

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37451
Docket No. MW-37947
05-3-03-3-340**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent Level 5 and dismissal) imposed upon Mr. F. Modes for alleged violation of Union Pacific Rule 1.6(4) in connection with an on duty personal injury sustained on April 15, 2002 was arbitrary, capricious, unwarranted, on the basis of unproven charges and in violation of the Agreement (System File J-0248-54/1333211-D).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. F. Modes shall now have all reference to this discipline removed from his personal record and he shall be returned to service with all rights and benefits restored unimpaired and compensated for all lost time.”**

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.

The Claimant was dismissed for dishonesty in connection with a claimed on-duty injury allegedly sustained on April 15, 2002. At the time of his dismissal, the Claimant had some 11 years of service with the Carrier. His work record showed no significant previous discipline.

The Organization challenged the discipline on the merits as well as several procedural grounds. After careful review of the record, we are constrained to find that the claim must be sustained on one of the Organization's procedural objections.

Rule 48(e) reads, in pertinent part, as follows:

"(e) A decision, based on evidence adduced at the investigation, will be rendered in writing within twenty (20) calendar days following date the hearing is concluded. . . ."

The Hearing was concluded on June 12, 2002. The 20th calendar day thereafter was July 2, which was a Tuesday. In its August 1, 2002 claim, the Organization noted that the Carrier's decision was not dated until July 5, the Friday after Independence Day, and, according to the UPS tracking information, was not mailed until July 8, 2002, the following Monday. On September 25, 2002, the Carrier denied the claim without refuting the Rule 48(e) violation; it was not addressed in any explicit manner whatsoever. The Organization advanced the unrefuted violation in its November 4, 2002 appeal. Once again, however, the Carrier's January 3, 2003 reply did not respond to it.

In accordance with the substantial body of Board precedent, we may not ignore this mandatory provision of the parties' Agreement. Thus, we cannot reach the merits of the dispute. See, for examples, Third Division Awards 14623, 21996, 23553, 29987, 32759, and 33229. Accordingly, the Claimant's discipline must be set aside.

According to the record, however, the Claimant remained disabled for an undetermined time following his injury. Therefore, reinstatement with backpay is

directed to run only from the date he could have satisfied the Carrier's usual return-to-work requirements.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of March, 2005.