

The Second Division consisted of the regular members and in addition Referee Ronald L. Miller when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

1. That in violation of the current Agreement, Electrician Helper K. D. Machholz was unjustly suspended from the service of the Burlington Northern Railroad Company following an investigation held on December 3, 1985.

2. That the investigation held on December 3, 1985 was not a fair and impartial investigation.

3. That the notice of charge given Mr. Machholz and his representative prior to the subject investigation was indefinite and ambiguous and therefore this notice did not meet the specific and precise advance notice required by the Agreement.

4. That the notice of discipline was procedurally incorrect in that the suspension period covered a period of forty (40) days, not the assessed thirty (30) days.

5. That accordingly, the Burlington Northern Railroad be directed to set aside the discipline, remove any reference to it from Mr. Machholz's record and that it compensate him for any and all wages lost by him as the result of this suspension. In addition, any lost or adversely affected benefits such as vacation rights, health, (sic) welfare and insurance benefits, or pension, Railroad Retirement and unemployment benefits be restored along with his seniority rights if affected.

FINDINGS:

The Second 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 waived right of appearance at hearing thereon.

Before turning to the merits of this case, certain procedural issues must be addressed. First, the Organization contends that the notice of charge given to the Claimant was "indefinite" and "ambiguous." That notice states in part:

"Attend investigation ... on December 3, 1985 ... for the purpose of ascertaining the facts and determining your responsibility in connection with your alledged (sic) insubordination and failure to comply with instructions from proper authority on November 15, 1985 at approximately 3:40 PM."

On its face, the notice of charge issued to Claimant provides sufficient information concerning the circumstances under inquiry, specifically, the charge of insubordination and failure to comply with instructions on November 15, 1985. A careful review of the record, especially testimony at the investigative hearing, indicates that Claimant knew of the event associated with the charge and prepared a defense against the charge.

Second, the Organization contends that the notice of discipline was incorrect in that the suspension covered a period of forty (40) days, not the assessed thirty (30) days. The Notice states in part:

"As a result of the investigation accorded you on December 3, 1985, you are hereby notified that you are suspended from the service of Burlington Northern Railroad for a period of 30 days effective 3:30 P.M., December 16, 1985 to and inclusive of 11:30 P.M., January 24, 1986 for violation of Rules 564 and 576 of the Burlington Northern Safety Rule Book Form 15001 dated 8-81 ..."

The notice does not specifically state calendar or work day, only thirty (30) days. Nevertheless, the notice does specify the period during which the suspension was to be served; that period included thirty (30) days which the Claimant normally would have worked and ten (10) days which the Claimant normally would have observed as rest days. This notice should have stated thirty (30) work days. Notwithstanding the omission, the intent is clear. This defect is not significant and cannot be a basis for setting aside the disciplinary action.

Third, the Organization contends that the Investigating Officer refused to allow relevant testimony. A careful review of the record indicates that the Investigating Officer properly focused the hearing on the period between the beginning of the work shift and the end of the encounter between the supervisor and Claimant in the B-34 area. This is the period during which the Claimant is charged with engaging in insubordinate conduct. He was not denied an opportunity to present testimony relevant to this time period. On a related matter, it was not necessary for the Carrier to call the crane operator as a witness. If the Organization believed that the operator's testimony would have contributed significant information, it had the right and opportunity to call him as a witness. The Organization chose not to do so.

Moving to the merits of this case, there is substantial evidence from which to conclude that Claimant engaged in insubordinate conduct on November 15, 1985. When given clear instructions to perform a specific task, Claimant stated his intention to go home. Although he contends that he made the statement in the context of not feeling well, the Claimant did not indicate his ill health to the supervisor:

83 Q. "Mr. Machholz, you stated you did tell your foreman, Mr. Jim Olson, you were not feeling well."

A. "I said I don't feel like working, I want to go home."

86 Q. "You said you wanted to go home, but you did not say you weren't feeling well?"

A. "What else would I go home for, other than sickness?"

The Claimant was repeatedly instructed to perform specific duties and he repeated his intention to go home later in the shift. The Claimant's conduct was argumentative and uncooperative without justification.

Subsequently, the Claimant proceeded to the B-34 area. Within approximately ten (10) minutes of the first incident, the supervisor and another foreman found Claimant seated at a lunch table when there was work to perform.

The record of this case does not show that Claimant specifically refused to perform assigned work. Nevertheless, it is clear that the Claimant was unreasonably argumentative and that he delayed without good cause in carrying out his supervisor's instruction.

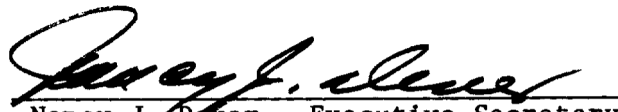
There is no basis in the record for this Board to reduce the discipline assigned by the Carrier.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of June 1988.