

PUBLIC LAW BOARD NO. 4901

AWARD NO. 176

CASE NO. 176

**PARTIES TO
THE DISPUTE:**

United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company
(ATSF Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained by operation of the Agreement

STATEMENT OF CLAIM:

“Request in behalf of Southern California Division Brakeman G. R. Gutierrez for the removal of the alleged violations of Rules 12.0 of the Policy on use of Alcohol and Drugs revised on October 15, 1996 from the Claimant’s personal record and reinstatement to service of the Burlington Northern and Santa Fe Railway Company, Coast Lines, with seniority and all other rights unimpaired and with pay for all time lost including payment of Health and Welfare Benefits beginning on February 4, 1999, and continuing until returned to service as a result of the Formal Investigation conducted on May 11, 1999.

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 after the formal investigation produced evidence showing that a urine sample he provided for a drug and alcohol test contained a nitrite adulterant. Per Carrier’s policy, adulteration of a test sample constitutes a test refusal and warrants the discharge penalty.

While the Organization challenged the discipline on a number of grounds, including violation of the sample collection protocols, compliance with the time limit provisions of the parties’ Agreement must be addressed as a threshold matter.

Article 13(d) reads as follows:

A train service employe disciplined as a result of a formal investigation shall be informed of that fact within thirty (30) days after the investigation is completed, unless a longer time limit is mutually agreed to in specific cases.

The formal investigation was conducted on May 11, 1999. By typewritten letter dated May 28, 1999, Carrier attempted to inform Claimant of its dismissal decision. The hand addressed

envelope, however, contained the wrong address. It was "Returned to Sender" for "No such number."

On June 14th, the Organization's local chairman telephoned and wrote to Carrier to advise of the time limit violation and demand Claimant's immediate reinstatement to service. It relied upon Article 13(g)(6), which reads as follows:

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.

By letter dated June 16th, Carrier claimed "typographical error" and admitted sending the decision letter to the wrong address. The Carrier's letter went on to apologize for the error and the delay in delivery.

The Organization appealed the decision by letter dated July 6, 1999 to the Division Superintendent. The certified mail return receipt shows the appeal was received by Carrier two days later on July 8th. Regarding the Superintendent's decision on appeal, Article 13(g)(1)(b) provides:

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

The Superintendent's letter was not dated until August 20, 1999, which was some forty-five days after the date of the Organization's appeal. Accordingly, the Organization alleged a second time limit violation and again demanded Claimant's immediate reinstatement. Thus has this procedural issue come before this Board.

In defense of its position, the Carrier contended the mailing error was corrected at the earliest opportunity. In addition, Carrier maintains Claimant was not prejudiced by the mailing error or the delay in declining the appeal. Carrier also maintains that the "... applicable rule does not mandate automatic reversal of the discipline even if Carrier renders a late denial." Finally, it cites Decision No. 16 of the National Disputes Committee ("NDCD No. 16") to avoid a forfeiture of the discipline.

NDCD No. 16 is inapplicable to this dispute for any one of three primary reasons. First, the contention was never raised during the handling of the Claim on the property. It is well settled that new evidence and/or argument may not be raised for the first time with the Board. Second, the authority of the National Disputes Committee was limited to the interpretation of specified national *non-operating employee* agreements. (Italics supplied) Lastly, because the National Disputes Committee dealt with non-operating employee agreements, it was construing significantly different contract language.

The record herein clearly establishes that Carrier committed two time limit violations of the Agreement. As noted in Award No. 127 of this Board, which applied identical time limit provisions under different numbering scheme, Article 13(g)(6) was automatically activated when Carrier failed


to comply with the time limit requirement. This is doubly so on this record given the two independent violations. As a result, the Claim was "... closed, and settled accordingly ..." before it reached this Board. Thus, we have no authority to consider the Carrier's equitable contention regarding lack of prejudice or the other matters raised by it.

In practical effect, when Carrier failed to timely inform Claimant of its disciplinary decision, it foreclosed itself from imposing discipline. Similarly, when the Superintendent failed to timely decline the Organization's appeal, it effectively accepted the appeal. Under either approach, the result is the same.

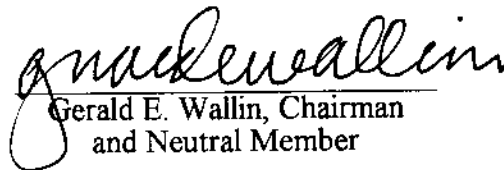
Given the fact that the parties either closed and settled this matter without disciplinary action or, in the second instance, closed and settled this matter by accepting the Organization's appeal, by operation of their Agreement, Claimant's purported dismissal must be overturned. Accordingly, we are precluded from addressing any of the other issues raised in the parties' submissions.

AWARD:

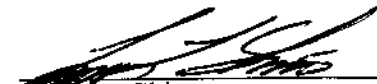
The Claim is sustained by operation of the Agreement.



P. L. Patsouras,
Organization Member



Gerald E. Wallin, Chairman
and Neutral Member



Gene L. Shire,
Carrier Member

DATE: OCT 17, 2002