

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26559  
Docket Number MW-26342

Robert W. McAllister, Referee

PARTIES TO DISPUTE: ( **Brotherhood of Maintenance of Way Employees**  
(Southern Pacific Transportation Company  
(**Eastern Lines**)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The thirty (30) days of **suspension** imposed up" Foreman M. H. **Himel** for alleged 'violation of Rules 801, 802, and **M811** of the Rules and Regulations of the Maintenance of Way and Structures of SPTCO' was without just and sufficient cause and on the basis on unproven charges (System File MW-84-54/415-40-A).

(2) The hearing held on March 29, 1984 was not held as required by Article 14(b).

(3) For the **reasons** set forth in either Part (1) and/or (2) above, the claimant's record shall be cleared of charges leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: The Claimant is a Foreman with thirty-five years of service. At the time of the incident, he was in charge of Extra Gang No. 136 at **Schriever**, Louisiana. He was charged with a violation of Rules 801, 802, and **M811** in connection with duties assigned to him on February 3, 1984. In a letter dated February 8, 1984, he **was** notified he was suspended without pay for thirty (30) days.

On February 17, 1984, the Claimant requested a hearing. Within a week of the request, he was advised his hearing would be held on **May 6**, 1984, at Lafayette, **Louisiana**. The day before the hearing was scheduled to commence, March 5, 1984, the Claimant's representative was orally advised that the scheduled hearing would have to be postponed because the Hearing Officer became ill **enroute** from Houston **to** Lafayette. That same day, a letter was addressed to the Claimant stating:

"Because of the fact our presiding officer, Mr. Karl Buechler became ill while traveling **to** Lafayette, La. **to** preside **over** your hearing the carrier will be unable to hold the hearing on March 6, 1984. Therefore, your hearing will be postponed and rescheduled when **our** presiding officer will be able to return to work."

The Claimant and his representative, however, appeared on March 6, 1984, at the appointed time and place and, when the investigation was not held, drafted a letter protesting the delay. The hearing was eventually held and completed on March 29, 1984. At the hearing, the Organization contended the Agreement was breached when the Carrier took it upon itself to postpone a scheduled hearing. It also argued that, under the circumstances, the Claimant was not guilty of violating company rules.

Paragraph (b) of Article 14, Discipline and Grievances provides:

"An employee disciplined or who feels unjustly treated shall, upon making a written request to the officer of the Carrier authorized to receive same, within fifteen (15) days from the date of advice, be given a fair and impartial hearing by an authorized carrier officer. The hearing will be held within fifteen (15) calendar days thereafter, unless for good cause, additional time is requested by the Carrier, the employee, or employee's representative."

The last sentence of paragraph (b) was the subject of our prior Third Division Award 24731. Therein, we concluded that, under the circumstances involved, Carrier's postponement was improper and sustained the claim of the Organization without getting to the merits of the matter. The Organization **urges** we adopt Third Division Award 24731 as controlling and sustain this Claim.

In reviewing the above Award, we note that in that case two letters of postponement were sent to the Organization. The first stated:

"Due to other commitments, your hearing has been  
**postponed....**"

The second stated:

"Due to other commitments, your hearing has  
again been postponed."

It seems no reason, other than a vague statement, "due to other commitments," was ever given for postponement of either scheduled hearing. That is not the situation in **our** case.

Third Division Award 24731 also seeks support and quotes extensively from Third Division Award 23082 involving the same Organization, but a different Carrier. Third Division Award 23082 concluded that the investigation under review there was improper because the Carrier "offered no reason for postponement," which again is not the situation here.

In addition to relying on Third Division Award 24731, the Organization has submitted a number of other Awards which it argues support a conclusion that unilateral postponement of hearings and investigations by a Carrier make the matter void **ab initio**.

We have examined these authorities and find that each involved Agreement language that required investigations or hearings to be set within positive time frames. The language used was either silent on postponements or required that they be arranged by mutual agreement of the parties. We do not have any quarrel with these results in such circumstances because, as stated in Third Division Award 22748:

"While holding the parties to the time limits set out in their agreements may from time to time work an injustice for either a carrier or a claimant, we must apply the agreements as written and not by case law create exceptions which have not been agreed on by the parties."

However, Rule 14(b), as we read it, is not silent about postponements nor does it absolutely require concurrence by the other side.

Rule 14(b)'s "good **cause**," conveys additional time beyond fifteen days for the holding of the hearing. It is the **reason** for requesting the delay, not the manner of the request, that allows a hearing to be held beyond fifteen days. In this case, the reason for the request was the sudden illness of the Hearing Officer. This seems to be a circumstance of "good **cause**." We, therefore, conclude Rule 14(b) was not breached.

With regard to the merits of the discipline, the record shows the Claimant had an unblemished record of service. The Rules he was alleged to have violated were:

- "801. Employees will not be retained in the service who **are...insubordinate**.
- 802. Indifference to duty, or the performance to duty will not be condoned.
- M811. Employees must **not...substitute** others, or exchange duties without proper authority."

Insubordination is the state of being disobedient to constituted authority. This Board has often indicated that it involves the refusal to obey an order which a superior officer is entitled to give and expect to have obeyed. We have carefully studied the testimony in the hearing transcript and must conclude the Claimant's conduct was not in violation of Rule 801. The Carrier's District Manager had contacted the Claimant by telephone and asked him to assemble a crew to change out a broken rail. The Claimant experienced difficulty in marshalling a crew to do the task. The District **Manager** was asked if the Claimant had refused his instructions to assemble a crew. His specific answer was that he did not refuse.

Our examination of the Transcript also fails to develop that the Claimant was **indifferent** to the performance of his duties. After being asked to assemble a crew, he reported to the depot and made a number of calls during a time period of almost two hours. Because of the weekend, he was just not able to secure the force needed to do the job. Accordingly, we do not find the Carrier has established a violation of Rule 802.

The violation of Rule M811 seems to be predicated upon the attempts of the Claimant to contact a different Foreman to get a crew to change out the broken rail. Under the circumstances herein present, we fail to see how such acts are to be considered an exchange of duties.

Accordingly, it is our view the Carrier did not have just and sufficient cause to discipline the Claimant with a thirty (30) day suspension. The reference to the discipline will be removed from the Claimant's record, and he shall be paid for all losses sustained as provided in Rule 14(f) of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1987.