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**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25002
Docket No. 44693
99-1-98-1-U-2003

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

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Union Pacific Transportation Company)

STATEMENT OF CLAIM:

“Claim in behalf of Conductor M. L. Kaspar, Union Pacific Railroad former Chicago and North Western Transportation Company, for compensation for all lost time including time spent at the investigation and that this incident be removed from Claimant’s personal record when he was investigated on April 9, 1997 on the following charge:

‘Your responsibility in connection with improperly setting out train on March 1, 1997, at approximately 02:52 hours, EJ&E Siding, West Chicago, Illinois, while you were employed as conductor on CBTGY 26’”

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

Claimant was found guilty following an Investigation held on April 9, 1997 into alleged failure to set out his train on the proper track. There is no dispute that on March 1, 1997, the Claimant arrived at West Chicago and was instructed to set out his train on the EJ&E main track. The record is clear that the Claimant failed to do so and instead set the entire train out on the siding. What is unclear and disputed in the testimony between the Yardmaster and Claimant is the exact instruction he was given. The Claimant asserts he followed the Yardmaster's inaccurate instruction to set the train out to the left, which turned out to be the siding instead of the mainline. The Yardmaster testified the Claimant said he "knew where the main was" and he had provided no inaccurate information.

The Organization argues that the Carrier's actions are procedurally defective on several counts. The Carrier failed to timely hold an investigation and render discipline. The Carrier failed to call an important witness and make available radio tapes which prevented a fair and impartial hearing.

On merits, the Organization argues that there is no proof of the Claimant's failure to follow instructions. Claimant was unfamiliar with the area and made three requests for a pilot. No pilot was ever provided. The Claimant was then given clear instructions by the Yardmaster, which when correctly followed put his train on the wrong track. The Organization argues that the conflict in testimony must be resolved in favor of the Claimant as it was unrefuted that he was told to set out on the left (wrong) track.

The Carrier denies any procedural violation of the Claimant's rights. The Carrier maintains that there was substantial evidence to conclude that the Claimant was guilty as charged. It points to testimony and evidence that the Claimant clearly did not follow his instructions to yard the train on the main track. The Carrier asserts that the evidence of record demonstrates guilt.

The Board has reviewed the procedural issues at bar. The major issue is that of Rule 83 which states in pertinent part:

"Investigation shall be held and decision rendered in writing within seven days from the date of alleged offense..."

This Board finds that the precipitating event occurred on March 1, 1997. There is no factual evidence that the Investigation was held and a decision rendered in writing within seven days. The Investigation notice was sent certified, dated and postmarked March 4, 1997, for the Investigation to be held on March 6, 1997. There is no dispute in this record that no one contacted either the Claimant or his representative prior to his receipt and signature for this certified mail on March 10, 1997. There is no evidence in the testimony or record that the Carrier met on March 6, 1997 expecting an Investigation that had to be postponed due to the Claimant's failure to appear. We find no record of any Investigation convened on March 6, 1997 in the office of the MTO at Proviso Administration Building at 15:00 hours.

We cannot overcome the threshold consideration of procedure. The Carrier's constructive delivery of certified mail was not followed by any telephone call to the Claimant on same or following date to attend an Investigation. The Claimant stated in testimony that he did not receive a call from anyone in crew management or Proviso Service Unit of the impending Investigation. Nor did anyone notify his representative until March 10, 1997, and then on the following day of a postponement to March 18, 1997. Even further, the postponement is listed at the request of the Local Chairman, which is factually inaccurate. It was again postponed by the Carrier on March 18, 1997 due to needed evidence, without the concurrence of the Local Chairman, who was ready to proceed.

Accordingly, this Investigation violated the Agreement Rule cited above. It was untimely. The claim must be sustained without consideration of merits (see in particular Third Division Award 26309 and response of Corporate Counsel of May 21, 1987).

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 2nd day of June 1999.