

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 63

Case No. 63

STATEMENT OF CLAIM

(1) The Carrier violated the provisions of the current Agreement when it dismissed Laborer Mr. Gilbert G. Escalante from service on February 7, 1996 for alleged violation of Rules 1.1.3, 1.2.5. Subpart A, and 1.2.5, Subpart C of the Burlington Northern Railroad General Rules, which is arbitrary, capricious, and on the basis of unproven and disproved charges and in violation of Rule 26 of the Agreement.

(2) The Carrier will be required to return Claimant to service with all seniority and other rights unimpaired and compensated for all wage loss suffered.

FINDINGS

Following an investigative hearing, the Claimant was dismissed from service on February 16, 1996 "in connection with your accident-prone behavior and failure to properly report a personal injury which allegedly occurred on January 29, 1996, at 3:45 P.M., while working as a laborer at Edmonton, Texas".

The Organization initiated a claim on the Claimant's behalf, and such claim was received by the Division Superintendent on March

11, 1996. By June 24, 1996, well beyond the required 60-day limit, the Organization had not received a reply from the District Superintendent and wrote to the Assistant Director, Labor Relations stating that the claim must be "allowed as presented", citing Rule 27, which states in pertinent part that where a claim is properly initiated and then disallowed:

. . . the Company shall within sixty (60) calendar days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.

On July 25, 1996, the Division Superintendent wrote to the General Chairman, indicating that the claim was denied.

The Company admits that it failed to respond to the claim within the required 60 days. The Company contends, however, that liability under Article 27 ceases upon the Division Superintendent's belated response. Both parties provided the Board with numerous previous Awards as to whether the claim should be "allowed as presented" (that is, the disciplinary action entirely rescinded and the Claimant made whole) or whether the Company's reply terminated the period for which the Company was liable (without respect to the merits of the matter). The Board is persuaded that the Carrier's position is the correct one. It should be noted that, in the instance of a dismissal (or, similarly, a demotion or failure to award a position), the damage inflicted on the Claimant (if the claim is a meritorious one) continues from day to day,

becoming increasingly serious as long as a procedural defect is not cured. Third Division Award 13167 examined many aspects of this question and concluded as follows:

Just as Rule 61 does not provide for continuing claims, but are accepted within the intention of the rules, so should it be accepted that a continuing claim is not one claim but a series of claims to which the time limit rule applies successively as each claim matures. Given such construction of "the continuing claim rule," it follows that each of the series of claims should be allowed (measured by days since this is the standard used in the time claim and time limit rule) for so long as the Carrier remains in default of the time limit rule. At the point the Carrier notifies the claimant in writing of its decision, the Carrier cures its procedural default and the substantive issue is joined prospectively. If the employees win on the merits, their claim will be sustained for the full period of the claim. If not, their claim will be sustained for the period in which the Carrier was in default of the time limit rule.

By contrast, some of the awards providing for sustained claims "as submitted", cited by the Organization, deal with matters which were already completed, such as a suspension; for these instances, there was no "continuing" possible damage to the Claimant. Other sustaining awards concerned not a tardy answer to an appeal letter but matters which can be considered more directly harmful to the Claimant's defense, such as a tardy disciplinary decision following an investigative hearing. Such instances are readily distinguishable from the claim here under review.

On this basis, the claim will be sustained for the period from February 16, 1996 until July 25, 1996 (the date of the Division Superintendent's tardy response), based on Rule 27. For this period, the Claimant shall be compensated "for all wage loss suffered". Since there is no rule or cited practice for deduction

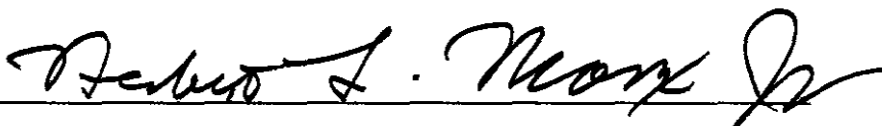
of outside earnings during this period, no such deduction is required.

Thus, the claim remains to be resolved on the merits for the period commencing July 25, 1996. During the investigative hearing, the Claimant readily admitted to his failure to follow the rule for immediate reporting of an on-duty accident; instead, he waited until the next day. He provided no mitigating information to explain why the alleged accident could not have been reported when it occurred. There is no question as to the Claimant's knowledge of the requirement of prompt reporting, given a record of frequent counseling as to safety procedures. The Carrier also provides convincing evidence as to a staggering number of recent accidents incurred by the Claimant, making the charge of his being accident-prone logical and supportable.

This history is in contrast to the conclusion reached in the Board's Award No. 58. Therein, the Claim was found to have "an unusually poor history as to work accidents", but the Board found no substance in the charge concerning the final incident leading to the dismissal. Here, by contrast, the Claimant's failure to report an accident when it occurred and his total lack of explanation for his inaction make this a sufficiently weighty "last straw".

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to make this Award effective within 30 days of the date of this Award.

A handwritten signature in cursive script, reading "Herbert L. Marx Jr", is written over a horizontal line.

HERBERT L. MARX, Jr., Neutral Referee

NEW YORK, NY

DATED: March 7, 1997