

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14133
Docket No. 14039
16-2-NRAB-00002-150002

The Second Division consisted of the regular members and in addition Referee Joseph M. Fagnani when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen-Division of TCU/IAMAW
(BNSF Railway Company)

STATEMENT OF CLAIM:

- “1. That the Burlington Northern Santa Fe violated the terms of the February 1, 2006 Agreement, specifically Rule 35, when on August 8, 2013, Carman Mitchell Litfin was issued a Notice of Investigation and was subsequently dismissed from service on October 4, 2013 for failure to comply with instructions on August 7, 2013 at approximately 2340 hours when working as a Carman at the Northtown Yard.
2. That accordingly, the Carrier be ordered to reinstate the Claimant and compensate him eight (8) hours pay at the pro-rata rate for each workday he is withheld from service commencing September 26, 2013 and continuing until he is returned to active duty.
3. Additionally, the Carrier be ordered to make the Claimant whole as follows:
 1. returned to service with seniority rights unimpaired;
 2. made whole for all vacation rights;
 3. made whole for all health, welfare and insurance benefits and doctor expenses for him and his family during the time he was held out of service;
 4. made whole for pension benefits including Railroad Retirement and unemployment insurance;
 5. made whole for any other benefits he would have earned during the time he is out of service;

6. made whole for all wages, overtime he could have worked, lump sum payments, general wage increases and cost-of-living adjustments;
7. removal of all record of this unjust discipline from personal records.”

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 were given due notice of hearing thereon.

As a threshold issue, the Board will address the Organization’s contention that the claim should be allowed as presented due to the Carrier’s failure to timely respond to the initial claim as required by Rule 34 of the Agreement, which reads, in pertinent part, as follows:

“(a) All claims or grievance must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 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 Organization notes that the initial claim in this case was mailed to the Superintendent of Field Operations on October 15, 2013 and delivered on October 18,

2013 and that the claim was not denied until December 27, 2013 beyond the 60 day time limit set forth in Rule 34. The Organization argues, therefore, that Rule 34 states that if the claim is not timely denied, “the claim or grievance shall be allowed as presented.” In support of its position that the claim before the Board should be allowed as presented, the Organization has cited several Awards rendered on this property.

While not disputing the fact that the response to the initial claim was rendered beyond the time limits in Rule 34, the Carrier argues that it is liable for no more than the back pay for the period from the Claimant’s dismissal until the denial was rendered on December 27, 2013. The Carrier has cited several NRAB and Public Law Board Awards in support of its position, citing, in particular, Award No. 44 of Public Law Board 5935 involving the Parties now at bar, wherein Arbitrator Simon, in interpreting the proper application of Rule 34 for a dismissed employee, supported the Carrier’s position relative to the proper remedy for an untimely denial.

The Board finds that arbitral precedent clearly supports the Carrier’s position that in cases of dismissed employees, such as the Claimant herein, its failure to deny the Organization’s initial claim in a timely manner did not require that the Claimant be reinstated to service and paid for all lost time. In Second Division Award 13692, Referee Kenis succinctly set forth the prevailing arbitral authority on this issue:

“The long settled Rule is that the late denial of a claim tolls the Carrier’s liability for the procedural violation as of that date. From the date of the late denial, the dispute is considered on the merits if the merits are properly before the Board. Second Division Awards 10754, 11187, 12384, 12580, Third Division Awards 26239, 35604, 35473, 24298, 24269. Accordingly, the measure of damages for the Carrier’s violation of Rule 35 is compensation to the Claimant at his straight time rate from the date of his dismissal until January 18, 2001, when the Carrier properly issued its declination of the claim.”

While the Organization has cited several Awards regarding the application of Rule 34, the Board notes that those Awards did not involve dismissed employees and accordingly do not overcome the weight of precedent as cited by the Carrier. Accordingly, the Board finds that the failure to deny the initial claim in a timely manner requires the Claimant to be paid for his time lost from the date of his

dismissal on October 4, 2013, until the date the denial was issued on December 27, 2013.

In regard to the merits of the dispute, the Claimant was dismissed from the Carrier's service following a formal investigation in connection with the following:

“. . .your alleged failure to comply with instructions on August 7, 2013 at approximately 2340 hours when working as a Carman at the Northtown Yard.”

The record in this case indicates that at approximately 11:35 P.M. on the subject date, Leadman Carman Krondak called the Claimant and Carman Breth and instructed them to inspect an outbound train that was on departure track 7. Mr. Krondak stated that almost an hour later, at 12:30 A.M., he called the Claimant and asked him what time had he started the inspection on track 7 and the Claimant responded “put down any time I wanted.” Mechanical Foreman Knight testified that while driving down Sugar Bowl Road at 12:30 A.M., he observed the Claimant talking to a Switchman. About 20 minutes later, the Mechanical Foreman drove to departure track 7 and noted that the air hoses had not been coupled on the train and that the inspection had not been started on the train. Mr. Knight stated that at this point, he arranged to have two other Carman assigned to inspect the train and called the Claimant and Carman Breth to meet him in his office to discuss the matter. Also, Mechanical Foreman Knight testified that Carman are expected to begin their tasks no later than 30 minutes after receiving instructions.

The Claimant testified that after receiving the instructions to inspect the train, there was a need to obtain a testing device that was located on departure track 3 and while he and Carman Breth were retrieving the device, they were blocked by a train making a shove movement and were again similarly delayed on their way back to departure track 7. A statement from a Switchman was entered into the record confirming that a shoving move was made that blocked egress to departure track 3.

The Board finds that there is substantial evidence in the record to support the Carrier's conclusion that the Claimant failed to follow instructions to begin the inspection of the train within the expected 30 minutes and that, if fact, the Claimant, when called by General Foreman Knight, almost an hour and a half after receiving the instructions, had not even started the inspection. Relative to the delay caused by the shoving movement, the Switchman's statement indicates that she had a conversation

with the Claimant and Carman Breth on their way to departure track 3 at 12:30 A.M., which was almost an hour after the instructions had been given. The Claimant has given no plausible explanation for the additional delay nor is there a logical explanation of why two individuals had to retrieve the tester as opposed to one of them starting the work on the train by beginning to couple the air hoses, which work did not require the tester. The Board finds that the Carrier sustained its burden of proving the Claimant's guilt of the charged offense.

Relative to the discipline assessed in this case, the Carrier notes that its decision to dismiss the Claimant was in accordance with its Policy for Employee Performance Accountability (PEPA). Specifically, such Policy provides that a first serious violation will result in a 30-day record suspension and a review period of 36 months and that a second serious violation committed within the review period "may result in dismissal." The Carrier points out that at the time of this incident, the Claimant was under two active 36-month review periods for two Level S 30-day record suspensions assessed for prior violations.

Upon review of the entire record, the Board finds that the discipline of dismissal was in accordance with PEPA in that this was the Claimant's third serious offense within the review period. While the Carrier had given the Claimant the chance to continue employment after the second serious violation, the Claimant did not take advantage of this opportunity afforded him. Accordingly, the Board will not disturb the Carrier's decision to dismiss the Claimant. While the claim for reinstatement is denied, the Claimant should be made whole for time lost from the date of his dismissal on October 4, 2013 until the issuance of the denial on December 27, 2013 and no compensation will be awarded beyond that date.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 5th day of October 2016.