

PUBLIC LAW BOARD NO. 2206

AWARD NO. 45

CASE NO. 45

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Sectionmen J.P. Schipper, O.C. Banda and Truck Driver S.E. Becker, September 6, 1978, was without just and sufficient cause and wholly disproportionate to the alleged offense and is in violation of the thirty (30) day period provided in Rule 4D. (System File 22-3 MW-20 11/9/78).
- (2) Sectionmen J.P. Schipper, O.C. Banda and Truck Driver S.E. Becker be reinstated to their former positions and paid for all time lost, including any overtime worked by members of the gang to which they were assigned.


OPINION OF BOARD:

Claimants were employed as Sectionmen near Denver, Colorado, until September 6, 1978 when they were taken out of service following an investigation held August 7, 1978, pursuant to a written notice which read as follows:

Attend investigation in the second floor Conference Room, Burlington Northern Yard Office, 3700 Globeville Road, Denver, Colorado at 9:00 a.m. Monday, August 7, 1978 for the purpose of ascertaining the facts and determining your responsibility in connection with an alleged altercation which occurred on company property at about 6:15 p.m., August 2, 1978 at Denver, Colorado as well as for your alleged violation of Rule G.

Arrange for representative and/or witnesses, if desired, in accordance with governing provisions of prevailing schedule rules.

Please acknowledge receipt by affixing your signature in the space provided on copy of this letter.


R. L. Beem
Division Superintendent

JFA/ld

ACKNOWLEDGED: _____

NAME _____

DATE _____

The record developed at the investigation, including Claimants' own admissions, persuasively establishes that they had spent the afternoon drinking together in a local bar after quitting work at 2:30 PM on August 2, 1978. At approximately 6:00 PM, they returned to Carrier's property to borrow a tow chain because one of their automobiles had become disabled. During the course of their travels they became embroiled in a dispute which boiled over into a fist fight in the conductors room at Carrier's 31st Street Yard Office, and which resulted in bodily injury to Claimant Schipper, requiring his treatment at a local hospital. The incident came to Carrier's attention when the Yard Telegrapher reported an altercation in progress and the Assistant Trainmaster and security police found Claimant's at about 6:30 PM in the conductors room.

Carrier sent each Claimant a written notice of discipline dated and postmarked September 6, 1978, by certified mail with return receipt requested, reading as follows:

This is to advise you that you are hereby dismissed from the services of Burlington Northern, Inc. for violation of Rules G and 57 of the Burlington Northern Safety Rules for being under the influence of alcoholic beverages while on company property and for entering into altercation with fellow employees while on company property at approximately 6:15 P.M., August 2, 1978 in the 31st Street Yard Office, Denver, Colorado, while assigned as Extra Gang Laborer on Gang 900, as disclosed by investigation accorded you on August 7, 1978.

Please acknowledge receipt by affixing your signature in the space provided on copy of this letter, and relinquish any and all company property that has been issued to you.

F. D. Smith
Assistant Terminal Superintendent

JFA:sg

(SIGNATURE)

(DATE)

The record shows that the Claimants certified receipt of those notices on September 7, 1978.

Thereafter, the present claim was initiated by the Organization in a letter dated September 11, 1978, as follows:

22-3

Mr. R. L. Beem, Superintendent,
Burlington Northern,
Denver, Colorado.

Dear Sir:

This letter is being directed to you in behalf of Sectionmen J. P. Schipper, O. C. Banda and Truck Driver S. E. Becker, Denver, Colorado.

On August 7, 1978 an investigation was held in behalf of these employees. On September 6, 1978 a letter was addressed to these employees by Assistant Terminal Superintendent F. D. Smith and mailed to them 'certified mail'. The letters in question were delivered on September 7, 1978.

It is our position Rule 40 D of the Agreement was violated when these employees failed to receive the decision by the carrier within thirty (30) days following the investigation. It was not received by them until the thirty first (31) day following the investigation.

