

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40595
Docket No. MS-40267
10-3-NRAB-00003-080065**

The Third Division consisted of the regular members and in addition Referee Martin W. Fingerhut when award was rendered.

(Abdul R. Elsharif

PARTIES TO DISPUTE: (

(Florida East Coast Railway, LLC

STATEMENT OF CLAIM:

“It is my request to be heard and the following considerations be granted:

1. I would like to be immediately re-instated back into the service with the record showing no break in service.
2. I would like to be compensated for the loss of wages and medical benefits estimating total to date \$26,318.80. (As this progresses, I expect this number to increase).
3. I would like to be re-assigned to a new crew within the same field in which I was wrongfully terminated.
4. I would like to be compensated for the loss of 401K and tax benefits estimating total to date \$5,500. (As this progresses, I expect this number to increase).”

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 May 2, 2007 the Petitioner received the following letter from the Carrier:

“You are directed to attend a Formal Investigation to be held in the FEC Railway Bowden Yard Conference Room at 11:00 AM, Friday, May 4, 2007 to develop facts and responsibility, if any, surrounding the charges listed below. The incident under investigation allegedly occurred while you were on duty and under pay while operating Company vehicle, HR 2185, on April 10 & 11, 2007. You are charged with the following:

- 1. Failure to Operate Company Vehicle HR 2185 in a Safe Manner by failing to stop at a Red Traffic Signal at the intersection of Highway US 1 and State Road 206 (Dupont Center) on April 11, 2007.**
- 2. Failure to Operate Company Vehicle HR 2186 in a Safe Manner by failing to stop at a Red Traffic Signal near the Avenues Mall, Jacksonville, FL on April 10, 2007.**
- 3. Failure to Report Traffic Incidents to Proper Authority on April 10 & 11, 2007.**
- 4. Failure to Report alleged Mechanical Defect on HR 2186, namely insufficient brakes, to Proper Authorities on April 10 & 11, 2007 in accordance with Company policies.**
- 5. Continuing to Operate Company Vehicle HR 2186 on April 10 & 11, 2007 with an alleged safety defect.**

6. Insubordination by way of Failing to Provide a Written Statement of the April 11, 2007 Traffic Incident when directed to do so by Gang Foreman C. Jordan on April 18, 2007.”

Following the Investigation, the Petitioner was found guilty of all charges and dismissed from service. That dismissal is the subject of this appeal. The facts as adduced at the Investigation, as briefly as accuracy will allow, are as follows.

Manager of Bridges, Kendall testified that on the morning of April 16, 2007, he was approached by the Petitioner who informed him that he had “an incident with the brakes on Boom Truck 2186 and had run a red light due to the truck not stopping.” The Petitioner told him the incident had occurred on April 11, 2007. There was no mention of a second similar incident on the same date.

At that point in his testimony Kendall explained that it later developed that the incident had occurred on April 10, 2007, not April 11, and that the error was the result of confusion arising from a shortened workweek during the period. All witnesses, including the Petitioner, confirmed the date as April 10. There was no indication in the record that the confusion in dates had any adverse impact on the Agreement due process rights of the Petitioner.

Kendall testified that no one had reported the red light incident prior to the Petitioner’s report on April 16, nor had anyone reported any problem with the truck’s brakes. He stated that on April 9, some smoke had been observed coming from the brakes when the truck had been operated for a short period with the emergency brake engaged, but no problems were revealed when the brakes were examined. In addition, he stated that the truck had been driven on a daily basis after April 9, with no brake problem reported.

Kendall further testified that after the Petitioner’s report, he requested statements from all other members of the gang that had driven the truck, both before and after the occurrence, to be delivered to him by no later than April 18. All reports with the exception of the Petitioner’s were received in a timely manner. The Petitioner’s report was not received until April 24. All statements, other than the Petitioner’s, recited that no brake problems had been encountered. Kendall had the

brakes examined by Carrier mechanics on April 18, at which time it was found that the brakes were in good working order.

Finally, Kendall testified that he had a further conversation with the Petitioner on April 29, at which time the Petitioner advised that there had been a second incident of running a red light which had occurred on the same day as the first incident, and that the second occurrence likewise was a result of a brake failure. Kendall stated that a review of GPS documents associated with the truck showed that the Petitioner had operated the truck approximately 200 miles on the same day, after the incidents, at speeds approximating 70 miles per hour. Kendall concluded that if the Petitioner had experienced the brake problems he alleged, the Petitioner should have pulled the truck off the road and called for help.

Carrier witness Tobler, a Bridgeman, who had ridden with the Petitioner at the time of the two incidents, testified that both incidents occurred on April 10. He testified that the Petitioner had not stopped, checked the brakes, or called any supervisor after either occurrence.

On cross-examination, Tobler stated that he had talked to the Petitioner at the time of the incident about stopping problems. He testified:

“Well, like I said normally when I drive the truck and I am coming to a red light, stop behind a car I try and bring the truck down before I get there to it. And that’s what I try to tell him sometimes, you know. You need to slow that truck down before you get there to it. Sometimes he has a habit, a tendency to do it in gear and then try to slow the thing down. I said you can’t do it like that you got to be loaded or unloaded you got to use the gear to bring this truck down.

