

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

**Award No. 25081  
Docket No. 44772  
99-1-98-1-U-2052**

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

(Union Pacific Railroad Company  
**PARTIES TO DISPUTE:** (  
(United Transportation Union

**STATEMENT OF CLAIM:**

“The Supreme Court of Nevada held: We conclude that provisions of the UPRR-UTU CBA are substantially implicated by UPRR’s third-party complaint against Harding. Therefore, UPRR’s third-party complaint constitutes a minor dispute under the RLA and must be resolved pursuant to the mandates of that federal statute. Because UPRR’s state law claims were preempted by the RLA, the district court properly dismissed its complaint as to Harding.” Union Pacific believes the rule (Rule 103) quoted does not exist, or is not part of the applicable CBA between the UTU. Pursuant to the finding of the Nevada Supreme Court, this issue is being brought before the First Division for a decision under the applicable CBA as to whether Mr. Harding is protected by the CBA against the cross-complaint by the cited rule or any other rule.”

**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.

On January 12, 1995, while employed as conductor on an eastbound freight train, Larry Harding was involved in a head-on collision with a westbound Southern Pacific train being operated by a Union Pacific crew. This collision occurred in the vicinity of Caliente, Nevada, and resulted in the death of the engineer on the westbound train, Michael Allen Smith. The Carrier concluded this collision was caused by the failure of Conductor Harding and his engineer, Roger Sullenberger, to stop at a red signal at a switch at Acoma, Nevada, to wait for the westbound train to take the siding. Carrier dismissed Harding as a result of this incident, and the dismissal was upheld by Public Law Board No. 4998 in Award No. 113.

On February 16, 1995, Engineer Smith's widow and estate filed a wrongful death suit against the Carrier. The Carrier, on June 7, 1995, filed a third-party complaint against Harding and Sullenberger, seeking contribution and indemnification with regard to Smith's suit, along with indemnification for damages caused to Southern Pacific's train and for Carrier's lost profits and damaged property caused by the accident.

On August 23, 1995, Harding filed a motion to dismiss Carrier's third-party complaint, alleging that the district court lacked jurisdiction due to preemption by the Railway Labor Act. Sullenberger joined in this motion on August 31, 1995. Without explaining its decision, the district court granted the motion to dismiss with respect to Harding and Sullenberger on November 6, 1995. Upon Carrier's motion, the district court, on May 15, 1996, certified its decision as a final partial judgment as to third-party defendant Harding, whereupon Carrier appealed to the Nevada Supreme Court. In upholding the district court's dismissal of the third-party complaint, the Supreme Court, on May 19, 1998, held, in pertinent part, as follows:

Harding asserts that deciding the merits of UPRR's third-party claims will necessarily require interpretation and application of a collective bargaining agreement (CBA), thus the Railway Labor Act (RLA), preempts UPRR's third-party complaint. Harding is a member of the United Transportation Union (UTU). Rule 103 of the UPRR-UTU CBA provides:

**LOSS OR DAMAGE TO EQUIPMENT:**

**Rule 103:** Conductors will not be obliged to pay fines for loss or damage to equipment.

Harding and UPRR dispute the meaning of the word "fine." UPRR argues that the ordinary meaning of the word has a penal connotation, whereas Harding argues that civil damages may constitute a fine. Because there is a question as to the interpretation of "fine," Harding contends that UPRR's third-party complaint involves the type of dispute which must be resolved through the mandatory procedures of the RLA.

\* \* \*

In the case before us, we believe that preemption is appropriate. The application or interpretation of Rule 103 of the UPRR-UTU CBA is substantially involved in this case; if the language of the rule encompasses civil damages, it would appear that Rule 103 of the UPRR-UTU CBA conclusively resolves the matter. Therefore, we conclude that the district court properly dismissed UPRR's state law claims against Harding on the basis of RLA preemption. . . .

On August 26, 1998, Carrier served its notice of intent to file an ex parte submission in this matter.

Carrier avers its attorneys discussed this decision with the Labor Relations Department, at which point it was found that Rule 103 of the 1981 Agreement covering conductors and trainmen for the Los Angeles - Salt Lake City territory reads as follows:

Rule 103. TRAIN BULLETINS. Current bulletins pertaining to operations of trains will be reissued in January of each year.

Carrier states it then contacted the General Chairman in an attempt to determine where Harding's attorneys had obtained their information. According to the Carrier, the General Chairman said he would contact them. Receiving no

response, the Carrier wrote to the General Chairman on November 2, 1998. The Carrier states it later called the attention of the General Chairman to Rule 104, which reads:

Rule 104. FINES. Fines will not be assessed against trainmen.

Carrier argues the Rule cited by Harding's attorneys does not exist and, therefore, there is no prohibition against it filing an action against an employee as a result of damages caused by an employee's negligence. Alternatively, the Carrier contends Rule 104 does not prohibit the filing of such an action.

Rule 104, says the Carrier, has been in the Agreement since at least April 1, 1943, and has never been the subject of arbitration. Carrier interprets Rule 104 to prohibit a unilateral imposition by the Carrier of a money payment, without recourse or hearing, for normal and reasonably expected damages to its property during an employee's working day. It denies the Rule was intended to protect an employee from all liability for extraordinary damages caused by the employee's gross negligence, nor does it prevent the Carrier from pursuing an appropriate remedy for damages through civil or criminal courts.

