

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

Award No. 26080

Docket No. 45867

04-1-02-1-U-3148

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 W. P. Stover (360-32-6732) for a basic day penalty, each date claimed, from January 02, 2001, until finally returned to service, and for the payment of all lost time associated with the Carrier's refusal to properly allow Engineer Stover to return to train service when all of his engineer's seniority had been exhausted on January 02, 2001, pursuant to an agreement executed by the Parties on December 06, 1999, and in accordance with the 1985 UTU National Agreement. Claim is valid as presented account Carrier failure to decline the original claim filed on January 18, 2001, within the time limits of the agreement."

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.

The record in this case discloses that on December 6, 1999, the Claimant, while holding an Engineer's position with this Carrier, signed a Disciplinary Reinstatement Agreement with the Carrier that provided for his return to service subject to certain conditions. Section 3, quoted below, is relevant to this case and stated:

"3. Mr. Stover will be restricted to yard service duty only. The Carrier will retain complete authority over this restriction during Mr. Stover's tenure of service with the Union Pacific. This means Mr. Stover will remain in yard service until the Carrier elects to remove the restriction."

According to the Organization, pursuant to Article XIII, Section 3 - Retention of Seniority, paragraph (3) of the October 31, 1985 UTU National Agreement, the Claimant, who also maintained Trainman's seniority under the UTU National Agreement, would have been permitted to exercise his Trainman's seniority in the event he were "unable to hold any position or assignment in engine service as engineer..." The record indicates that on January 2, 2001, the Claimant was cut from the Kansas City Yard Engineers' Extra Board and placed on the Engineers' Bump Board despite the fact that, in the Organization's view, the Claimant had insufficient seniority as an Engineer to bump another engine service assignment.

The situation that gave rise to the instant claim involves the Claimant's subsequent decision to exercise his UTU seniority to a Trainman's position. The Organization asserted that on two occasions, the Carrier informed the Claimant that he must exercise his train service seniority. Specifically, one such notification occurred in the form of a January 5, 2001 notation entered into the Claimant's work history, that he "must exercise his seniority to a train service assignment." Because, in the Organization's view, the Claimant was twice denied the opportunity to exercise his seniority as Trainman, despite the fact that it appeared to be the Carrier's position that he should make such an exercise, on January 18, 2001 the Organization filed with the Carrier's General Director-Timekeeping Operations, a continuing claim on the Claimant's behalf for lost earnings for two time periods, January 3, 2001 through April 2, 2001; and July 7, 2001 through July 25, 2001.

The Organization reported in its submission to this Board that the Claimant had applied for and had received unemployment compensation during the entire period encompassing the time claim, for being "unable to work as an Engineer and prohibited by the Carrier from exercising (his) seniority as a Trainman."

According to the record, notwithstanding the Carrier's substantive arguments concerning the instant dispute, the Organization asserted that the Carrier failed to meet the negotiated time limit for declining the January 18, 2001 claim. Specifically, the Organization cited Section 2 of the System Agreement - Claim Handling Process, which reads:

"2. Should any time claim be disallowed, the Carrier, within sixty (60) days from the date same was filed, must notify the employee or his representative in writing of the reason(s) for such disallowance."

According to Section 8 of the same System Agreement, the Organization maintained that the Carrier's failure to issue a timely denial of the claim rendered it payable on its face, as follows:

"8. If either party fails to comply with a time limit contained in this agreement, the claim shall be allowed (if the carrier's failure) or withdrawn (if the organization's failure). Claims so disposed of shall not be considered as a precedent or a waiver of the contentions of either party as to other similar claims."

The Board has carefully considered the extensive arguments advanced by both parties regarding the procedural aspects of this case as regards the Organization's claim submission and the Carrier's response. When the above Agreement language is applied to the facts and evidence of record, the Board concludes that the Organization's claim was properly submitted; however no response from the Carrier was issued within the 60-day period referenced in paragraph (2), above.

Given the Carrier's failure to timely deny the claim, and the language contained in paragraph (8) of the System Agreement - Claims Handling Process quoted above, the claim shall be allowed. Because the instant procedural dispute was a threshold issue dispositive of the claim, the Board is precluded from affording this claim any further consideration. With respect to the amount of compensation

to which the Claimant is entitled, the Board notes that as the Organization stated in its submission to the Board, "The Claimant was 'unable' to work in engine service assignment from January 3, 2001, to April 2, 2001, and from July 7, 2001, to July 25, 2001." It is further acknowledged by the Organization that during this "entire time period" the Claimant "applied for, and received, unemployment compensation."

Therefore, in light of the above, the Board directs the Carrier to pay the Claimant for the time lost from January 3, 2001 through July 25, 2001 at the appropriate Trainmen's rate of pay, offset by the unemployment compensation he received during the above-defined claim period. In formulating the above remedy, the Board considered the Organization's arguments and arbitral opinion offered in support of its position against offsetting. However, given the circumstances here, the Board finds no contractual prohibition against deducting railroad unemployment benefits received by the Claimant from Claimant's lost earnings during the claim period.

#### 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.

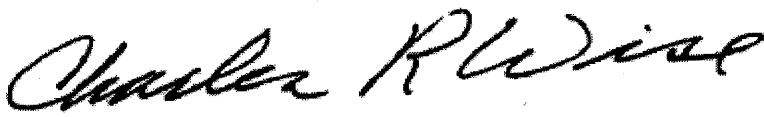
NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of First Division

Dated at Chicago, Illinois, this 13th day of December 2004.

### **Carrier Member's Dissenting Opinion to Award 26080**

The Carrier's position with regard to the failure of the Organization to make its initial appeal of the claim in accordance with the agreement provisions concerning claims handling was proper. Appealing the claim to the General Director of Timekeeping instead of the proper timekeeper was an end run designed to confuse and it worked. The Board only encourages such tactics by sustaining awards such as these.

Carrier Member respectfully dissents.

A handwritten signature in cursive script that reads "Charles R. Wise". The signature is written in black ink and is positioned above the printed name and title.

Charles Wise  
Carrier Board Member