

PUBLIC LAW BOARD NO. 4901

AWARD NO. 234

CASE NO. 234

PARTIES TO
THE DISPUTE:

United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim denied

STATEMENT OF CLAIM:

“Request in behalf of Arizona Division Brakeman C. L. Lopez for his reinstatement and for removal of the alleged violations of Rules 1.1, 1.1.1, 1.1.2, 1.1.3, 1.2.5, 1.2.7, 1.4, 1.6(1)(2)(3)(4), 1.13, and 1.47(D)(1) of the General Code of Operating Rules, in effect April 2, 2000, and rules S01.1, S-1.2, S-1.2.3, S-1.2.4, S-1.2.8, and S-1.5.3 of the BNSF Safety Supplement No. 1 in effect April 1, 2002, from the Claimant’s personal record and with pay for all time lost, all rights unimpaired, and with Health and Welfare beginning May 22, 2002, as a result of the investigation conducted on June 27, 2002, until returned to service.”

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

On February 1, 2002, Claimant reported sustaining a personal injury to his right knee. He alleged that he slipped on a spike can lid at approximately 0930 on January 30, 2002. He claimed it was frozen to the ground so he could not remove it from the walking path he followed. He also alleged he fell or stepped into a hole approximately 18" wide and 18" deep the next day, January 31st.

An investigation was originally scheduled for February 14, 2002 to inquire into allegations of misrepresentation of the facts surrounding the alleged injury as well as violations of Carrier rules regarding the reporting of hazardous conditions. Several postponement requests by the Organization and Claimant delayed the scheduling until June 10, 2002. There was a further delay of seventeen days, until June 27th, to accommodate the vacation plans of a Carrier witness. Under the circumstances, this short delay was not found to be prejudicial in light of all of the relevant circumstances.

Because of the nature of the alleged misconduct, Claimant was withheld from service on May 22, 2002. His doctor did not release him to return to work until that date.

Following investigation, Claimant was dismissed for violation of the rules as charged. At the time of the Carrier’s action, Claimant had approximately seven and one-half years of service. The record does not show him to have had any previous discipline of significance.

The record herein compels us to deny the Claim for both procedural and substantive reasons. Although procedural issues were raised by both parties, the contentions advanced by the Organization lack merit. Given the nature of the alleged misconduct, it was not improper for the Carrier to withhold Claimant from service pending the investigation. Second, although both parties’

correspondence contained typographical errors (dated the year 2001 versus 2002), it is clear when the events in question occurred and there is no evidence that anyone was misled. As a result, the errors were harmless. Finally, the record does not establish that the Carrier failed to produce any witnesses that had material information.

The Carrier, on the other hand, asserted a procedural challenge to the jurisdiction of this Board which is found to have merit. The Carrier's disciplinary decision letter was dated July 24, 2002. The Organization's appeal was not dated until September 25, 2002, which is sixty-three days later. Article 13(g)(1)(a) of the parties' Agreement establishes a 60-day time limit. Article 13(g)(6), as written, is a self-activating provision that says a Claim "... shall be considered closed ..." if there is a failure to comply with the time limit. The matter being thus closed, we have no jurisdiction to sustain the Claim.

Our review of the merits would also produce a denial award. According to Claimant's testimony, he said he reported the slip on the can lid as well as the fall into the 18" deep hole to his conductor. The conductor's statement and testimony do not corroborate Claimant. Moreover, an inspection of the area for the alleged hazards by the trainmaster two days later failed to produce any sign of the alleged hazards. The trainmaster supplemented his testimony with photographs of the area taken during his inspection. The photographs do not show either of the alleged hazards.

If the hazards were present and caused Claimant to slip once and fall to his knee once, as he claims, he clearly violated the Carrier's rules that require the immediate reporting of such unsafe conditions to a Carrier supervisor. The 72-hours grace period allowed by Carrier for the reporting of personal injuries, per General Notice No. 92, does not extend to the late reporting of safety hazards.

Finally, Claimant's own testimony shows that he did not think he was injured by either alleged event. As previously noted, the conductor does not corroborate Claimant's assertion that he informed the conductor of the events. Moreover, the conductor did not observe Claimant limping or otherwise displaying any sign of having been injured.

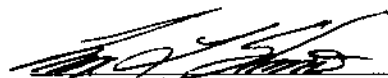
Our review of the record, therefore, finds substantial evidence in support of the Carrier's determination that Claimant was guilty of the violations charged. Given the nature of the violations, the Carrier was not unreasonable in imposing discipline of dismissal.

AWARD:

The Claim is denied.


Gerald E. Wallin, Chairman
and Neutral Member


Rick Marceau,
Organization Member


Gene L. Shire,
Carrier Member

DATE: 3-4-04

PUBLIC LAW BOARD NO. 4901

AWARD NO. 236

CASE NO. 236

PARTIES TO
THE DISPUTE:

United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim denied

STATEMENT OF CLAIM:

“Request in behalf of Southern California Division Conductor L. L. Drewitz to be reinstated to the service of the Burlington Northern Santa Fe Railway Company, Coast Lines, with seniority and all other rights unimpaired but on a leniency basis.”

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed for absence without authority beginning November 16, 2001 after he was released from Carrier's Employee Assistance Program with instructions to contact the Carrier to immediately mark up for service. At the time of his release, he had less than four years of service. His prior work record contained two 10-day record suspensions for absenteeism.

Despite typographical errors suggesting otherwise, the record shows that Claimant was properly notified to attend an investigation on December 11, 2001. The investigation was held on that date but Claimant did not attend.

The Claim here seeks reinstatement on a leniency basis. As we said in Award No. 45 of this Board,

A leniency petition, in practical effect, amounts to an admission of guilt as well as an acknowledgment of the appropriateness of the disciplinary penalty. It does not seek to challenge any factual findings. Rather, distilled to its essence, it asks for a remission of the penalty as an act of administrative grace.

The record herein, abbreviated as it is, shows that Claimant was released from the EAP to mark up for service on November 16, 2001. He did not. Over a 3-day period, Carrier's crew scheduling personnel tried to contact Claimant without success. At no time did Claimant contact


the Carrier to mark up as directed or to advise of his status even after the December 1, 2001 notice of investigation was sent to him by certified mail. The record does not show that Claimant has made any attempt thereafter to directly contact the Carrier since the December 27, 2001 notice of dismissal was mailed to him.

On March 20, 2002, nearly three months after the dismissal notice was mailed, the Organization attempted to intercede on Claimant's behalf. It alleged that Claimant had been under a doctor's care from November 17, 2001 to February 14, 2002. However, the Local Chairman's letter does not reflect that any supporting documentation was provided. Although the Organization's submission contains five reports from Kaiser-Permanente for medical treatment after November 16, 2001, the Carrier's submission does not show they were ever provided to the Carrier while the matter was being handled by the parties on the property. Moreover, none of them show that Claimant was a hospital admit or was otherwise incapable of contacting the Carrier. Also, none explains the Claimant's whereabouts after February 14, 2002 for some five weeks before the Organization contacted the Carrier on his behalf.


Given the foregoing facts, we do not find the Carrier acted unreasonably in denying the Claimant's request for a leniency reinstatement.

AWARD:

The Claim is denied.


Gerald E. Wallin, Chairman
and Neutral Member


~~P. L. Patsouras~~, R. L. MARCEAU
Organization Member


Gene L. Shire,
Carrier Member

DATE: 3-4-04