

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25134

Docket No. 44752

00-1-98-1-U-2039

The First Division consisted of the regular members and in addition Referee John R. LaRocco when award was rendered.

(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago and
(Northwestern Transportation Company)

STATEMENT OF CLAIM:

"The Brotherhood of Locomotive Engineers UP (CNW) request the Division consider and authorize the claim of Engineer T. L. Holmes, SS No. 333-48-8951, Union Pacific Railroad former Chicago and North Western Transportation Company, for compensation for all lost time, including time spent at the investigation, that this incident be removed from claimant's personal record and that he be removed from the Union Pacific Discipline System known as Upgrade when he was investigated on the following charge:

"At approximately 2115 Hrs, August 21, 1997, while employed as Engineer on Train MNPPRB-20, you ran through switch from Track 4 to Track 5 in Fremont yard; at approximately MP 366.7, while making 25 car pickup and made reverse move through switch derailing 2 cars."

Subsequent to the investigation, claimant was disciplined with a Level 2 on the Union Pacific Discipline System known as Upgrade in a letter dated October 14, 1997 from Mike Ring, Superintendent Council Bluffs Service Unit."

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.

Pursuant to proper written notice dated August 22, 1997, the Carrier notified the Claimant, an Engineer, to attend an Investigation on August 25, 1997, to determine the Claimant's responsibility, if any, for running through the Track 4 to Track 5 switch at Fremont Yard, resulting in a two-car derailment. The Carrier sent an identical notice to the Conductor working with the Claimant. Both notices specified that the Investigation was set for August 25, 1997.

The Carrier postponed the August 25 Investigation until August 28, 1997. While the Carrier prepared a postponement consent letter, neither the Claimant's representative nor the Conductor's representative signed the letter. Similarly, neither verbally concurred with the postponement. The Carrier did not provide any reason for postponing the Investigation from August 25 until August 28.

While the record is not entirely clear, the Carrier again postponed the August 28 Investigation to September 2, 1997. The record contains an unsigned letter indicating that the Conductor's representative had requested a postponement of the August 28, 1997 Investigation. When the Hearing was eventually convened, the Conductor's representative vigorously denied requesting any postponement. In any event, there is nothing in the record indicating that the Claimant's representative either requested a postponement of the Investigation or agreed to the postponing of the Investigation from August 28 to September 2.

The Claimant and his representative appeared on September 2 for the Hearing but, the Carrier canceled the Hearing due to the absence of a Carrier witness. The record is unclear whether the Carrier postponed the Investigation to September 10, 1997 or September 18, 1997. The record contains the Carrier correspondence dated September 3 asking for a postponement until September 18, but the Carrier also

prepared a continuance consent letter stating that the hearing was postponed only until September 10, 1997.

The Carrier convened the Investigation on September 18, 1997, but the Claimant and his representative did not appear due to lack of notice. The Hearing was eventually held on October 6, 1997.

At the onset of the Investigation, the Organization objected that the Hearing was not being held within the applicable time limits. Without prejudice to this position, the Organization proceeded to defend the Claimant against the charge. The Carrier produced evidence showing that, while the Claimant was picking up 25 cars at Fremont Yard, two cars ran through a switch. The Claimant contended that the switch could have been damaged by prior movements in the yard.

Following the Hearing, the Carrier determined that the Claimant was partially culpable for the derailment and it assessed him a Level 2 on the Carrier's Upgrade Disciplinary Policy.

Section 5 of the applicable discipline rule reads:

"Unless postponed for good cause, the investigation will be held no later than 10 days after the date of the notice."

The Carrier originally notified the Claimant of the impending Investigation on August 22, 1997. Pursuant to Section 5, the Carrier had to convene the Investigation within ten days of August 22, unless the Investigation was postponed "... for good cause ..." or, the parties mutually agreed to a postponement which is akin to waiving the Section 5 time limit.

When the Carrier first postponed the investigation from August 25 to August 28, it was still within the 10-day time limitation. However, the next postponement to September 2, was one day beyond the 10-day maximum. Therefore, the Carrier was required to show good cause for the postponement or a mutually agreed upon postponement. The Carrier lacked good cause to postpone the hearing to September 2 because it never gave a reason for the postponement. The record does not contain any evidence that the Organization agreed to the postponement to September 2. Moreover, there is inadequate documentary evidence that the Conductor's representative requested

such a postponement. Even if the Conductor's representative acquiesced to a requested postponement, these actions would not bind the Organization.

Nevertheless, the Claimant and his representative appeared at the September 2 Hearing and, if it was held, presumably they would have objected to the Carrier's breach of the Section 5 time limits.

While the Carrier again postponed the Investigation from September 2 to September 18, the record is void of evidence confirming that the Carrier notified the Organization of the new Hearing date. The Carrier proffered contradictory correspondence: one letter claiming the Hearing was continued with the parties' consent to September 10; and, another letter postponing the Hearing until September 18. The record does not contain any evidence that the Organization consented to the postponement or that it even knew the Hearing would be held on September 18. Aside from the lack of notice, the absence of a Carrier witness may or may not be good cause for postponing the Investigation. In this case, the issue of good cause is moot because the Carrier had already breached Section 5 by setting the Hearing for September 2 without articulating any reason for exceeding the ten day time limit.

The record in this case conclusively shows that the Carrier unilaterally postponed the Investigation until ten days beyond August 22, 1997, without either the concurrence of the Organization and, more importantly, without showing good cause. On the property and before this Board, the Carrier did not directly address the Organization's argument that the Carrier untimely held the Investigation. The Carrier's deliberate and unilateral postponement of the Investigation constituted a violation of Section 5.

This Board emphasizes that this is not a situation where the Carrier inadvertently missed the ten day time limit or had a good reason for missing the time limit. Where the breach of the time limits is intentional, with no justification for the postponement, the appropriate remedy is to rescind the disciplinary action.

This Board stresses that our decision herein is restricted to the peculiar facts and circumstances in this record.

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 15th day of May, 2000.