I am requesting the above named employees be reinstated to their former positions and paid for all time lost as a result of the investigation. This to include any overtime worked by members of the gang to which they were assigned.

Very truly yours,



G. H. Duesdieker
General Chairman

GHD/lh

opelu #5

cc - Mr. S. E. Becker
Mr. J. P. Schipper
Mr. O. C. Banda

In the final appeal on the property the Organization urged, in addition to the timeliness of dismissal notices, that the penalty of discharge was too severe. That point was not taken up in the appeal to our Board, however, and the merits of the case are not before us for review. Certain other procedural objections relative to the propriety of the investigation and conduct of the hearing were raised de novo in oral argument before the Board, and therefore have not been considered because raised too late. Thus, the only question properly presented for our disposition is whether Carrier violated Rule 40-D by posting the notice of discipline to Claimants on the thirtieth (30th) day following the investigation. 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 employee, 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 employee. If not effected within five (5) calendar days, or if employee is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be cancelled.

The Organization urges that the Rule is intended to require receipt of the disciplinary decision by the Claimants no later than the thirtieth day after their investigation. However, that is not what the Agreement language says and we may not embroider with interpretation the plain and unambiguous words with which the parties express their intent on this point. If we disregard or add to that plain language of the rule on this point, we would be usurping for ourselves the role properly exercised by the negotiators of that language. In the facts of this case, Carrier "rendered", i.e., submitted or presented, its decision exactly within the letter of the law by posting it on the last day of the thirty-day period following the investigation. It might well be argued that absent impossibility or some compelling reason, all parties would be better served if things were not cut so close in matters of such importance. But the rule did not require that Carrier do more than what it did here by posting the decision on the last day of the period. In that connection, Awards 3-20125 and 3-21996 submitted by the Organization clearly are distinguishable on their facts.

The present case is directly on point with the facts and contract language presented for decision in P. L. Board No. 176-12 (UTU/PC, Hanlon) and P. L. Board No. 2295-24 (UTU/BN, Brown). Thus, in Award 24, P. L. Board No. 2295 held as follows:

"The Organization contends that the discipline should be set aside because Claimant did not receive notice of the assessed discipline until January 16, 1978, 31 days after the investigation was held.

"The governing rule (Paragraph D, Agreement of January 16, 1947) provides:

"'Decision will be rendered within thirty (30) days following the investigation and written notice will be given each employee to whom discipline is assessed and the employee will receipt for same.'

"The decision was rendered within 30 days. Notice of such decision was postmarked on January 14. The rule does not require that such notice be received within the 30-day period."

Similarly, P. L. Board No. 176 in Award 12 ruled as follows:

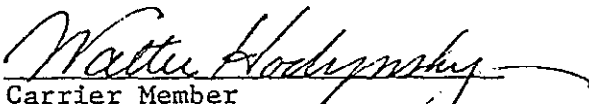
"The appeal in this case is based solely on the allegation that claimant was not notified of the carrier's decision within the ten day period following the completion of the investigation as provided in Rule 55. The investigation was completed on April 17, 1966 and carrier's letter of notification of decision was mailed on April 27, 1966 which is within the ten days allowed."

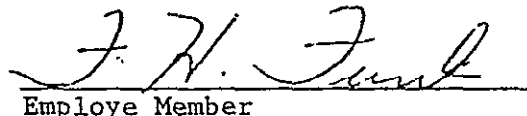
See also Award 2-1717, reading in pertinent part as follows:

"We find no merit in the contention that Carrier, in violation of Rule 7 (f), failed to render its decision within ten days from the date of hearing. The decision was dispatched by registered mail on March 11, 1960, ten days after the hearing had concluded. There is no question, therefore, but that the decision was rendered within the prescribed period. See First Division Awards 16366 and 16739 as well as Fourth Division Awards 1055 and 1177."

AWARD

Claim denied.


Carrier Member


Employee Member


Dana E. Eischen, Chairman

Date: 10/17/68