

PUBLIC LAW BOARD 6363

In the Matter of the Arbitration Between:
NORFOLK SOUTHERN RAILWAY
COMPANY

and

NMB Case No. 11
Claim of R. F. Jones

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM: Claim of Switchman R. F. Jones for restoration to service with compensation for all time and benefits lost in connection with his dismissal for alleged falsification of payroll documents.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant(s) employees within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on May 23, 2002 at Norfolk, Virginia. Claimant was present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Engineer's craft.

Claimant was assigned as a Utility Brakeman at the Voltz Mixing Center on September 4, 2001. The record shows that Claimant was observed leaving the property at the end of his shift at approximately 6:05 a.m., but subsequently called in a tie-up time of 7:05 a.m. Claimant was accordingly paid one hour and five minutes at the overtime rate for service he did not perform. Claimant was consequently removed from service and directed to attend a formal investigation in connection with the following charge:

Arrange to report...for a formal investigation to determine your responsibility, if any, in falsifying pay records by claiming 1 hour's pay for work not performed while you were performing service as Utility Brakeman on Position 7UDD304 on September 4, 2001.

An evidentiary hearing into the matter was held on October 12, 2001, and by letter dated October 22, 2001, Claimant was dismissed. The record establishes that the Organization appealed Claimant's dismissal at the local level on November 18, 2001 in accordance

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with Section F(1) of the controlling Agreement, which also requires in pertinent part that:

The Carrier shall, within thirty (30) days from the date the appeal is filed render a decision in writing on the appeal and, if the appeal is denied, the reasons for such denial shall be given. If no decision is rendered within thirty (30) days, the appeal shall be considered valid and settled accordingly, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other discipline cases.

According to the record before the Board, the Organization again appealed Claimant's dismissal on January 4, 2001, this time to the Carrier's Director of Labor Relations. In that letter, General Chairman Sykes contended in pertinent part as follows:

At the outset we must point out that, in response to the assessment of discipline on October 22, 2001, the Local Chairman filed a timely appeal with Division Superintendent Sliger on November 18, 2001, receipt of which was acknowledged on November 20, 2001 (copy attached for your ready reference). At this writing, some forty-five days later, no response to that appeal has been received. In application of the above-cited agreement, response to such appeals is required within thirty days. Failure to adhere to these time limitations serves to validate an appeal. Having breached a statute of limitations, we ask that our appeal be granted on that basis.

The Carrier responded on January 29, 2001 with a form letter denying the Organization's second appeal, the content of which did not address the alleged time limit violation. In a follow-up letter dated February 7, 2001, the Organization again cited the Carrier as follows:

At this juncture we must note that you did not respond to the issue we raised over the failure of the Division Superintendent to respond to the Local Chairman's appeal. Such failure clearly places a statutory bar on the continuing imposition of discipline in this matter. The Local Chairman took affirmative steps to insure that his appeal, dated November 18, 2001, was submitted to the Carrier in a timely fashion with acknowledgment of receipt thereof. This placed a concurrent burden on the

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Carrier to similarly verify and prove their response. They did not! The alleged response, copy faxed to this office after we raised this issue with you on January 4, 2002, does not sufficiently satisfy your burden of proof. Support for this position is found in Third Division Awards 32324 (Newman), 33320 (Mason), 33623 (Malin), 34195 (Benn) and 35721 (Douglas) and Award No. 28 of Public Law Board 6041 (Fletcher).

The Carrier nevertheless disregarded the Organization's argument, and as resolution of the matter could not be reached on the property, it was submitted to the Board for disposition.

DISCUSSION AND ANALYSIS: Upon review of the record, the Board is sufficiently convinced that Section F(1) of the Agreement was breached by the Carrier in the processing of the claim, and it concludes that the Organization's claim should be sustained without consideration as to its merit.

The record shows that the Organization appealed Claimant's dismissal in a timely manner on November 13, 2001, and the Carrier failed to respond within time limits specifically set by controlling provisions in the Collective Bargaining Agreement. Indeed, as the Organization noted in its February 7, 2002 letter, the record before the Board does contain a copy of a first level denial over the Division Superintendent's signature dated November 26, 2001. However, there is absolutely no additional evidence in the record that suggests the letter was ever sent and certainly none that it was ever received. The Carrier's bare assertions on this point do not meet its burden to prove that the denial was timely, and as such, the bona fides of the Carrier's November 26, 2001 communication is not adequately established in this record. As noted in Third Division Award No. 33320 (Mason) cited by the Organization:

Boards of Adjustment have previously held that time limits must be applied as written; that they cannot be interpreted on the basis of equity; and that they are not intended to provide a technical defense for either party when no meritorious defense is available. Boards have also held that a party alleging the sending of a letter must offer some proof that it was sent (Third Division Awards 10173, 11505, 20763, 24186, 25309, 30786, 31759). (Emphasis added)

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Other Arbitration Boards too numerous to cite have also ruled on the absolute nature of time limit rules. Section F(1) of the Agreement herein before the Board expressly states that, "the appeal shall be considered valid and settled" if no decision is rendered within thirty days, and absent genuine evidence of mutual waiver, the Carrier's compliance with that requirement is compulsory.

In this case, the Organization has argued persuasively that the Carrier failed to satisfy its contractual obligation under Section F(1) to respond to its initial appeal of Claimant's dismissal within thirty days. Given this finding, the Board is compelled to sustain the claim without consideration as to its merit. The following Award so reflects.

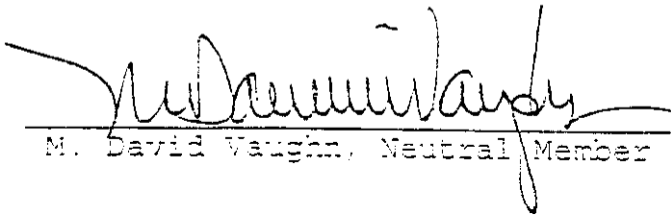
AWARD: The claim is sustained in its entirety as set forth in the Discussion.

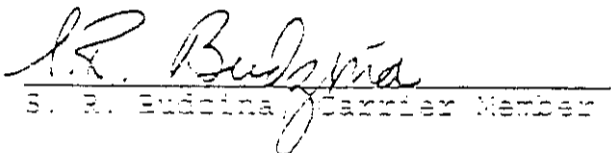
Claimant's dismissal shall be rescinded; and he shall be reinstated to service with all seniority rights unimpaired, and he shall further be made whole for all wages and benefits lost as a result of his suspension from service and subsequent dismissal.

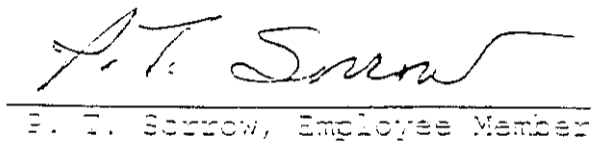
Claimant's service record shall also be expunged of all reference to his dismissal.

This Award shall be implemented within 30 days from the date of issuance.

Dated this 30th day of December, 2002.


M. David Vaughn, Neutral Member


S. R. Budzina, Carrier Member


P. T. Sorrow, Employee Member