

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37338
Docket No. MW-37322
05-3-02-3-353**

**The Third Division consisted of the regular members and in addition Referee
Ann S. Kenis when award was rendered.**

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE: (

**(The Burlington Northern and Santa Fe Railway Company
(former Burlington Northern Railroad Company)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Work Equipment Mechanic W. B. Golie for his alleged failure to apply proper lockout tag out to adjacent machines on the same track while he was working on a spike reclaimer on November 28, 2000 was without just and sufficient cause and excessive punishment (System File B-M-852-F/11-01-0156 BNR).**
- (2) The Agreement was further violated when General Director Roadway Equipment J. W. Upward failed to timely disallow the claim presented by Vice General Chairman G. E. Frank.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Work Equipment Mechanic W. B. Golie shall be reinstated to service with all seniority unimpaired, compensated for all wage loss suffered, credited for railroad retirement, vacation and other related losses."**

FINDINGS:

The Third 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.

On November 28, 2000, the Claimant was working as a Traveling Equipment Maintainer with Rail Gang RP11 at Great Falls, Montana. That morning, the Roadmaster and the Assistant Division Engineer performed a random operations test on Rail Gang RP11. They saw the Claimant repairing a spike reclaimer. The Claimant followed the lockout/tagout procedure for the spike reclaimer prior to making the repairs, but the Carrier supervisors noticed that he had not tagged or locked out the machines that were running adjacent to the spike reclaimer.

The Claimant was removed from service and an Investigation was held on December 7, 2000. Following the Investigation, the Claimant was dismissed. The Organization's appeal was not resolved on the property and it is now properly before the Board for resolution.

We turn first to the Organization's procedural argument. The Organization contends that the Carrier untimely disallowed the initial claim and therefore it must be allowed as presented. Rule 42A is the applicable provision and it states as follows:

"RULE 42. TIME LIMIT ON CLAIMS

- A. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company 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 Company 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 Company as to other similar claims or grievances."

The record establishes that the instant claim dated February 13, 2001 was sent by UPS mail and received by the Carrier on February 14, 2001. By letter dated April 17, 2001, the Organization advised the Carrier that there had been no response to the claim within the 60-day time limit. In subsequent correspondence, the Organization stated that it did not receive the Carrier's claim denial until April 18, 2001, 64 days after the initial appeal of the discipline was filed.

The Carrier disputed the Organization's claim of untimeliness. It argued that a denial letter was sent to the Vice General Chairman on April 12, 2001, within the 60-day requirement. An affidavit from the administrative assistant who mailed the claim denial was submitted, as was the United States Postal Service Certified Mail tracking information, in support of the Carrier's contention that it was not in violation of the time limit Rule. The Carrier contends that the date of mailing the claim declination, not the date of receipt, is controlling.

It is not necessary for the Board to interpret the Agreement and construe whether the time limitation runs from the date the Organization receives the claim declination or the date the declination was sent. Even under the construction most favorable to the Organization - the party asserting this affirmative defense - we are not convinced that the evidence established that the Carrier's denial was outside the required 60-day time limit set forth in Rule 42A. The date on the certified mail receipt would have been conclusive evidence in support of the Organization's position. Significantly, however, the date was omitted when the Organization signed the certified mail receipt. As the record stands, then, there is nothing beyond mere assertion to substantiate the Organization's argument. Accordingly, the Board finds that there is insufficient proof to conclude that the Carrier issued an untimely denial of the claim.

Turning to the merits, we conclude that there is substantial evidence to support the Carrier's determination that the Claimant violated the applicable Rules

Form 1
Page 4

Award No. 37338
Docket No. MW-37322
05-3-02-3-353

pertaining to lockout/tagout procedures. Where, as here, adjacent machines are within 50 feet of the machine being locked out, the person performing the lockout must also tagout the adjacent machines. The Claimant concededly did not do so, despite his familiarity with this important Carrier Safety Rule.

The Organization's assertion that the Claimant lacked sufficient hardware to properly lockout/tagout the adjacent machines does not lessen the Claimant's culpability. If the adjacent machines could not be properly locked and tagged out, the Claimant should not have been running those machines until the necessary safety precautions had been taken. His actions constituted a serious potential danger to the Carrier's operation and thus discipline was fully warranted.

The Claimant has a long service record and his dismissal is indeed regrettable. However, we have no basis for concluding that the penalty imposed was an arbitrary or unreasonable exercise of the Carrier's discretion. Unfortunately, the Claimant had committed a serious Rule offense two years previously. Under the Carrier's Policy for Employee Performance Accountability, two serious Rule offenses within a three year period results in dismissal. We find no valid reason on this record for disturbing the discipline assessed under these circumstances and must therefore rule to deny the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 19th day of January 2005.