NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23082
Docket Number MW-23236

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Missouri Pacific Railroad Company
((Former Chicago and Eastern Illinois Railroad Co.)

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

(1) The dismissal of Welder J. E. Hamm for alleged violation of Rule G was without just and sufficient cause and wholly disproportionate to the charge leveled against the claimant (Carrier's File S 214-108).

(2) Welder J. E. Hamm shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: On November 16, 1978, the Carrier wrote claimant, certified mail, at his last known address:

"Report to the Office of the Superintendent, Missouri Pacific Railroad Company Office Building, Sibley Boulevard and Indiana Avenue, Yard Center, Dolton, Illinois at 10:00 a.m. November 20, 1978, to develop the facts and place your responsibility, if any, in connection with your reported violation of Rule G at or about 12:00 noon on November 15, 1978 while on duty in a company vehicle on company property at Dolton, Yard Center Illinois.

Arrange attendance of witness and/or representative as provided for by schedule agreement."

On the same date, November 16, 1978, the Carrier wrote claimant another letter, stating:

"Refer to my letter of November 16, 1978 setting formal investigation in the Office of the Superintendent, Missouri Pacific Railroad Company Office Building, Sibley Boulevard and Indiana Avenue, Yard Center, Dolton, Illinois for 10:00 a.m. November 20, 1978, to develop the facts and place your responsibility, if any, in connection with your reported violation of Rule G at or about 12:00 noon on November 15, 1978 while on duty in a company vehicle on company property at Dolton, Yard Center, Illinois.

"At the request of the carrier, this investigation is postponed and rescheduled to be held at 10:00 a.m. on Tuesday, December 5, 1978, at the same location.

Arrange attendance of witness and/or representative as provided for by schedule agreement."

The Organization contends that Carrier's unilateral postponement of the investigation was in violation of those portions of Rule 34 reading:

"Notice of such investigation, stating the known circumstances involved, shall be given to the employe and the investigation will be held within ten (10) days of date when charged with the offense or held out of service.

* * * *

"Investigation shall be held, so far as possible at the home terminal of employes involved, and at such time as to cause employes a minimum loss of rest or time. When necessary to secure presence of witnesses or representatives not immediately available, reasonable postponement at the request of either the Company or Employe may be had, but in any event, such investigation shall be held within thirty (30) days of the date of notice."

The Organization contends that no request for a postponement of the investigation was made to any representative of the Organization, or to the man charged. The contention is also made that the extension of time in which to conduct the investigation was not necessary to secure presence of witnesses or representatives not immediately available, and, therefore, the only exception to the ten-day time limit specified in Rule 34 had no application.

The record shows that in the investigation conducted on December 5, 1978, the General Chairman raised the issue that he was not contacted regarding the postponement of the first scheduled investigation and contended that the investigation was not conducted within the ten-day time limit as provided in Rule 34 of the Agreement. It has often been held that objections concerning notice of charge, the timeliness of the investigation, and similar issues, must be raised prior to or during the course of the investigation, or they are considered waived. In this case the objection was timely raised.

The Carrier contends that the postponement of the investigation was in accordance with accepted past practice on the property. However, no evidence has been submitted concerning past practice. As stated in Award 14491:

> "If Carrier relied on practice as its affirmative defense it was obliged to prove it . . . ."

See also Awards 13928 and 14583.

Award No. 41 of Public Law Board No. 1844, involving the same Organization as herein and another Carrier considered a situation similar to what we have in our present case. In that Award it was held:

> "The instant claim mounts no serious challenge to the sufficiency of the evidence nor the appropriateness of the penalty imposed. Indeed, were those the only issues we would deny the claim. But the claim comes to us on the procedural jurisdictional complaint that Carrier violated Rule 19(a) which reads in pertinent part as follows:
>
> > 'The investigation will be postponed for good and sufficient reasons on request of either party.'
>
> "The crux of this claim, as presented and pursued on the property, is that Carrier did not 'request' but rather just unilaterally presumed to postpone the hearing originally scheduled for September 2, 1977. On the property Carrier defended against that complaint by asserting that there were 'good and sufficient reasons' for postponement, and also by pointing out that the Organization requested and was granted several postponements by Carrier before the hearing actually was held. At our hearing Carrier asserted for the first time that then Vice Chairman Jorde was 'told' about the necessity of postponement prior to August 30, 1977. The Organization articulated its objection regarding that postponement on the record at the hearing and pursued this objection diligently on the property. At no time prior to our Board Hearing did Carrier raise this latter defense. It comes too late now to be legitimately raised and considered.

"There is no doubt on this record concerning the 'good and sufficient reasons' why Carrier wanted a postponement. The only question is whether Carrier complied with the clear contractual requirement that it 'request' such postponement from the other party to that agreement. To 'tell' is not the same as to 'request'. We must assume that the parties to the Agreement knew the meaning of the words which they used. Irrespective of the bona fides or the justification for a postponement, Carrier violated Rule 19(a) when instead of requesting a postponement it unilaterally granted itself a postponement and merely informed the Organization of that fiat accompli. It should be noted that each party is required to grant the other a postponement under Rule 19(a) when requested to do so for good and sufficient reasons. If Carrier had requested that particular postponement and the Organization had refused, we would have a different case. But Carrier's fatal error herein was in failing altogether to make the request and in acting unilaterally.

"Nor in the final analysis is it really relevant that Carrier subsequently granted several requests from the Organization for postponements. Such considerations go to questions of equity and comity; whereas we are called upon here to interpret clear and unambiguous contract language. Perhaps the result does not seem 'fair' or a layman might deem that the 'guilty party' has been permitted to escape through a technical 'loophole'. However, we do not sit to dispense our own particular brand of justice. Rather, we are requested to interpret the contract before us and where it is clear we have no alternative but to enforce it as it is written. See Award 3-11757."

This Board does not find the reasoning set forth in the above-quoted award to be in palpable error. In our present case the Carrier has offered no reason for postponement of the investigation from November 20 to December 5, 1978.

This Board is always reluctant to decide claims on technicalities, but we have no choice but to apply the Agreement as written. We cannot ignore the clear language thereof. We find that the Carrier violated the Agreement in postponing the investigation in the manner that it did.

Without passing upon the merits of the dispute, the claim will be sustained; however, in line with many awards issued by this Division, the Carrier is entitled to take credit for the earnings claimant may have had in other employment while out of service of the Carrier.

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 Employes involved in this dispute are respectively Carrier and Employes 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 in accordance with the Opinion. Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1980.