

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22748
Docket Number MW-22344

Robert A. Franden, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Burlington Northern Inc.

STATEMENT OF CWM: "Claim of the System Committee of the Brotherhood
that:

(1) The suspension of thirty (30) days imposed upon Section Foreman M. D. Laudert and his permanent disciplinary demotion to laborer for being absent from duty on January 31, 1977 was excessive, unwarranted, without just and sufficient cause, an abuse of justice and discretion and in violation of the Agreement (System File T-M-194C/MW-20 5/9/77).

(2) Mr. M. D. Laudert's seniority as section foreman be restored and unimpaired, reimbursement be made for all wage loss suffered, including the difference between what he would have received at the section foreman's rate and what he was paid at the laborer's rate until he is returned to work as a section foreman with seniority as such unimpaired and he be reimbursed for mileage expense incurred traveling between his headquarters at Hawley, Minnesota and Staples, Minnesota on February 7, 1977."

OPINION OF BOARD: Section Foreman M. D. Laudert was demoted from foreman to laborer and suspended from the service of the Carrier for 30 days after an investigation wherein he was found to have absented himself from duty on January 31, 1977 without proper authority.

At the outset the Organization takes the position that the investigation was not properly held in that claimant was not given 5 days written notice of the investigation as provided in Rule 40 (C):

"RULE 40. INVESTIGATION AND APPEALS

C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held, Investigation shall be held, as far as practicable, at the headquarters of the employee involved."

There is no question but that the claimant did not receive the notice of the investigation which was held on February 7, 1977 until February 4, 1977. At the **commencement** of the hearing the claimant's Organization representative objected to the holding of the hearing due to the defect **in the** notice.

The Carrier takes the position that any defect in the timeliness of the notice was not prejudicial and hence should not be the basis for overturning the discipline assessed.

While we find some language in Award 20238 that could be cited for the proposition that a failure to give the 5 days notice required by rule 40-C is not fatal unless shown to be prejudicial, we believe that the awards of this Board which hold the parties to their agreements with respect to time limits should be followed. The **wording** of the **rule** is clear; 5 days written notice is required. That is a bargained for right of an **employee** subject to discipline. In the instant case the **employee** being subject to discipline lay claim to that right at the outset of the hearing. While holding the parties to the time limits **set** out in their agreements may **from** time to time work an injustice for either a carrier or claimant, we must apply the agreements as **written** and not by case law create exceptions which have not been agreed on by the parties.

We will sustain the claim with the exception of the mileage claim for which we find no contractual basis,

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved. in this dispute are respectively Carrier and Employees within the **meaning of** the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

Award ~~Number~~ 22748
Docket Number ~~MW-22344~~

Page 3

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Claim sustained in accordance with this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: _____

A.W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of February 1980.