Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 26076
Docket No. 45493
04-1-00-1-U-2166

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of Engineer D. M. Schroeder, for all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Schroeder's record, with seniority and vacation rights unimpaired."

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.

According to the record, on July 28, 1999 the Claimant allegedly failed to properly stop his train and consequently passed a red flag at MP 90.25, in violation of Carrier Operating Rule 9.12.1(A), while working as an Engineer on the "Jefferson City Sub." Pursuant to 49 CFR Part 240, the Carrier revoked the Claimant's locomotive engineer certification immediately after the incident, for a 30-day period

from July 28, 1999 through August 27, 1999. Following an on-property Investigation, on September 9, 1999 the Carrier's Superintendent found the Claimant guilty and imposed a Level 4 disciplinary suspension of 30 days under the Carrier's UPGRADE Disciplinary Policy. According to the discipline Notice, the 30-day suspension was supposed to run concurrently with the above-specified 30-day license revocation period.

On December 29, 1999, the Claimant ("Petitioner") appealed the Carrier's revocation decision to the Federal Railroad Administration's (FRA's) Locomotive Engineer Review Board (LERB). In FRA Docket No. EQAL-99-104, dated August 14, 2000, in a decision signed by the LERB Chairman, the LERB found that:

> "...Petitioner cannot be held responsible for operating past a red flag for purposes of an efficiency test for compliance with Rule 9.12.1-Part A. when Petitioner was instructed to operate under Rule 9.12.1."
>
> Thus, the LERB concluded that:
>
> "Based on these findings, the Board hereby disapproves UP's decision to revoke Petitioner's certification as a locomotive engineer in accordance with the provisions of 49 C.F.R. Part 240."

Then, pursuant to a September 22, 2000 letter prepared by the Carrier, the parties agreed to settle the above disciplinary matter, which had been previously docketed before this Board. According to that letter, the "Settlement" paragraph of the letter read as follows:

> "Carrier will remove the Level 4 Discipline from Mr. Schroeder's record and allow pay for time lost. The Organization will withdraw the case from the 1st Division.
>
> If this properly reflects our agreement, please so indicate by signing in the space provided below and returning a signed copy for my handling."

Pursuant to the above, the record indicates that on September 26, 2000, the Carrier's Timekeeping Department paid the Claimant for 31 days, presumably for

the 30-day suspension and one day for attending the Investigation. However, in an October 26, 2000 letter from the Claimant to his General Chairman, the Claimant stated that the duration of his suspension was actually 47 days, and reported that he had been reinstated to service on September 14, 1999, after attending his Rules class. The Claimant closed his letter with a request for payment for "the other fourteen days I was held out of service."

In an October 31, 2000 letter to the Carrier, the Organization asserted that based on its interpretation of the September 22, 2000 settlement agreement, the Claimant was actually entitled to payment of "an additional 17 days for all lost time associated with this incident." Specifically, the Organization calculated this amount to be an additional $2,791.34 ($164.1963 x 17 days). According to the Organization, although the Carrier did not formally respond to the Organization's above October 31, 2000 letter, the Director-Labor Relations essentially telephonically responded that the Carrier was not obligated to pay the Claimant for time lost as a result of being held out of service prior to the Investigation.

The Organization's position that this Board should compensate the Claimant for the additional 17 days at issue is two-fold. First, the Organization contends that the "plain language" contained in the parties' September 22, 2000 settlement agreement clearly and unambiguously provides for the Claimant's reimbursement for all time lost, as opposed to a portion thereof, and the Board possesses no authority to alter such clear and unambiguous settlement terms (First Division Awards 19414, 19224, 15013, 17344 and 20071). Second, First Division Award 25422 (Referee Meyers), recently rendered on this Carrier's property, sustained a claim for all lost time during a 30-day revocation period imposed upon an Engineer, which was subsequently disapproved by the appellate LERB, as was the exact situation in this case.

The Carrier's principal arguments were that, first, it satisfied its obligation under the terms of the above September 22, 2000 settlement agreement by paying the Claimant for the 31 days attributed to the 30-day suspension and one day for attending the Investigation. Second, the Carrier argued that it should not be held financially liable for any days on which the Claimant could not work after the August 27, 1999 final date of suspension given the fact that the Organization had requested two Investigation postponements and that, following the Superintendent's issuance of the September 9, 1999 Discipline Notice, the Claimant neglected to mark-up for service in a timely manner. Thus, any payment beyond the 31 days specified above

would be excessive and thus a "windfall" not contemplated by the settlement agreement.

Upon its careful consideration of the entire record placed before this Board we find that such record in light of the facts and circumstances underlying this case supports the Organization's position. Specifically, the language contained in the Carrier's September 22, 2000 letter clearly provided that the Claimant would receive payment for all time lost. The Carrier did not include any language specifying that offsets would be made for any days comprising a supposed period of postponement at the request of the Organization, or for days on which the Claimant arguably failed to return to work based on what the Carrier has implied was his own dilatory conduct.

With respect to the Organization's argument that the afore-cited Award 25422 further supports its position that the Claimant was entitled to a total of 47 days' pay for lost time, the Board finds that by paying the Claimant for the 30-day suspension period, which completely overlapped the July 28, 1999 through August 27, 1999 revocation period, the Carrier essentially did pay the Claimant for the time lost as a result of the revocation. Thus, the sole question for the Board is whether the parties' settlement agreement entitles the Claimant to the payment of any additional days beyond the 31 days already paid.

The Board concludes that the above-quoted settlement agreement language provides, most plainly and simply, that in addition to having the Level 4 discipline removed from his record, the Claimant would be allowed "pay for time lost." The record unequivocally established that the Claimant lost a total of 47 days as a result of the incident and was paid for 31 days. Therefore the Board holds that, based on the settlement agreement quoted and interpreted above, the Carrier is directed to pay the Claimant 16 days' pay at his daily rate of $164.1963, the rate previously used to compute the 31 days previously paid to the Claimant as documented by the Director-Timekeeping in his letter of September 28, 2000.

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 13th day of December 2004.

Carrier Member's Dissenting Opinion to Award 26076

The majority first quotes a settlement correctly, "allow pay for time lost", then later states, "Specifically, the language contained in the Carrier's [settlement] clearly provided that the Claimant would receive payment for all time lost." (emphasis by the Board).

Carrier must first point out that the Board added, then (to add insult to injury) underscored a non-existent word to justify its decision; secondly that the underscore should have been placed under the word "lost", *i.e.*, "...Claimant would receive payment for time lost."

Carrier pointed out that Claimant had been paid for the time he had lost. By this award, the Board has required the Carrier to pay Claimant for days he chose not to work, and for days the Organization delayed by their postponements. These latter days were certainly not days caused by any Carrier action therefore the Carrier should not have to pay for those days. To paraphrase an old song title, "You can't lose what you never would have had."

Carrier Member respectfully dissents.

Charles R Wise

Charles Wise
Carrier Board Member