

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25459
Docket No. 44931
03-1-99-1-U-2142

The First Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Unsupported and inappropriate claim of Engineer C. R. Jones for various amounts of day's pay and/or mileage account not being provided a copy of the Collective Bargaining Agreement between the Union Pacific Railroad Company and the Brotherhood of Locomotive Engineers.(Carrier File 1161951, Timekeeping Declination TO1210858)"

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.

Carrier is the Petitioner in this case, having listed the instant claim to the First Division.

Pursuant to the merger of the Southern Pacific Transportation Company with the Union Pacific Railroad Company, a Merger Implementing Agreement was

negotiated by the parties for the St. Louis Hub and signed on April 15, 1998. Side Letter Number 3 of the St. Louis Hub Implementing Agreement states in pertinent part:

"In our discussions regarding Article IV, this will confirm Carrier's commitment to provide copies of the designated collective bargaining agreement referenced therein to all former SSW/SPCSL and UP (former MP Upper Line) engineers comprehended by this implementing Agreement at the earliest possible date, but no later than by date of implementation of this Agreement."

A time claim filed on behalf of Local Chairman C. R. Jones is one of many filed by the Organization claiming that copies of the collective bargaining Agreement were not provided by November 1, 1998, the implementation date of the St. Louis Hub. The Claimant seeks a basic day penalty for the period December 7, 1998 through December 10, 1998.

The claim was appealed after the timekeeping declination and denied through the claims handling process. The Carrier's position was that there was no valid basis for the grievance. The Carrier conceded that Agreements were sent to various locations after November 1, 1998, but contended that the Organization failed to prove the existence of any harm caused by this slight and unintentional delay. The Carrier further argued that the instant claim was procedurally defective in that it improperly "grouped" a claim for four basic days penalty on one claim form.

As to remedy, the Carrier argued that four basic days pay was plainly unwarranted as there was no reasonable relationship between the penalty claimed and the alleged violation. A remedy must be limited to that which would make an employee whole, the Carrier pointed out. Here, the Claimant has not shown that he was prejudiced or otherwise adversely affected by not timely receiving the Agreement. Since the remedy sought is in the nature of a punitive penalty rather than compensation for financial loss, the claim must be denied.

The Organization for its part maintains that the Carrier is the party that has been non-compliant with the procedural requirements of the Agreement. It asserts that the Carrier failed to send a final rejection letter to the Organization's highest designated officer within 60 days of the time claim conference as required under Section 6 of the System Agreement - Claim Handling Process. The Carrier's failure

to adhere to this procedural requirement dictates a sustaining award in this case, the Organization argues.

On the merits, the Organization takes the position that the Agreement violation has been proven by substantial evidence, including the Carrier's own admission in its on-property correspondence. To the Organization, the failure to disseminate the contracts was not a de minimus or unintentional error. The right to a copy of the contract is fundamental to the enforcement of the employees' rights. It is impossible to enforce those rights effectively without access to the collective bargaining Agreement, the Organization maintains. This is particularly true in the instant case, where the Claimant is the BLE Local Chairman charged with monitoring and implementing the provisions of the agreement in accordance with his duty of fair representation.

Moreover, the Organization argues that the Carrier not only refused to provide a time-limit extension for the filing of claims for alleged contract violations discovered after the issuance of the contracts to the employees, but it also cancelled some of the orders for printing the contracts. The Organization submits that this is clear evidence of the Carrier's bad faith and deliberate evasion of its agreed upon responsibilities. The remedy requested in this case should therefore be upheld, as the basic day penalty is the recognized means on this property to enforce the collective bargaining Agreement. See, First Division Awards 3303; 19320; 14225.

The Carrier responds by stating that it sent out thousands of Agreement books to Union offices and various company managers prior to the St. Louis Hub Implementation. The Carrier insists that it made every attempt to ensure that enough Agreement books were available to employees. However, many employees received more than one copy, thus leaving a shortage which was remedied. The record shows the Carrier's efforts in this regard, it is argued, and refute any claim of bad faith by the Organization.

The Board has carefully studied the record in this case. At the outset, we reject the procedural objections raised by the Carrier and the Organization. Notwithstanding the Carrier's assertions, we find no contractual basis for requiring the Claimant to file a separate time claim form for each of the four days claimed.

By the same token, the Organization is unpersuasive when it argues that the Carrier failed to timely send a final rejection letter to the Organization pursuant to

Section 6 of the System Agreement - Claim Handling Process. The parties have not specified the form which the rejection letter must take. We find that the claim declination form provided to the Organization after the claims handling conference sufficiently complied with the requirements of the Agreement.

Turning to the merits, there is substantial evidence on the record to show that the Claimant did not receive a copy of the collective bargaining Agreement within the time frame specified by the parties in Side Letter 3. Indeed, the Carrier does not deny that dissemination of the contract books was incomplete as of November 1, 1998, the date of the Implementation of the St. Louis Hub Agreement.

The more difficult question in this case centers on remedy. On the one hand, the Organization is correct when it argues that the chief means of redress by employees for agreement violations is to file time claims. It has been recognized that the Organization must have a means of policing its agreement with the Carrier. That means is achieved by compelling the Carrier to provide compensation for Agreement violations. First Division Awards 24770; 14225; 19320.

On the other hand, the Board has also recognized that penalty damages must be tailored to the particular circumstances of each case. The more egregious the circumstance, the more likely that a full remedy will be awarded. First Division Awards 24579; 24482; 25484. Conversely, the absence of intentional violation can play a mitigating role in the overall assessment of the appropriate remedy.

Applying the foregoing principles to the instant case, we do not agree with the Organization that the Carrier's violation of the Agreement was so egregious as to warrant the relief sought. The evidence presented by the Carrier adequately refuted the Organization's claim of bad faith and convinces us that the record does not support a finding of intentional disregard by the Carrier of its Agreement obligation.

That being the case, we find that four basic days is an excessive penalty. On balance, and taking into consideration the fact that the Claimant is a local chairman who should have had a copy of the Agreement in order to enforce its provisions, we are persuaded that a more appropriate remedy under the circumstances would be two basic days. Accordingly, the Board directs the Carrier to pay the Claimant two basic days for the period December 7 and 8, 1998.

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AWARD

Claim sustained in accordance with the Findings.

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 20th day of August 2003.