claim response and an allegation of the lack of a fair and impartial investigation owing to certain witnesses not being called for testimony by the Carrier.

Rule 34(a) reads in pertinent part as follows:

"... Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

The Division Superintendent's response to the initial claim letter reads in full as follows:

"Referring to your letter of September 9, 1978, re. Carman M. D. Kastanek who was suspended from the service of Burlington Northern, Inc. for five (5) days from August 4, 1978 to August 8, 1978 inclusive for violation of Rule 535(e) and (f) and 537 of the Burlington Northern Safety Rules pursuant to investigation accorded him July 7, 1978.

This is to advise that your request that Mr. Kastanek be made whole as provided in Rule 35(g) and that censure be removed from his record is hereby respectfully declined in its entirety."

It is the Organization's contention that this letter fails to give "the reasons for such disallowance", and thus the claim should be "allowed as presented".

A long line of awards has dealt with the adequacy of the Carrier's responses under this or similarly worded rules. While these awards are not unbrokenly consistent, the gist of the cases is that the proven failure of the giving of any reason, implied or otherwise, will lead to a sustaining award, as in Award No. 3312 (Bailer); on the other hand, the form and nature of the reason is interpreted minimally, as in Third Division Award No. 21342 (Cables) which states:

"This Board has consistently ruled that no particular form or language is required to be used in denying a claim or giving the reasons for denial. Awards 10061 (Daly), 14761 (Ritter), 14846 (Dorsey), 14864 (Ives) and many others."

Whether or not the Division Superintendent's answer in this case meets the criterion of the rule depends on the particular circumstances.

The original letter from the Organization stated the cause of the claim as "doubt" concerning the "fair and impartial outcome" of the investigation. This is followed solely by comments of the Organization concerning the investigative hearing record itself. This leads to a "request" that the disciplinary action be rescinded. When the Division Superintendent stated that the request is "declined in its entirety", the only reasonable conclusion to be drawn is that the Carrier's representative was not in accord with the interpretation of the hearing set forth by the Organization. The issue was properly joined, and the Organization was not handicapped in progressing its claim further. The Board finds that the Division Superintendent's answer, in this context, did not violate the requirement of Rule 34(a).

The Organization argues that a fair and impartial hearing was denied to the Claimant because the Carrier failed to call as witnesses the crew of the switch engine involved in the accident. No such claim was raised during the course of the hearing, which would have been the proper time to raise it. Aside from this, the Board finds that it was a reasonable judgment call by the Carrier not to seek out this testimony. There is no doubt as to what occurred after the Claimant's vehicle entered the track. The question at issue was whether or not the Claimant acted improperly in entering the tracks at that point in the first place.

As to the merits of the dispute, the record is clear that the Claimant knowingly entered the track at a point where a red-flagged gate gave sufficient warning of danger. To drive around the gate, as the Claimant did, was to risk deliberately the type of incident which in fact occurred. The essence of the matter is that the Claimant knowingly acted in disregard of an obvious warning of danger in the operation of his vehicle. The penalty assessed was a moderate one. The Board finds no basis on which to set aside the Carrier's judgment in these circumstances.

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Award No. 8672
Docket No. 8499
2-BNI-CM-'81

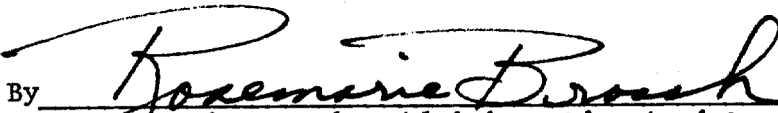
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 18th day of March, 1981.