

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37794
Docket No. MS-38047
06-3-03-3-459

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

PARTIES TO DISPUTE: (United Transportation Union
(San Joaquin Valley Railroad

STATEMENT OF CLAIM:

"A claim and grievance for San Joaquin Valley Railroad employee Nathan Zoolakis for reinstatement to service with seniority unimpaired and compensation for all time and credits lost and that all reference to this incident be expunged from his personnel record."

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.

For reasons cited in Third Division Award 37793, the Claimant shall be returned to service, with seniority unimpaired, but without pay for time lost.

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AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 31st day of May 2006.

NRAB Third Division
Award Nos. 37793 & 37794
Docket Nos. MS-38046 & MS-38047

Labor Members' Dissent

In Docket No. MS-38046, the Neutral Member of the Board found "The record is void of any evidence that the Claimant was trying to "steal" money. It was a simple time claim." In Docket No. MS-38047, the Neutral Member of the Board found "there is no evidence that the Claimant was disobedient to authority in the January 7, 2003 meeting." In summary of the two cases, Neutral Member concludes, "It is clear from the record of both cases that the Carrier has failed to meet its burden of proving that the Claimant violated its rules."

In spite of exonerating claimant of all wrongdoing, Neutral Member fails to hold Carrier accountable for its actions based upon its pleading of procedural violation. The Labor Members are dismayed that the conventional level of proof is not acceptable in this case.

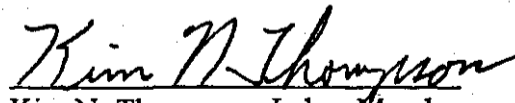
The initial appeal was submitted to the Carrier by Local Chairman's letter dated June 15, 2003. Carrier's receipt of Local Chairman's letter of appeal is confirmed by United States Postal Service Request Proof of Delivery at 1:33 p.m., July 1, 2003, Attachment 1 of Organization's Brief. Carrier authored letter dated August 13, 2003 to Local Chairman in which it was alleged that no appeal had been received; therefore, the discipline will stand. Upon receipt of his copy of the August 13 letter, General Chairman notified the Carrier that proof of delivery was available and he could provide a copy of the letter of appeal. Not only did the Carrier not request to see the proof of delivery, but it refused to accept a copy of the letter of appeal. All further response from the Carrier was to deny handling of the appeal.

It must be considered, why did the Carrier initiate its August 13 letter declaring that it had not received an appeal? When confronted by the General Chairman that proof a delivery was available, why was the Carrier not interested? Why did Carrier not request to see the proof? When the General Chairman offered to provide a copy of the letter of appeal, why did the Carrier refuse acceptance?

No Carrier reports to the Organization that it did not receive an appeal unless it is concerned about a timely response to that appeal. In such case, when the Organization confirms proof of delivery, the Carrier requests proof of delivery and then makes a timely response.

Carrier's actions in instant case are completely out of character. It is obvious that Carrier's position is a sham. Carrier had dismissed claimant on two separate issues and obviously had determined that it could further insure its dismissal of claimant by creating a procedural issue, thus having it both ways. The Neutral Member bought into this sham and relieved Carrier of its liability, returning claimant to service without pay for time lost. Like the Carrier's procedural issue, the decision herein is a sham.

The findings in this Award are unacceptable.


Kim N. Thompson, Labor Member