Q. So you’re saying that you need to downshift that truck?

A. You need to downshift that truck loaded or unloaded.

Q. And when he does it he just goes to neutral and just uses the brakes?

A. Try and use the brakes and instead you can’t do it each time like that.”

(The record indicates that Tobler was disciplined for his failure to report the incidents.)

Bridge Foreman Jordan, the Petitioner's immediate supervisor, testified that his first knowledge of the occurrences was on April 16. He testified that he was not called by the Petitioner on April 10 with respect to either incident. Several other members of the crew were called by the Carrier. All testified that they had no knowledge of red light incidents prior to being told on April 16, and that they had driven the truck involved both prior and subsequent to April 10 and had experienced no braking problems.

The Petitioner testified that he had experienced braking problems on the day of the incidents, that he had called Jordan at the time of the occurrences and had been directed by Jordan to continue to drive the truck until he reached his destination. Concerning the testimony of Kendall that the Petitioner had operated the truck after the alleged incidents at approximately 70 miles per hour, the Petitioner's testimony was that sometimes the speedometer did not operate properly. Finally, with respect to his failure to supply a written statement by the time prescribed, the Petitioner stated that he did not believe that the Carrier really needed it by April 18 and, in any event, he had not been provided with any paper or pencil.

So much for the basic facts presented at the Investigation. Before turning to a consideration of the merits, there are two procedural arguments raised by the Petitioner which require consideration.

Initially, the Petitioner contends that the claim must be sustained because the Carrier failed to comply with Rule 13(b) of the Agreement, which provides that claims must be denied "... within sixty (60) calendar days from the date filed. . . ." The initial claim letter is dated June 7, 2007. The denial letter is dated August 10, 2007, more than 60 days thereafter. The difficulty with the Petitioner's argument, however, is that the Board has long and consistently interpreted the term "filed" as used in Rules such as Rule 13(b) as being the date the claim is received by a carrier, not the date of the letter. In this case, the date stamp on the claim letter shows a receipt date by the Carrier of June 13, 2007. Accordingly, the Carrier's denial was timely.

The second argument raised by the Petitioner is that the Carrier violated his Agreement due process rights by including his prior service record as an exhibit to the Investigation transcript. Here again, the Board held that an employee's prior service record can be included in the transcript, but solely for the purpose of determining the level of discipline if discipline is otherwise found appropriate. In this case, at the time the Petitioner's service record was placed in the transcript, the Hearing Officer stated that it would not be used "to find guilt or innocence. . . . It will be used in the event discipline will be issued and the service record will then be taken into consideration." There is no evidence that the Carrier used the service record to determine guilt. Indeed, there is no evidence that the Carrier used the service record for any purpose, including determining the level of discipline.

Turning to the merits of the dispute, the role of the Board is to determine whether there was substantial evidence adduced at the Investigation to support the finding that the Petitioner violated the Carrier's Rules as contained in the charge letter. It is clear that the evidence did support such a finding.

The first two items charged the Petitioner with failing to stop at two red light signals. The Petitioner not only admitted to not stopping at the red traffic signals, he was the one who informed the Carrier of those facts.

The third item charged the Petitioner with failing to report the two incidents at the time they occurred. While the Petitioner testified that he did report the incidents, the testimony of Tobler, who was riding in the truck with the Petitioner at the relevant times, was that the Petitioner had not notified anyone. In addition, the testimony of Bridge Foreman Jordan, the Petitioner's immediate supervisor, was that he had not known of the incidents until April 16. There was sufficient evidence upon which the Carrier could rely in finding that the Petitioner had not reported either incident at the time of its occurrence.

The fourth charged item was that the Petitioner failed to report any brake defects at the time the incidents occurred. Here again, the testimony of Tobler and Jordan that the Petitioner had failed to make any report concerning either red light incident was sufficient basis to support a finding that no report of brake failures had been made.

The fifth item charged was that the Petitioner continued to operate the truck at the time of the incidents with alleged defective brakes. As set forth above, the testimony of several witnesses showed that all had driven the truck both before and after the incidents and had found no brake defects. Nevertheless, the Petitioner testified that he believed the brakes were defective and, as far as he was concerned, he had continued to operate the truck at speeds approximating 70 miles per hour notwithstanding a perceived serious brake defect.

The sixth item charged was that the Petitioner was insubordinate when he failed to provide a witness statement in a timely manner. The Petitioner did not deny being told to provide the statement. His defense was that he did not comply because it was not important for him to do so, as evidenced by the failure of his supervisor to provide him with pencil and paper. There is no rational for the Board to disagree that the Petitioner's refusal was anything other than an act of insubordination.

Lastly, we find that the penalty of dismissal was not arbitrary or unreasonable. The Petitioner violated several Rules involving safety which could have resulted in injury to himself, fellow employees, and the public. Driving a truck over public highways through two red lights and at high speed believing that the truck had defective brakes are factors which the Carrier had the right to determine it could not allow to recur. The Petitioner's act of insubordination was simply an act of defiance. Dismissal was not excessive.

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 27th day of August 2010.