C O R R E C T E D

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9322
Docket No. 8724
2-BN-FO-'82

The Second Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen & Oilers
(Burlington Northern Railroad Company

Dispute: Claim of Employes:

1. Under the current controlling Agreement, Mr. R. Emry, laborer, Lincoln, Nebraska, was denied an opportunity to perform service on his regular work days, January 4 and 5, 1979.

2. That, accordingly, the Burlington Northern, Inc. be ordered to compensate Mr. R. Emry for eight hours pay at the pro rata rate on each of the two previously mentioned dates.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

The relevant facts in this case are not disputed. Claimant, R. S. Emry, was, at the time this dispute arose, employed as a laborer at Carrier's shops at Lincoln, Nebraska. Claimant was absent from work due to illness on January 2 and 3, 1979. When he attempted to protect his assignment on January 4, 1979, he was not permitted to do so without furnishing a doctor's release.

On January 5, 1979, Claimant appeared at the doctor's office to secure the release. While he was there, a dispute arose as to who would pay for his physical examination. At this point, Shop Superintendent E. J. Spomer was called to the doctor's office. Spomer informed Claimant that he could return to work on January 8, 1979 without having to furnish a physician's release. However, he also told Claimant that he would not be paid for eight hours work for both January 4 and 5, 1979. As a result on January 14, 1979, the Organization filed a claim on Claimant's behalf for eight hours' pay at the pro rata rate for the two days.

The claim was handled in the usual manner on the property until February 15, 1980. On that date, Superintendent Spomer wrote to J. J. Riggins, Local

Chairman, Local #1204, IBF&O, Havelock Shops. Spomer indicated that he had concluded that Claimant should, indeed, be paid for January 4 and 5, 1979. Spomer further indicated that "this settlement does not set a precedent and will not be referred to in future disputes of this nature". Riggins accepted the terms of the settlement by affirming his signature to Spomer's letter. Claimant Emry was subsequently paid for January 4 and 5, 1979.

Despite this "settlement", the Organization appealed the case to this Board for determination. In response to Carrier's claim that the case is now moot, the Organization contends that the Carrier is seeking to introduce documents not submitted into evidence on the property in clear violation of Circular 1 of the rules of this Board. In addition, the Organization argues that the case is not moot because Claimant was unjustly denied the right to protect his assignment on January 4 and 5, 1979 in violation of Rule 15 F. Further, according to the Organization, the Claimant was disciplined without an investigation in violation of Rule 28a.

Carrier insists that the case is now moot. It notes that the claim was for two days pay which Claimant has received. It adds that the claim was settled with the full approval of the Organization's local chairman on the property. It was not settled unilaterally. Thus, in Carrier's view, there is no justifiable claim before this Board.

One of the main purposes of a multi-step grievance procedure is to secure a resolution of labor relations disputes at the lowest possible level. While we would expect that Shop Superintendent Spomer would have made a full investigation of the matter when it was first presented to him (i.e. in early 1979), nothing in the record or the parties' mutually agreed upon procedures prevented Superintendent Spomer from resolving the dispute prior to its submission to this Board.

In addition, this settlement was ratified by the Organization's own representative on the property. As Referee Eischen noted (Award 21011):

> "Even more basic is the accepted principle of labor relations (that) settlement's in grievance handling by duly authorized representatives are final and binding on both parties and, absent express contractual requirement, are not subject to ratification or rejection by others away from the table." (Emphasis added).

It is clear to us that this claim has been fully settled. Except for his loss of pay for January 4 and 5, 1979, Claimant was not "disciplined" by Carrier. Thus, when Claimant received his two days' pay he was made whole. Accordingly, this claim has been fully settled on the property.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of December, 1982.

DISSENT OF LABOR MEMBER TO AWARD 9322

The majority, in this Award, was in gross error when it failed to address the issues presented in the claim and instead chose to shirk the responsibility of determining if the Carrier violated the current collective bargaining agreement by denying the Claimant an opportunity to perform service on January 4, and 5, 1979.

The majority indicated that "The claim was handled in the usual manner on the property until February 15, 1980." It must be noted however that on January 30, 1980, the organization had presented this claim to the Second Division, National Railroad Adjustment Board as required by Section 3, First (i) of the Railway Labor Act. The aforementioned section of the Railway Labor act mandates that claims "...shall be handled in the usual manner up to and including the chief operating officer of the Carrier designated to handle such disputes;..." The organization followed these mandates and failing to reach a satisfactory adjustment of the matter referred the claim to this Division of the National Railroad Adjustment Board.

It was <u>after</u> the claim was referred to this Board that the handling of the claim <u>was not</u> handled in the usual manner as required by the Railway Labor Act. We would point out that on May 8, 1979, the Assistant to the Vice President, Burlington Northern, declined the claim because the incident

in question was not "...prohibited by the Agreement..." and the Vice President of Labor Relations on May 29, 1980, informs the Board that the claim was not valid to begin with.

The majority erroneously indicates that "..nothing in the record or the parties' mutually agreed upon procedures prevented Superintendent Spomer from resolving the dispute prior to its submission to the Board." (emphasis added) and "despite this settlement, the organization appealed the case to this Board for determination." As previously indicated such a position is in error. While there were discussions between the General Chairman's office and the highest desinated officer's office regarding possible alternative solutions to this claim, no settlement was reached, and the General Chairman had in fact rejected a similar offer when such was made by the Labor Relations office.

The Carrier then, through the shop superintendent, and after the case was filed with this Board resolved the monetary portions of the claim with the Local Chairman unbeknownst to the General Chairman. This surreptitious action by the Carrier makes a mockery of the appeal procedure required by the current collective bargaining agreement and shows a total disregard for the grievance procedures.

The organization came before this Board requesting the Board to determine: (1) Did the Carrier violate Rule 15F? and (2) If the Rule was in fact violated, what is the correct compensation for the Claimant? The majority

under the guise of mootness has chosen not to render a decision on a highly controversial issue thus relegating the issue to a future tribunal.

In view of the errors contained in the majority's decision we must vigorously dissent.

Don A. Hampton
Labor Member