

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

(Brotherhood Railway Carmen of the United States
(and Canada
Parties to Dispute: (
(Burlington Northern Railroad

Dispute: Claim of Employees:

1. That the Burlington Northern Railroad unjustly dismissed Carman J. C. Dent from service following an unfair and unjust investigation.
2. That the Carrier violated Agreement rules when they failed to deny the claim as presented within the allowable sixty (60) day time limits.
3. That Carman J. D. Dent be immediately reinstated to service with seniority rights, vacation rights and all other benefits that are a condition of employment, unimpaired and with compensation for all lost time plus twenty one percent (21%) annual interest, compounded daily, and that he be reimbursed for all losses sustained account of loss of coverage under health and welfare and life insurance agreements during the time unjustly and unfairly held out of service.

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 employes 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.

Claimant, an employe of the Carrier with almost 40 years service at the time of his dismissal on March 31, 1983, worked as a Car Inspector at Thomas Yard, Birmingham, Alabama. On March 21, 1983, Claimant was charged with failure to lock and blue flag Track No. 3 ICG, and place blue disc protection on the throttle of Engine BN 30 during the performance of his duties on March 19, 1983, at 10:30 A.M. Claimant's dismissal from service came two days after the investigation into the charges against him. For the following reasons, the Claim is denied.

As a preliminary issue, the Organization contends that the Carrier violated Rule 34(a) of the Agreement, which states:

"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 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 claims or grievances."
(Emphasis supplied.)

The record reveals that the initial Claim was timely appealed and received by Carrier's Chief Mechanical Officer on May 16, 1983. On July 19, 1983, the Local Chairman requested of the Chief Mechanical Officer that the Claim be allowed as he had not received any notice of disallowance from the Carrier. In response, the Chief Mechanical Officer tendered to the Local Chairman a copy of a letter dated June 30, 1983, in which the Carrier rejected Claimant's appeal. The Carrier maintained that the June 30, 1983, letter addressed to the Local Chairman was delivered to the U.S. Mail on that same date.

The Board recognizes Rule 34(a)'s express provision which calls for the granting of a claim or grievance by default if the Carrier fails to provide the required notice within sixty days of the filing of the claim or grievance. From the record before us, the Board cannot conclude either that the Carrier never mailed the letter on June 30, 1983, denying the Claim, or that the Organization timely received a denial of the Claim but elected, for whatever reason, to decline acknowledgment of its receipt. The Board finds, in the absence of any evidence of past practice or contract limitation to the contrary, that the usual method of delivery for presentment of claims and responses thereto during the appeal process on the property is the regular U.S. Mail. Indeed, except for the Organization's initial appeal and Carrier's denial of a violation of Rule 34(a) on August 1, 1983, the record fails to indicate the use of Certified Mail delivery by either party during the remainder of the appeal process on the property. Therefore, the Board concludes that but for the vagaries of delivery by U.S. Mail, the placement of Carrier's June 30, 1983, denial of the Claim into the regular U.S. Mail on that date was the accepted practice on the property, and the denial fell within the time limit of Rule 34(a).

Turning our attention to the merits of the case, the record contains sufficient credible evidence, including the Claimant's own admission, to prove his guilt of the offense charged. Claimant was observed by the General Car Foreman on March 19, 1983, moving between cars coupling air hoses. The entire time Claimant worked Track No. 3 ICG there was no lock on the west end of the track and no blue flag. In addition, the four cars Claimant serviced on Track No. 3 ICG were attached to the rear of the 75 car train to which the locomotive was coupled. Claimant was aware that the remaining 71 cars had already been inspected and that the power was attached. Besides committing a violation of Safety Rule 181(b), Claimant failed to place a blue signal on the throttle of Engine BN 30 in violation of paragraph (c) of that Rule, which provides as follows:

"In addition to protection required as prescribed in (b) of this rule, when workmen are on, under or between the locomotive or rolling equipment coupled to a locomotive, a blue signal must be attached to the controlling unit at a location where it is readily visible to the engineer or employee at the controls of that locomotive."

Claimant's length of service is an important, but not the only factor in evaluating the Organization's contention that the penalty of discharge was excessive. Other factors pertinent to this case are Claimant's familiarity with the rules and his prior discipline record. Claimant knew he was acting in violation of an important Safety Rule on March 19, 1983, when he coupled cars without blue flag protection. His conduct is not justified based upon Claimant's subjective belief that a "short cut" was necessary in order to prevent delay. There is no evidence that Claimant was ordered to proceed without blue flag protection or that he would have been disciplined for delay in complying with Safety Rule 181. Review of Claimant's service record reveals that in the three years prior to his dismissal, Claimant received a notation on his personal record for failing to properly blue flag and lock a switch, and removal from service from June 3, 1980, until December 21, 1980, for a second blue flag violation observed by an FRA Inspector.


The Board finds, based upon review of the entire record and the recent violations by Claimant of the same offense, that it is compelled to sustain his discharge as neither arbitrary, capricious nor unreasonable.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July 1986.