

The Fourth Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Transportation Communications International Union
(Allied Services Division)

PARTIES TO DISPUTE:

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(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood
(P-246) that:

1. The Carrier acted in an arbitrary, capricious, unjust manner and in violation of Rule 22 among others of the schedule agreement when it assessed discipline of a thirty (30) days suspension to Scott L. Danley effective December 6, 1989 to 11:00 p.m. January 4, 1990.
2. The Carrier shall now be required to reinstate Mr. Danley to his former position and pay him an amount equal to what he could have earned including, but not limited to, daily wages, overtime, holiday pay and health benefits, had he not been disciplined. Further, the Carrier shall clear claimant Danley's record and restore all his rights and privileges unimpaired.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was notified by letter dated October 20, 1989, to attend an Investigation to determine responsibility, if any, for alleged failure to submit written reports. Following postponements, the Investigation was held on November 16, 1989, wherein Claimant was found guilty and assessed an entry of censure in his personal record and a thirty (30) days suspension.

The Organization has raised both procedural and substantive issues. It is the Organization's position that the Carrier found Claimant guilty of actions for which he was not charged. Claimant was charged with failure to submit written reports, but found guilty of failure to comply with instructions. Further, the Organization argued at the Investigation and on the property that the Carrier failed to comply with Rule 22 with regard to timeliness in advancing charges. Specifically, Rule 22 states in pertinent part that:

"No charge shall be made that involves any matter of which the Division Special Agent for the division involved has had knowledge twenty (20) calendar days or more."

It is the position of the Organization that the Carrier had knowledge of the report not being filed and did not act in a timely manner to charge the Claimant. Accordingly, its Investigation comes too late to comply with the Agreement.

On merits, the Organization argues that the Carrier has failed to prove its case. Claimant was unclear as to the procedure for filing incident reports and further, the lack of the incident report caused no harm to the Carrier. The discipline assessed was excessive given that the issue did not raise to the level requiring severe response.

This Board has carefully reviewed the evidence and record at bar. We find no procedural errors. Although Claimant was charged with failure to submit written reports and found guilty of failure to comply with instructions, this constitutes the same clear activity. The Claimant was knowledgeable that the matter under Investigation was his alleged failure to file the required incident reports concerning trespassing arrests on the dates of September 19, 1989, August 22, 1989, August 21, 1989, and July 9, 1989. The finding of guilt involved the determination of whether Claimant did or did not file those written reports. The difference in language between the charges and findings of guilt are a difference without import in this instant case.

The Organization's argument that the Carrier violated Rule 22 has been carefully considered. The Rule is clear that if the Carrier's Division Special Agent had knowledge of the lack of incident reports and failed to act in twenty calendar days, the Carrier could no longer bring charges against the Claimant. Central to the Organization's position is that Claimant filled out a daily activity report listing each arrest on the date of the event. On September 19, August 22, August 21 and July 9, 1989, the Claimant filed the daily activity report which was reviewed by the Division Special Agent in charge. Therefore, the Carrier was aware that the arrests had been made and that the incident reports were due. The Organization maintains that the Carrier cannot now argue that it didn't have the knowledge until much later, when in fact, Carrier would be aware that the written incident report was not turned in.

Our review of the transcript and the language of Rule 22 is that no procedural violation occurred. In the facts of this case, the Division Special Agent testified that his first knowledge of the incidents under investigation occurred when a subpoena was delivered for the Claimant on the date of October 16, 1989. On that date, a review of records indicated that the incident reports had not been filed. The Special Agent in Charge also testified that although he may have reviewed the daily activity reports, it is the Claimant's responsibility to turn in the incident reports and not a routine matter to question when they will be turned in by Officers. He further testified that he would not have been keeping track of or monitoring the submission of incident reports with all of the other on going routine activities. In fact, there is no evidence that the Carrier "had knowledge" of the lack of an incident report prior to October 16, 1989. The language of the Rule does not state when the Carrier could have known or should have known, but only when the Carrier had the knowledge. As Carrier did not have the knowledge that the incident reports had not been filed until after the review of records following the subpoena of October 16, 1989, no violation of Rule 22 occurred.

Having found no procedural error, we have reviewed the merits. There is sufficient probative evidence supporting a conclusion of guilt. The Claimant admits that he failed to file the incident reports. Having found the guilt established on the basis of the record, the only task left is to examine the quantum of discipline. Herein, the testimony and correspondence with regard to Claimant's Personal Record details numerous discussions, letters and instructions regarding past failure to file proper incident reports. Under these circumstances, the Board finds the discipline to be appropriate. The Claim cannot be sustained and the judgment of the Carrier will not be disturbed.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of February 1992.