

PUBLIC LAW BOARD NO. 4901

AWARD NO. 161
CASE NO. 161

PARTIES TO
THE DISPUTE:

United Transportation Union
(ATSF Coast Lines)

vs.

Burlington Northern Santa Fe Railway Company

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained

DATE: November 27, 2001

STATEMENT OF CLAIM:

"Request in behalf of Phoenix Conductor Z. T. Gage for the removal of the Level 3 Suspension of Twenty (20) days, that commenced on January 7, 1998, to be reinstated to the service of the Burlington Northern Santa Fe Railway Company Coast Lines, on January 27, 1998, and exoneration of the alleged violations of Rules 1.1, 1.1.3, 1.1.4, 1.3.1, 1.4, and 1.6 of the General Code of Operating Rules Third Edition, effective April 10, 1994, from the Claimant's personal record and that the Claimant be allowed all time lost including the payment of Welfare Benefits beginning on January 7, 1998, and continuing until returned to service as a result of the Formal Investigation held on December 9, 1997."

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 disciplined for failing to timely report an alleged personal injury. Although the parties have raised many contentions regarding the merits and the procedural aspects of the dispute, the Organization has asserted a time limitation violation. Given the nature of this procedural objection, it must be addressed as a threshold matter before any of the other contentions may be reached.

The Local Chairman appealed the discipline to the Division Superintendent by letter dated January 17, 1998. The Superintendent's declining letter was not dated until February 20, 1998, which was 34 days after the date of the appeal.

The parties' Agreement reads, in pertinent part, as follows:

ARTICLE 13
INVESTIGATIONS AND DISCIPLINE

* * *

(g) In the handling of appeals involving discipline matters, the following *shall* govern:

* * *

1 (g)(1)(b) If the appeal is to be denied by the Superintendent, he *must* within thirty (30) days from the date of such appeal, notify the employe and his representative, in writing, the appeal is denied.

* * *

(g)(6) If there is a failure to comply with the time limit provision of this agreement by either party, the matter *shall* be considered closed, and settled accordingly, but this shall not be considered as a precedent or waiver of the contentions of either party for the handling of other similar discipline cases.

(Italics supplied)

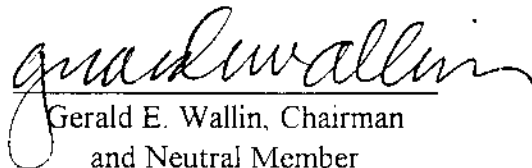
In his June 15, 1998 denial, the Carrier's highest designated officer acknowledged the Superintendent's failure to comply with the applicable time limit. He disregarded the failure, however, on the ground that Claimant's due process rights were not adversely affected. Moreover, in its submission, the Carrier cited Award 5 of Public Law Board No. 2591 and Award 21 of Public Law Board No. 2156, which apparently involved these same parties, in support of this rationale.

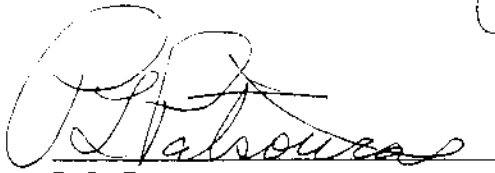
We disagree with the Carrier's contention. Neither award controls here. Award 5 was issued on November 21, 1980 and did not cite the rule language applicable at the time. We do not know, therefore, if a default provision like Article 13 (g)(6) was in effect at the time. The same is true of Award 21, which was issued January 18, 1979 and involved the agreement applicable to yardmen. It does not explain whether the agreement contained a similar default provision.

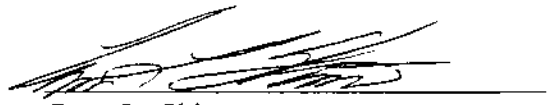
The text of the cited portions of Article 13 (g), certain words of which the Board italicized for emphasis, shows that the parties intended its application to be mandatory by use of the words "shall" and "must." We may not, therefore, ignore its mandate. Accordingly, when the Superintendent failed to comply with the Article 13 (g)(1)(b) time limit, the matter was effectively closed out and settled in favor of the Organization and Claimant. As a result, we have no authority to overturn that disposition. Under the circumstances, our authority is limited to ordering that the Claim be sustained as presented.

AWARD:

The Claim is sustained.


Gerald E. Wallin, Chairman
and Neutral Member


P. L. Patsouras,
Organization Member


Gene L. Shire,
Carrier Member