Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7981
SECOND DIVISION Docket No. 7829
2-BNI-CM-'79

The Second Division consisted of the regular members and in addition Referee Bernard Cushman when award was rendered.

Parties to Dispute: System Federation No. 7, Railway Employes' Department, A. F. ofL. - C. I. O. (Carmen)

Burlington Northern Inc.

Dispute: Claim of Employes:

1. That the Carrier violated the current agreement, particularly Rules 13, 34, 35 and 39 when they improperly dismissed St. Cloud Shop's Upgraded (advanced) Carman Donald C. Roering from service October 11, 1976.

2. That accordingly the Carrier be ordered to compensate Upgraded (advanced) Mechanic (Carman) Donald C. Roering in the amount of the Carman's rate at whatever hours the shop force is assigned to work, all paid holidays, all benefits under Travelers Insurance, all benefits under Dental plan, all benefits under supplemental sickness plan, all benefits under Railroad Retirement plan (unemployment, sickness and retirement) all time to count toward journeymen's date, all time to count for vacation credits and all records cleared of this dismissal, this claim to commence October 19, 1976 and continuing until Donald G. Roering is restored to work at St. Cloud Shops.

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 wavied right of appearance at hearing thereon.

The claimant, Donald G. Roering, was initially employed by the Carrier as a Laborer in the Mechanical Department at St. Cloud, Minnesota on April 28, 1976. At about that time, the Carrier had a shortage of Carmen at the St. Cloud Shop. The Carrier bulletined for Carmen on the first and second shifts at St. Cloud. No bids for the positions were received. Accordingly, the shop superintendent at St. Cloud recommended the upgrading of forty Carmen Apprentices to temporary Carmen in accordance with the requirements of Rule 39(b) of the Schedule Agreement. By letter dated May 13, Vice President DeButts wrote to the General Chairman of the Organization for his

concurrence. There was included with the letter a list in seniority order of the apprentices which the Carrier wished to upgrade to temporary Carmen. This included the claimant. The claimant had applied for and had been accepted in the Carrier's Carmen Apprenticeship training program. The Organization concurred in the upgrading and signed the May 13, 1976, letter on June 24, 1976.

The claimant began his employment as a Carman Apprentice-First on May 5, 1976, seven days after he was employed as a laborer. As a result of the upgrading in accordance with the letter of May 13, 1976, which was approved by the Organization on June 24, the Claimant received an upgraded apprentice date of August 2, 1976. By letter dated October 11, 1976, the claimant was dismissed from the apprentice training program effective October 18, 1976. The Shop Superintendent specified reasons upon which he based his decision to dismiss the claimant. Among those reasons were formal reprimands for poor work habits received by the claimant from his supervisor on September 8 and 17, 1976, the loss of five creditable days by the claimant toward his journeyman certificate because of tardiness or leaving early, and delay in completing six lessons of the prescribed Railway Education Bureau course, which is required of apprentices. The claimant served as an apprentice for 61 work days and as an upgraded mechanic or Carman for 56 work days.

Subsequent to the dismissal of the claimant, the Local Chairman of the Organization submitted a claim on behalf of the claimant to the Carrier's superintendent by letter dated October 21, 1976. The Superintendent declined the claim by letter dated December 20, 1976. The Organization contends that the Carrier's declination of the claim was untimely and in violation of Rule 34(a). Rule 34(a) provides:

> "(a) All claims or grievances 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 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 Carrier states that the letter was delivered to the Local Chairman's office on December 20, the sixtieth day, and placed on his desk during the same day. The Local Chairman states that he did not receive the letter until the following morning, December 21, 1976. In his letter of December 27, 1976, the Local Chairman states that the letter "was not delivered until after the close of the first shift which you are well aware of that I work on." The record shows that the Local Chairman's shift ended at 4:00 p.m. on December 20. The Local Chairman stated that the letter was on his desk when he came to work on December 21, 1976. The Board finds that the letter was in

fact delivered to the Local Chairman's office and placed on his desk after the close of his work shift but during the same day it was dated, to wit, December 20, 1976.

The Board holds that the Carrier's declination of the claim took place on December 20, 1976, the sixtieth day, and was timely. It is well established that the first day of the time period in this case, October 21, is not counted in computing the sixty day period. This Board has followed that principle and has not included the date of filing within the time limit period. Second Division Award No. 3545; Third Division Award No. 19177. The use of the word "from" in Rule 34 (a) indicates that the parties intended the normal rule to apply and the sixty day time period would exclude the day on which the claim is filed. The Board finds that Rule 34 (a) was not violated.

