

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20125
Docket Number MW-19930

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Inc. (Formerly Spokane, Portland
(and Seattle Railway Company)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1-a) The thirty (30) day suspension of Machine Operator W. Kent was without just and sufficient cause.

(1-b) The Carrier violated the Agreement when it failed to schedule the thirty (30) day suspension of Machine Operator W. Kent to begin within five (5) days of notification thereof (System File 365 F/MW-20(b) 7/13/71).

(2) Machine Operator W. Kent be compensated for all wage loss suffered and his record be cleared of the discipline assessed because of the violations referred to within Part (1) of this claim.

OPINION OF BOARD: This is a discipline dispute which resulted from Claimant's involvement in the derailment of a dumpcar on April 28, 1971. The Petitioner contends that: (1) the discipline of a thirty (30) day suspension following hearing was without just and sufficient cause; and (2) the Carrier violated the Agreement when it failed to schedule the suspension within the period prescribed by Rule 40 D. of the Parties' Agreement.

The Carrier objects to the consideration of the Petitioner's first contention on the ground that the matter was not raised on the property. We cannot concur. In a letter to the Vice President-Labor Relations, dated July 13, 1971, the General Chairman stated:

"Conference was held June 25, 1971 with Mr. Wicks' representative Mr. S. B. McNaghten during which it was pointed out that accident occurred through no fault of claimant Kent's as he was using equipment provided by the Company and pole that was struck was permitted to be placed inside the minimum safety clearance of 8 ft. 6 inches, all of which was condoned by and under Company supervisors."

The foregoing clearly challenged the Carrier's findings of guilt and we must therefore consider whether the record supports the discipline. The record shows that the derailment occurred during the movement of equipment to pick up scrap along the right of way. The equipment consisted of a R-5 Rail Aid Crane, operated by Claimant, and a Dump Car TT-77 which was being pushed

by the Crane. The door (or tail gate) of the dump car, which was down during the movement, struck a rock detector pole alongside the track, resulting in the derailment. The Claimant's testimony about making the movement with the door down is as follows:

"SAYLOR: Mr. Kent, do you feel that moving the car with the door down complies with the safety rules?

"KENT: No."

In view of this clear admission by Claimant that he was not complying with the safety rules, we find no merit in the Petitioner's argument that the discipline was without just and sufficient cause.

In considering the Petitioner's second contention, several dates are pertinent. The investigation was held on April 30, 1971; Carrier's notice of its decision of guilt, including notice of a thirty (30) day suspension, was issued in a May 19, 1971 letter, wherein the thirty-day suspension was made effective Monday, May 31, 1971; the decision and suspension letter was received by Claimant on May 25, 1971 and thus the suspension date of May 31, 1971 did not begin until six calendar days after notice of decision to Claimant. Petitioner contends that the Carrier's failure to effect the discipline within five days after notice of decision violated Rule 40 D. and, further, that the Carrier should have complied with the five-day limitation because it could have done so without any reduction of the thirty (30) day suspension. For its part the Carrier accepts May 25, 1971 as the date on which the Claimant received notice of its decision. However, the Carrier says that, because the Claimant was on vacation during the period May 3-30, 1971, it was not possible to effect the discipline until he returned from vacation on May 31.

Rule 40 D. reads as follows:

"D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employe, with copy to local organization's representative. If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employe. If not effected within five (5) calendar days, or if employe is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be cancelled."

A dispute involving these same parties, an overlap between a vacation and a thirty-day suspension, and a time limit rule on rendering decision and effecting discipline similar to present Rule 40 D, has been before the Board in prior Award 19741 (Dorsey). In concluding in that Award that Carrier's noncompliance with the five-day limit in Rule 40 D. was not violative of the Agreement, this Board stated:

"We find that: (1) claimant had earned his paid vacation which was for a fixed period; (2) Carrier's finding of Claimant's guilt as prescribed in the November 19 notice to him and the 30 day suspension assessed against him for his failure to comply with Rules and Instructions on October 23 were of Claimant's making; (3) Claimant's vacation was a contractually earned asset; (4) the 30 day suspension was a valid contractual liability; (5) the asset and the liability could not run concurrently and the asset used as a setoff of the liability."

While the issues in Award 19741 are generally similar to the issues in this dispute, we note that the Award does not mention the issue of the Carrier's ability to comply with Rule 40 D. without any reduction of the suspension. The Carrier's ability to comply has been raised in this dispute; accordingly, Award 19741 is not apropos and this dispute must be decided on its own issues and facts. The Carrier said it instituted the suspension on May 31, 1971, because it was not possible to effect the discipline until Claimant completed his vacation on May 30. Petitioner says this conclusion is not sound because Carrier had thirty (30) days after the investigation within which to notify Claimant of its decision. The investigation was held on April 30, 1971; this gave the Carrier until May 30, 1971, the day before the Claimant was scheduled to return to work from his vacation, to notify him of its decision. The suspension could have been made effective within five calendar days after May 30 which would have been at a time not in conflict with the Claimant's vacation. Also, the Carrier's suspension date of May 31 would have been valid under the rule if Carrier had given notice of its decision five days prior to such date. Thus, in the time sequence of this dispute, the Carrier could have complied with Rule 40 D. without any resulting reduction in the thirty-day suspension. In view of the clear mandate in Rule 40 D. that "... a suspension shall become effective ... in no case more than five (5) calendar days after notice of such decision to the employee," we believe the minimum requirement of the rule is that when a Carrier has the ability to comply with the rule, it must do so.

In reaching this decision we have not been unmindful of the Petitioner's contention that the term "but in no case more than five calendar days after notice...to the employee" in Rule 40 D. makes the rule mandatory in all cases and that, therefore, Award 19741 should be held to be in error. However, in view of the Carrier's ability to comply with the rule in this dispute, as indicated above, we have not found it necessary to rule on this contention.

In view of the foregoing, and on the whole record, we shall sustain the claim.

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

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulke
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1974.