The Organization first notes Conductor Harding is no longer an employee of the Carrier, his employment being effectively terminated by a Settlement Agreement and Release he and the Carrier executed in February 1998. Furthermore, says the Organization, any employment rights he might have had were terminated when Public Law Board No. 4998 upheld his dismissal. As Harding is not an "employee" within the meaning of the Railway Labor Act, the Organization argues the Carrier's claim must be dismissed.

Alternatively, the Organization denies the claim was handled in the usual manner, as required by Section 3 First(i) of the Act prior to reference to this Board. It argues the claim, therefore, is not appropriate for a merits decision and must be dismissed.

Next, the Organization submits that Carrier's claim should have been asserted in the process of Harding's dismissal from service. It says the Award upholding his dismissal is final, binding and conclusive as a matter of law under

Section 3 Second of the Act, and that the Carrier's claim herein is barred as *res judicata*.

The Organization points out that the pendency of the Nevada action should not excuse the Carrier's procedural failures. Citing *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978), it says the Supreme Court has held that a decision of this Board that there would be no tolling of agreement time limits during the pendency of a state court action would not be overturned.

The Organization next asserts the Carrier's claim was mooted by the settlement it made with Harding in February 1998. According to the Organization, that settlement also settled the Nevada action depending upon its "final resolution," which by the language of the settlement included a ruling by the Nevada Supreme Court that it elected not to rule on the merits of the case for procedural reasons. The Organization avers the Nevada Supreme Court declined to address the merits of the Carrier's third-party complaint against Harding for the procedural reason that it was preempted by the minor dispute resolution procedures of the Railway Labor Act. The settlement agreement contained the following provision:

In the event of a "final resolution" of the pending appeal in Union Pacific's favor, Union Pacific will promptly file a voluntary dismissal with prejudice of its third-party complaint against Harding in the Nevada action and will not prosecute such action at any time thereafter.

Turning to the merits of the Carrier's claim, the Organization argues the Carrier is now estopped from denying the existence of the Rule provision cited by the Nevada Supreme Court. It notes that throughout the pendency of the Nevada action, the Carrier never took issue with this point. Nevertheless, the Organization recognizes that both provision contained the disputed term "fines." The Organization quotes the following definition of the term from *Black's Law Dictionary* (5<sup>th</sup> ed. 1979):

A pecuniary punishment imposed by lawful tribunal upon person convicted of crime or misdemeanor. A pecuniary penalty. It may include a forfeiture or penalty recoverable in a civil action, and, in

criminal convictions, may be in addition to imprisonment. See also Penalty.

Applying this definition, the Organization denies the term is limited to a penal connotation, as the Carrier, not being a government, has no penal authority. Giving the term a meaning within the context of the Agreement, the Organization suggests the only rational application would be inclusive of a forfeiture or penalty recoverable in a civil action, as the Carrier is seeking from Harding in its third-party complaint.

While the Organization makes a colorable argument that the Board lacks jurisdiction over this matter because it was not progressed in the "usual manner" as required by Section 3, First(i) of the Railway Labor Act, the Board chooses to take jurisdiction as a matter of economy. Based upon the record before it, the Board can see no evidence this dispute was handled between the Organization and the highest Carrier official designated to handle such matters prior to the Carrier's August 26, 1998, Notice of Intent. This is, however, a matter that could easily be remedied by the Carrier, and it would then be in a position to refile its claim, as our dismissal would be without prejudice.

As the Board sees the issue presented by the Carrier, it presents two questions to be addressed. The first relates to the intent of Rule 104 in its prohibition against the Carrier assessing fines against trainmen. The second relates to whether or not Rule 104 protects Harding against the Carrier's third-party claim in the judicial system. The first question is one of contract interpretation, which is appropriate to this Board. The second question, however, requires an interpretation of the settlement agreement between Harding and the Carrier, particularly in light of the decision of the Nevada Supreme Court. The Board finds this question to be beyond the scope of its authority. Thus, the remaining procedural objections raised by the Organization are not relevant to the Board's consideration of this dispute.

There is no dispute that the Rule cited by the Nevada Supreme Court does not exist in the parties' Agreement. The only Rule before us that deals with fines is Rule 104, quoted above. The question, therefore, is whether that Rule prohibits an action for indemnification or contribution in a civil damages action.

In the absence of specific bargaining history, the Board is compelled to rely upon general labor history. It was not uncommon early in this century for employers to impose fines upon employees for lost or damaged merchandise, or for violations of company rules, particularly those related to absenteeism or tardiness. (See, for instance, Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor*.) Often these fines were imposed arbitrarily and without affording the employee due process. In railroad passenger service, a trainman or conductor might be fined for violations of rules governing uniforms. These fines have virtually disappeared as the result of the creation of other disciplinary measures, provisions in collective bargaining agreements prohibiting such actions, and legislation. In Illinois, for instance, the Department of Labor regulations pursuant to the Wage Payment and Collection Act provide:

**Section 300.820 Damaged Property** A financial loss suffered by an employer due to damage to his/her property or to that of a customer or client shall not be deducted from an employee's pay unless the employee's expressed written consent is given freely at the time the deduction is made.

In this industrial context, the word "fines" means a financial penalty imposed upon an employee by his/her employer. Having an employee indemnify the Carrier, or be liable for contribution in a civil damages proceeding, is no different than the Carrier assessing a fine directly against the employee. It is the Board's conclusion that this is what Rule 104 was written to prevent. The Carrier's attempt to distinguish this case on the basis of the magnitude of the loss suffered is not persuasive.

#### **AWARD**

The Carrier's interpretation of Rule 104 is erroneous.

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**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

National Railroad Adjustment Board  
By Order of First Division

Dated at Chicago, Illinois, this 10th day of January, 2000.