

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43674
Docket No. MW-44997
19-3-NRAB-00003-180494**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(Iowa Interstate Railroad

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. S. Burkett by letter dated June 6, 2017 for alleged violation of the Carrier’s General Rules 1.1, 1.6, Safety Rules 10.1, 13.2 and the Carrier’s 6.1 - Use of Company Vehicles Policy was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File IAIS-2017-0003 IIS).**
- (2) The claim* as appealed under date of June 22, 2017, shall be allowed as presented because the Carrier failed to schedule and hold a conference to discuss the matter, in accordance with Rule 19G, prior to issuing a denial of the appeal.**
- (3) As a consequence of the above stated violation, Claimant S. Burkett shall be returned to service and he shall ‘... be paid for all straight time hours and overtime hours at the appropriate rate of pay for everyday that he is held out of service and not allowed to return to work, either to the position of a Machine Operator or to a Track Laborer position.’**

***The initial letter of claim will be reproduced within our initial submission.”**

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.

After investigation held May 10, 2017 at by letter dated June 6, 2017 the Claimant – an employee in the Carrier’s service for ten years – was dismissed for failing to maintain his qualifications for employment (insurability and a valid driver’s license).

At the relevant time, the Claimant was a Machine and Boom Truck Operator. After the Claimant completed a medical leave of absence of some seven months and being released to return to duty by his physician without restrictions on April 28, 2017, as part of the return-to-duty process, the Carrier ran a routine background check which revealed that while he was on leave, the Claimant’s Commercial Driver’s License (“CDL”) had been revoked as a result of his failing an operating while intoxicated test. The Claimant’s position required that he “... be insurable under IAIS’s commercial auto policy throughout IAIS employment and be able to obtain and maintain a Commercial Driver’s License (CDL) upon request.” Rule 6.1 requires that employee’s operating Carrier vehicles have a CDL and provide evidence of insurability by the Carrier’s insurance carrier. Rule 13.2 requires that if an employee’s CDL is revoked then the employee must notify the Carrier of that action.

The Carrier’s auto liability insurance provider refused to insure the Claimant. As a result of the Claimant’s loss of his CDL and lack of insurability, the Claimant was dismissed.

As of the investigation, the Claimant's personal driver's license was reinstated, but his CDL remained in revoked status. Tr. 32.

The Carrier has the right to require that employees in Claimant's position have a valid CDL and be insurable under the Carrier's policy. See Third Division Award 43451 between the parties:

"... The Carrier's job requirements set forth in the job description require that the employees assigned as machine operators must possess and maintain a valid driver's license and they must be insurable under the Carrier's commercial auto liability policy. The Claimant was not insurable under the Carrier's commercial auto liability insurance policy. ...

With respect to the driver's license, although the Organization argues that there is no need for a machine operator to operate a motor vehicle, the Carrier has shown that in the case of its machine operators, they sometimes have to drive to obtain parts for the machines.

The Board finds that the Carrier's job requirements as set forth in its handbook are legitimate, and the Claimant simply failed to meet those job requirements. Consequently, the Board has no choice other than to deny this claim."

Substantial evidence therefore supports the Carrier's position that Claimant was not in compliance with the Carrier's rules that he needed a CDL and be insurable through the Carrier's insurance provider.

However, dismissal was excessive and therefore arbitrary. Under the circumstances of this case, we note that at the investigation, although the Claimant's CDL was in revoked status, the Claimant estimated that his CDL would be reinstated on or about October 17, 2017. Tr. 32. Further, the Organization's position at the hearing that the Claimant was "... a dedicated employee with a clean record ..." (Tr. 47) has not been shown otherwise.

Under all of the circumstances, as a remedy, this Board shall order that the Claimant be reinstated. However, and falling under this Board's broad discretion to

formulate remedies, we shall place certain conditions upon the Claimant's reinstatement.

First, the Claimant must pass all return-to-duty and qualifications tests and requirements.

Second, the Claimant must be insurable by the Carrier's insurance provider. Specifically, that will include the Claimant's demonstration that he has a valid CDL.

Third, if he can meet the above conditions, the Claimant can then exercise his seniority to any open position.

Fourth, the reason this case arose was because the Claimant had his CDL revoked as a result of failing an operating while intoxicated test. The Claimant therefore brought all of this on himself as a result of his off-duty conduct. Had the Claimant not engaged in that conduct, all of this would not have happened. Therefore, the Claimant's reinstatement shall be without backpay.

Fifth, this Board shall retain jurisdiction to resolve any disputes which may arise under the terms of this remedy.

A procedural argument raised by the Organization in this case does not change the result.

Rule 19(G) provides [emphasis added]:

“G. Any appeal of the discipline assessed will be made by the Employee or his representative to the highest officer designated by the Carrier (‘Appeal Officer’) within 30 days after the date of the discipline letter. The parties will schedule a conference to discuss the matter within 30 days of the date of the appeal. The Appeal Officer will issue a written decision within 30 days after the date of the conference. If the appeal is denied, the reason for denial will be given. If no decision is issued within 30 days, the appeal will be allowed as presented.”

As quoted above, the Carrier's written decision must come "... after the date of the conference." In this case, the Carrier's written decision came before the conference (as well as "after").

The Carrier dismissed Claimant by letter dated June 6, 2017. Organization Exhibit A-1. By letter dated June 22, 2017, the Organization appealed that dismissal. Organization Exhibit A-2. By letter dated July 18, 2017, the Carrier issued a written decision denying the appeal. Organization Exhibit A-3. The conference was held on August 18, 2017, with the Carrier concluding in its letter dated August 30, 2017 that "[t]he Carrier's previous denial was reaffirmed." Organization Exhibit A-4.

Therefore, as the Organization asserts, the Carrier issued a denial of the appeal prior to the conference when Rule 19(G) provides for a denial "after the date of the conference." However, it must be noted that the Carrier also issued a denial after the date of the conference.

The language in Rule 19(G) is difficult. The Organization is correct that the rule requires that a denial come after the conference. But the Carrier's argument that, on its face, nothing in the rule prohibits the Carrier from issuing a denial both before and after the conference, cannot be easily dismissed. And from the record, it appears that the parties have handled prior cases both ways.

In this case (and the similar procedural disputes decided by this Board between the parties this date) the procedural difficulties pointed out by the Organization do not change the outcome. When the smoke cleared, Claimant did not have a CDL which precluded his driving Carrier vehicles. On the procedural argument raised by the Organization, the Carrier issued denials both before and after the conference and because a denial was also issued after the conference, technical compliance with Rule 19(G) was achieved. However, for the future and to avoid unnecessary disagreements between the parties, Rule 19(G) should be interpreted as it reads – i.e., that "[t]he Appeal Officer will issue a written decision within 30 days after the date of the conference." Issuance of denials before the conference will not be considered to be in conformance with the rule.

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 18th day of June 2019.