

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25990
Docket No. 45583
04-1-01-1-U-2679

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

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

STATEMENT OF CLAIM:

“Claim of Engineer G. D. Russell for removal of discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Russell’s record.”

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.

Following an Investigation on December 7, 2000, the Claimant was advised that he was assessed a Level 2 discipline in accordance with the Carrier’s UPGRADE Discipline Policy because he:

“... failed to contact the terminal train dispatcher at approximately 9:15 a.m., on November 11, 2000, to advise of desired route and

attain authority to make further movements in the North Little Rock Terminal. . . .”

A threshold procedural defect disposes of this claim without reaching the merits. As the Organization correctly point out, the Carrier did not comply with requirements of Rule 9, which states:

“9. A written decision will be issued no later than 10 days after completion of the hearing. The notice will be sent by US Mail to the last known address of the engineer and to the BLE Local Chairman.”

It is undisputed that, in order to meet the time limit provisions of Rule 9, the discipline notice should have been postmarked no later than December 17, 2000. Instead, it was postmarked December 19, 2000. The Carrier argues that there were extenuating circumstances which should be considered by the Board. It is the Carrier’s position that an act of God prevented timely mailing of the discipline notice. Specifically, the record reflects that there was a delay in the transcription of the investigative Hearing proceedings as a result of a power outage caused by an ice storm. In the Carrier’s view, the two-day delay, which was outside of its control, was harmless and need not prevent the Board from addressing the merits of the case.

The Carrier’s equitable argument does not comport with the language of the Agreement. Adopting the Carrier’s position would, in effect, create exceptions to the existing Rule. No matter how reasonable these exceptions might be, the Board does not have the authority to modify the existing Agreement provisions.

The Carrier is responsible for proper mailing within the time limits, regardless of the acts or omissions of the vendors it chooses to use. Moreover, the remedy for failure to adhere to the ten-day time limit is clearly set forth in Rule 10 of the Agreement:

“10. If the Superintendent fails to issue a decision within such 10 day time limit or if the engineer is found not at fault, the engineer will be paid for any time lost and engineer’s record will be cleared of the discipline at issue.” (Emphasis added)

The foregoing language is mandatory and does not permit the Board to weigh the gravity of the procedural violation against the charged misconduct. The discipline in this case is void as a consequence of the untimely notification.

AWARD

Claim sustained.

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 10th day of March 2004.

