Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
SECOND DIVISION

Award No. 14088
Docket No. 13990
14-2-NRAB-00002-140021

The Second Division consisted of the regular members and in addition Referee Joseph M. Fagnani when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen-Division of TCU/IAMAW
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(BNSF Railway Company

STATEMENT OF CLAIM:

"1. That the Burlington Northern Santa Fe Railroad Company violated the terms of our current Agreement, in particular Rule 35, when the Carrier failed to attend a scheduled investigation on April 30, 2012 regarding Carman Jeffrey S. Wilhelm for alleged failure to timely report an injury on May 28, 2011.

2. That accordingly, the Carrier be ordered to expunge the personal record of the Claimant, Carman Jeffrey S. Wilhelm, of all correspondence related to this incident."

FINDINGS:

The Second 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 Claimant in this case was employed as a Carman at the Carrier's facility in Alliance, Nebraska. By letter dated June 7, 2011, the Claimant was directed to report

for a formal Investigation on June 21, 2011, in connection with circumstances surrounding a personal injury. At the request of the Claimant's representative, the formal Investigation was postponed on several occasions due to the Claimant's inability to attend due to his medical condition. Included in the correspondence relative to postponement of the Investigation is an August 15, 2011, letter from Trainmaster Badenhoop to District Chairman Long stating that "we would like to move forward and conduct this investigation . . . on August 30, 2011." District Chairman Long responded by letter dated August 17, 2011 requesting a continuation of the postponement noting various medical reasons for the Claimant's continued inability to attend the formal Investigation. The District Chairman also forwarded the Carrier a copy of an August 18, 2011 letter from the Claimant's physician noting that the Claimant was under medication that would have an adverse effect on the Claimant's memory as well as affecting the Claimant's ability to perform under stress. The Claimant's physician concluded that he "would not advocate him being involved in any investigational type of matters for his work." Based on this information, the Carrier continued the postponement as had been requested by the Claimant's representative.

Another attempt was made to reschedule the formal Investigation for February 29, 2012; however, the postponement continued following a February 22, 2012 letter from District Chairman Long wherein he attached a February 17, 2012 letter from the Claimant's psychiatrist stating that the Claimant had increased stress levels and she did not recommend that the Claimant participate in the investigatory process.

There was another attempt to reschedule the formal Investigation for April 30, 2012; however, although the Local Chairman was present, the Claimant did not show up and the Investigation was not held. According to the Carrier, the formal Investigation continued to be in a postponement status as of April 30, 2012 and continues in such status at the present time. However, District Chairman Long wrote to Field Superintendent Esquivel on April 30, 2012, noting that he was present at the location set for the April 30, 2012 Investigation and demanded ". . . per Rule 35 that the Carrier expunge Mr. Wilhelm's record of this entire incident." Field Superintendent Esquivel responded to District Chairman Long by letter dated June 19, 2012 and at the conclusion of the letter he stated that the claim was denied. In response, District Chairman Long, in a letter dated July 16, 2012, stated in reference to his April 30, 2012 letter that "this is not a claim it was simply a notification" relative

to the fact that no formal Investigation had been held on April 30, 2013 and that ". . . we consider this matter to be concluded."

Thereafter, the Organization sent a letter dated August 22, 2012, to the Carrier's highest designated officer to handle claims or grievances advising that it was submitting an "appeal of claim and grievance" without specifically stating what decision was being appealed, but alluding to the exchange of correspondence between the District Chairman and the Field Superintendent, as noted above. The Organization's position was that the Carrier's failure to hold the Investigation on April 30, 2012 violated the terms of Rule 35 and requested that all reference to the original Notice of Investigation and all subsequent correspondence be expunged from the Claimant's record. The Carrier responded to the Organization in a letter dated November 26, 2012, asserting that the Carrier's postponement of the formal Investigation was done in accordance with Rule 35 and also stated that the "claim has been submitted prior to the Claimant's hearing being held and should be withdrawn." At the conclusion of the letter, the Carrier stated that the "claim is respectfully denied in its entirety."

Initially, the Carrier has taken the position that the Board does not have jurisdiction in this matter contending that no claim or grievance was filed by the Claimant or his representative to any local Carrier Officer authorized to receive same. The Carrier is primarily basing this position on District Chairman Long's statement in his July 26, 2012 letter that "this is not a claim it was simply a notification." Accordingly, the Carrier concludes that the subsequent handling of this matter did not constitute a claim or grievance and, therefore, the Carrier posits, this is "a case where no claim was filed."

The Board cannot uphold the Carrier's request that this case be dismissed for lack of jurisdiction for two reasons. First, there is nothing in the record to suggest that during the handling of this case on the property the Carrier ever advised the Organization that the matter was procedurally defective for the reason that no claim had ever been filed. This being the case, the Carrier cannot, for the first time, raise this argument before the Board. Of equal import is the fact that during progression on the property, the Carrier at both levels of handling clearly indicated that it was treating this matter as an appeal and, in each instance, stated that the "claim" was denied. If indeed, the Carrier believed that there was no claim ever filed, it was

incumbent upon the Carrier to so advise the Organization. This, the Carrier did not do, but rather used language indicating the contrary.

Relative to the merits of the case, both parties have relied on the following portion of Rule 35(a) in support of their respective positions:

> **"The date for holding an investigation may be postponed if mutually agreed to by the Carrier and the employee or his duly accredited representative, or upon reasonable notice for good and sufficient cause shown by either the Carrier or the employee."**

The Organization contends that the Carrier violated Rule 35 by "unilaterally, and without mutual consent postponing [the] investigation" and committed a fatal procedural error by not conducting the Investigation on August 30, 2012. In opposition, the Carrier asserts that the Claimant's rights were not prejudiced by not conducting the Investigation on April 30, 2012; on the contrary, the postponement was to the Claimant's personal benefit. The Carrier states that based on the long history of postponements and the correspondence incident thereto, it was known that the Claimant was unable to attend the Investigation and that the April 30, 2012 scheduled Investigation was handled the same as previously done, i.e., placed in a postponement status.

The Board finds that the Carrier's decision to not hold the April 30, 2012 formal Investigation in light of the Claimant's continued inability to attend same due to his medical condition did not violate Rule 35 in that this constituted "good and sufficient cause" for further postponement. The Carrier's position is further bolstered by the fact that the Claimant was granted a full disability by the Railroad Retirement Board to be effective April 30, 2012, i.e., the very date of the scheduled Investigation. It is clear to the Board, therefore, that the Claimant would not have been able to attend the Investigation had the Carrier proceeded on that date.

Under the particular facts and circumstances in this case, the Board finds no contractual support for the Organization's claim that all reference and correspondence in connection with the original May 28, 2011 incident be removed from the Claimant's record. In the event that the Claimant returns to active service at some point in the future, it will be up to the Carrier to decide at that time whether or

not to proceed in this matter. Likewise, it will also be up to the Organization at that time to object to the Carrier's decision if it chooses to do so.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 25th day of November 2014.