Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32497
Docket No. MW-32681
98-3-95-3-618

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (letter of censure) imposed upon Machine Operator N. D. Leier for his alleged violation of Rule 65 in connection with an accident that occurred on June 9, 1993 was unwarranted and in violation of the Agreement (System File T-D-702-H/MWB 94-02-09AA).

(2) The discipline (letter of censure) imposed upon Foreman D. L. Hustad for alleged violation of Rule 885 in connection with an accident that occurred on June 9, 1993 was unwarranted and in violation of the Agreement (System File T-D-703-H/MWB 94-02-09AD).

(3) As a consequence of the violation referred to in Part (1) above, Claimant N. D. Leier's record shall be cleared of the charge leveled against him and he shall be compensated for any wage loss suffered as a result of this improper discipline.

(4) As a consequence of the violation referred to in Part (2) above, Claimant D. L. Hustad's record shall be cleared of the charge leveled against him."

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 case before this Board involves Claimants Hustad and Leier who were each assessed a mark of censure on their personal records, following a formal Investigation. When the events giving rise to the discipline occurred, Claimant Hustad was employed as a Foreman, and Claimant Leier was employed as a Machine Operator.

On June 9, 1993, while Claimant Leier operated a ballast regulator, he stated that he "bumped into" Pup Tamper BNX 5600176 that was operated by Machine Operator Booth. Booth's machine was struck in the rear, while he "was waiting at the west switch at Blair."

Clearly, the evidence in the record warrants the conclusion that Claimant Leier violated Rule 65, which, in relevant part, provides that "[O]n-track equipment . . . must approach no closer than 150 feet to a standing train or engine. . . ." Moreover, Rule 65 goes on to state that "[O]perators of on-track equipment are responsible for maintaining a safe braking distance between other on-track equipment.

Claimant Hustad did not see the collision on June 9, but he heard the "sounds" which were caused by the collision. He "assumed a couple of machines bumping together." He stated that there was no damage to the machines. Claimant Hustad went on to state that he talked to each of the Operators and that "they all stated they were okay."

After the collision, Booth said that he told Claimant Hustad he had "a light pain in my neck, but it didn't last very long. I'm okay." Claimant Hustad did not report any injury to an employee arising from the incident of June 6. Two months after the incident,

on August 6, Booth filed a personal injury report with respect to injuries which he sustained from the June 6 collision.

Based upon the record, Claimant Hustad violated Rule No. 885 which, in relevant part, require that "all accidents resulting in injuries to employees on duty . . . regardless of the extent of injuries . . . must be promptly reported to the general manager."

Turning to a procedural issue raised by the Organization, it claims that the Carrier violated Rule 40 I which, in relevant part, provides:

> "I. The date for holding an investigation may be postponed if mutually agreed to by the Company and the employee or his duty authorized representative. . . ." [Emphasis added].

Rule 40 I requires that the Company and employee or duty authorized representative agree to a postponement of an Investigation. Initially, Claimants Hustad and Leier along with Booth received notice on August 9 that an Investigation was to be held on August 18, 1993. Later that day, on August 9, they were given notice by the Carrier that the Investigation was postponed at the request of Trainmaster Black.

The Organization contends that contrary to Rule 40 I, there was no agreement between the parties with respect to the postponement of the August 18 Investigation. The Organization points out that the notice of postponement of the August 18 Investigation was a unilateral action of the Carrier inasmuch as the Claimants and Booth did not agree to the postponement. In the notice of postponement they were merely directed to "acknowledge receipt" by affixing their signatures to the notice each of them received.

It is of great weight that there was no objection raised by the Claimants and Booth to the Carrier's postponement of the Investigation. Nor is there any evidence in the record that the Organization objected to the Carrier's postponement of the Hearing. Absent evidence that the Carrier's request was rejected by the Claimants, Booth and the Organization, leads the Board to conclude that they acquiesced in the postponement of the Investigation by the Carrier.

