

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36041
Docket No. MW-36357
02-3-00-3-599

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (Level 1 censure) imposed by letter dated December 28, 1998 upon Bus Driver M. J. McLeod for alleged violation of BNSF Maintenance of Way Operating Rule 1.6 and Rule S-28.6.1 concerning suitable language found on Pages 235 and 236 of the Safety and General Responsibilities for All Employees at or near work site at Trumbull, Nebraska while assigned to RP-22 on November 2, 1998 was unwarranted and in violation of the Agreement (System File T-D-1773-H/11-99-0305 BNR).
- (2) The discipline (Level 1 censure) imposed by letter dated December 28, 1998 upon Truck Driver B.A. Schultz for alleged violation of BNSF Maintenance of Way Operating Rule 1.6 and Rule S-28.6.1 concerning suitable language found on Pages 235 and 236 of the Safety and General Responsibilities for All Employees Rule at or near work site at Trumbull, Nebraska while assigned to RP-22 on November 2, 1998 was unwarranted and in violation of the Agreement (System File T-D-1774-H/11-99-0306 BNR).
- (3) As a consequence of the violation referred to in Part (1) above, any mention of this discipline shall be expunged from Claimant M.J. McLeod's record.

- (4) As a consequence of the violation referred to in Part (2) above, any mention of this discipline shall be expunged from Claimant B.A. Schultz's record."

FINDINGS:

The Third 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 instant dispute was progressed as two claims during the handling on the property. They were consolidated upon presentation to the Board.

The Claimants M. J. McLeod and B. A. Schultz were assigned to Gang RP 22 at Trumbull, Nebraska. On November 11, 1998, they were notified to attend an Investigation on November 16, 1998:

"... the purpose of ascertaining the facts and determining your responsibility if any in connection with alleged being Quarrelsome and Discourteous and using racial slurs on November 2, 1998 at approximately 0730 hours..."

The Carrier issued a second notice to the Claimants on November 11, 1998 stating in part that the Investigation "has been postponed by request of the Carrier," and directing the Claimants to attend an Investigation on November 30, 1998. Both Claimants affixed their signatures on the letter, acknowledging receipt.

At the Hearing held on November 30, 1998, the Claimants' representative objected to the timeliness of the Hearing, and stated that there had been no mutual agreement to postpone the date of the Investigation.

The Claimants were notified by letter dated December 28, 1998 that they were found guilty of the charges, and that a letter of censure had been placed in their personal records.

During the handling of this case, the Organization raised various procedural defenses. Among them was the contention that the Hearing had not been conducted in a timely manner in violation of the controlling Agreement. The resolution of that issue determines the outcome of this case, and precludes the necessity for further inquiry by the Board.

Rule 40 requires that a charged employee be afforded certain procedural protections. The Carrier is contractually required to schedule an Investigation within 15 days of the incident. The Agreement does allow for the postponement of an Investigation, but only if there has been mutual agreement.

In this case, the record establishes that the Carrier unilaterally postponed the Investigation. The Carrier concedes as much in its Submission. The Carrier argues that, although it postponed the Investigation without first obtaining the concurrence of the employees or their representatives, it did furnish notice to those involved, and said notice should be deemed sufficient under the Agreement provisions. In any event, the Carrier argues, its actions are not grounds to overturn a proven Rule violation.

The Board finds that the Carrier's contentions are without merit. The alleged incident occurred on November 2, 1998, and the Investigation was held on November 30, 1998, well beyond the contractual time limits for holding the Investigation. Prior decisions of the Board have held that the Carrier may not sidestep the procedural requirement by unilaterally postponing the Investigation and claiming that subsequent notification to the Organization was tantamount to mutual agreement. Second Division Award 11186, Third Division Awards 24731, 30998.

Moreover, notwithstanding the Carrier's arguments to the contrary, the Board's findings necessitate that we sustain the claim without reaching the merits and without fashioning an equitable remedy by engaging in an analysis of weighing the procedural defect against the misconduct. The Awards cited by the Carrier in support of its position with respect to remedy are not concerned with the interpretation and application of the precisely formulated time limit Rule with regard to the holding of Hearings in discipline cases, and, as such, they are inapposite here. Instead, the Board must be guided by the language of the Agreement itself, which provides:

"Rule 40 Investigations and Appeals

- J. If an investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed."**

In view of the foregoing clear and unambiguous directive, the claims must be sustained in their entirety.

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 Third Division**

Dated at Chicago, Illinois, this 21st day of May, 2002.