The Board further finds that the Organization did receive the actual delivery within the meaning of Rule 34 (a) if it is assumed that receipt is necessary. The Board is of the view that Rule 34 does not require actual delivery into the hands of the General Chairman within the sixty calendar day period. Here, there was delivery on the sixtieth day. Assuming, however, that personal delivery was required, an assumption that the Board does not make, Rule 34 (a) not requiring such delivery in the view of the Board, as stated above, actual delivery was in fact made on the basis of the facts in this record. The Board interprets Rule 34 (a) as satisfied by the sending of the Carrier's decision to the Organization within the sixty day period. Award No. 12 of Public Law Board No. 176, U.T.U. v. P.C.; Case W-F-221 of Special Board of Adjustment 850, U.T.U. v. C&NW; Third Division Award No. 11575, BRAC v. New York, New Haven and Hartford RR; Second Division Award No. 6878, IAMAW v. SP(p).

There is, however, another time limit issue in this case raised by the Carrier. The initial claim of October 21, 1976, was declined by letter dated December 20, 1976, as stated above. The Organization, however, did not file an appeal of the disallowance of the claim directly to the Carrier's Vice President-Labor Relations, the highest appeal officer, until April 14, 1977. That date was 115 days after the declination of the claim by the Superintendent of St. Cloud Shops. Rather, the Organization appealed to the Carrier's Vice President-Mechanical. The appeal to Mr. R. E. Taylor, Vice President-Mechanical, was dated February 1, 1977. His reply was dated March 23, 1977, and Mr. Taylor stated that "this is not a discipline case and it is not properly referable to me for the reasons stated below," stating, among other things, that the claimant had begun his apprenticeship on May 5, 1976, and had not completed 122 days as an apprentice when he was dropped effective October 18, 1976. Taylor went on to state that the Carrier determination in the case stemmed from Rule 38(c).

Rule 38(c) provides that all apprentices shall be subject to a probationary period of 122 work days during which they may be dropped at any time that the Company determines they show insufficient aptitude or interest to learn the trade. By letter dated February 9,1970, the Carrier had issued a notice to all General Chairmen setting forth the proper procedure to be used in the

handling of claims and grievances. This letter was written after the consumation of the merger which created Burlington Northern effective March 3, 1970. So far as pertinent, the letter stated that in other than discipline cases initial filing should be with the employing officer of the individually named claimant and that if not settled at that level, such claims and grievances may be appealed to the Vice President-Labor Relations at St. Paul, Minnesota. The letter stated further that until further advised "I (Vice President-Labor Relations at St. Paul, Minn.) will be the highest designated officer for all crafts on the Burlington Northern under the Railway Labor Act (material in parentheses supplied)." Thereafter, on August 18, 1976, an updated list of Carrier's officers designated to handle claims from the shop craft unions was distributed to General Chairman. The August 18, 1976 letter did provide for an intermediate appeal to Vice President-Mechanical in disciplinary cases, but in all other cases the procedure remained that such claims shall be filed initially with the employing officer and if not settled at that level, appealed to the Vice President-Labor Relations. Rule 34 (b) provides that such an appeal must be taken in writing within sixty days from the receipt of notice of disallowance. This was not done here.

The Organization claims, however, that the situation here constitutes a disciplinary matter and requires the holding of a fair and impartial investigation with written notice and the full panoply of procedures under Rule 35, including the application of the standard of just cause.

A threshold question, therefore, is raised as to whether the dropping of the claimant from the apprenticeship program constituted discipline. The Board holds that this is not a case which involves discipline. The apprenticeship program and in particular the provisions of Rule 38 (c) create a special category of employees who are subject to a probationary period of 122 work days during which they may be dropped at any time the Company makes a determination of insufficient aptitude or interest to learn the trade. The case of an apprentice who is dropped from the program may be likened to that of an employee who becomes physically incapacitated to perform the duties of his job and who is removed from service for that reason. The function of the supervisors is to use the probationary period as an opportunity in which to screen the employee and to arrive at a determination as to whether or not he is likely to succeed in performing the duties of the job. In any event, the special provisions of Rule 39 (c) make it clear that dropping apprentices from the apprenticeship program is not intended to have the full panoply of the procedures of Rule 39 which relate to discipline, such as investigation and the requirement of just cause and the like. A special category has been established by the parties. Nor does the fact that apprentice is temporarily upgraded, in view of the requirement that the apprenticeship program be completed despite the upgrading remove the employee who is temporarily upgraded from the scope of the apprenticeship program. Since such an employee is still within the apprenticeship program and cannot become a regular Carman or Mechanic until he has completed the apprenticeship program, the contractual intent is obviously to still make available to the Carrier the opportunity, at least for the purpose of assessing his skills and potential, the right to drop the employee from the apprenticeship program if it is determined by

management that there is insufficient aptitude or interest on the part of the employee. We shall, therefore, deny the claim. See Second Division Awards 6873 and 7263 for authority.

Having found that Carrier had the right to remove claimant from service in line with the foregoing, we need not deal with the procedural objection of the Carrier.

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
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 20th day of June, 1979.