In addition, there was no showing by the Organization that the postponement caused any prejudice to the Claimants. Indeed, there were two additional postponements of the Investigation which were requested by the Organization, and agreed to by the Carrier.

It may very well be that with respect to one of the requests by the Organization for a postponement of the Investigation, the Organization's representative acted solely on behalf of Booth. This Board does not believe that consent is required by the representatives of Claimants Leier and Hustad. The Agreement with the Carrier sets forth the Organization as a party to the Agreement. Both the representative for Booth and the representatives for the Claimants are employed by the Organization. Accordingly, it is presumed that the representatives for Booth and the Claimants acted on behalf of the Organization.

As with the initial postponement of the Hearing from August 18 to August 26, neither the Claimants nor Booth, and their duly authorized representatives raised an objection to the request for postponement by the representative for Booth. Accordingly, if agreement by the representatives of the Claimants were required, it was supplied by their silence or acquiescence to the postponement of the Investigation.

Both Claimants Leier and Hustad received letters of censure for violating Rules 65 and 885, respectively. This Board concludes that the penalty is not arbitrary, discriminatory or excessive.

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 Third Division

Dated at Chicago, Illinois, this 25th day of March 1998.

LABOR MEMBER'S DISSENT
TO
AWARD 32497, DOCKET MW-32681
(Referee Cohen)

The Majority erroneously ruled on the procedural argument raised by the Organization when it held:

> "The Organization contends that contrary to Rule 40 I, there was no agreement between the parties with respect to the postponement of the August 18 Investigation. The Organization points out that the notice of postponement of the August 18 Investigation was a unilateral action of the Carrier inasmuch as the Claimants and Booth did not agree to the postponement. In the notice of postponement they were merely directed to 'acknowledge receipt' by affixing their signatures to the notice each of them received.
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The problem here is that a review of Transcript Page 3 of the investigation, which was eventually held on September 21, 1993, would clearly reveal that the Vice Chairman strenuously objected to the fact that the initial postponement was done so by the Carrier without consent of the parties. Rule 40I is a contractual obligation to which the parties to the Agreement must comply without fail. The provisions are so crystal clear that it is unimaginable that the Board would sanction such clear and unambiguous language as somehow being less than mandatory. The Majority did not stop there in its perversion of the clear terms of the Agreement. The Majority held:

> "In addition, there was no showing by the Organization that the postponement caused any prejudice to the Claimants. ***"

As we stated above, the requirements of Rule 40 are clear and unambiguous and should not be subject to misinterpretation. The parties are obligated to comply with the clear terms of the Agree-

ment and failure to do so is fatal to the party who violates said provision. Mandatory language is agreed to by the parties and is meant to be strictly enforced. There is no provision for either party to show that they were somehow "prejudiced" before demanding adherence to the clear and unambiguous language of the collectively bargained agreement. In this connection, we invite attention to Award 24731, one of the six awards presented to the Board in support of our position to which the Majority felt obligated to ignore, wherein it held:

> "This is not the first case of the kind before the Board involving the postponement of an investigation unilaterally when the rule provided for postponement at the 'request' of either party. In Third Division Award No. 23082 we passed upon a very similar dispute involving the same Organization and another Carrier. In Award No. 23082 we endorsed and quoted extensively from Award No. 41 of Public Law Board No. 1844, in which it was held:
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> * * *
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> '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 a postponement prior to August 30, 1977. The Organization articulated its objections 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.
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> 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 requirements 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 fait 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. (Underscoring in original)

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.'

* * *

The same conclusion is warranted in our present case. Without passing upon the merits of the dispute, the claim will be sustained, with pay for time lost by

"claimant being computed in accordance with Article 14(f) of the Agreement." (Underscoring in original)

The record of this case clearly shows that the Carrier blatantly ignored the clear and unambiguous language of the Agreement and the claim should have been sustained. Instead, the Majority simply decided to dispense its own particular brand of industrial justice, much to the detriment of the clear and unambiguous language of the Agreement. This award is fundamentally flawed and is of no precedential value.

Respectfully submitted,

Roy C. Robinson
Labor Member