

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6198**

**JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
T. M. STONE, CARRIER MEMBER
DON M HAHS, ORGANIZATION MEMBER**

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
SLSW, GENERAL COMMITTEE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER ST. LOUIS SOUTHWESTERN RY. CO.)**

**Award No. 11
Case No. 11
Engineer H. D. Adcock
Level 4 Discipline
30-days Suspension**

*Date of Hearing - May 1, 2000
Date of Award - July 31, 2000*

Statement of the Issue

The Chairman and Neutral Member, after review of the entire record, has determined that the issues before this Board are:

Was Carrier justified in assessing Claimant Engineer H. D. Adcock Level 4 discipline of thirty (30) days actual suspension in connection with his alleged responsibility for the derailment of YHU6925 on January 25, 1999?

and

Does Carrier's alleged mishandling of the instant dispute on the property present just cause for this Board to sustain the instant claim on procedural grounds alone?

FINDINGS:

Public Law Board No. 6198, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein.

Before this Board, the parties present Engineer H. D. Adcock's claim that he was unjustly assessed discipline of thirty (30) days actual suspension in connection with the derailment of his yard assignment on January 25, 1999. According to the record, Claimant's train at the time of the incident, designated as Yard Job YHU6925, consisted of two locomotives (coupled back-to-back) and two cars (coupled to the nose end of the trailing unit). Claimant, operating YHU6925 from the rear locomotive and facing away from the direction of movement, proceeded past a point on the 500 track at Hutchinson protected by Maintenance of Way red flags (and evidently over a flag itself), derailing the lead locomotive at a partially dismantled switch. The Board notes that ground personnel were not riding the point to protect this movement as required by Air Brake and Train Handling Rule 31.2.3, nor was Claimant operating from the "lead controlling unit" as is stipulated in that same rule.

A formal investigation into the matter was conducted on February 19, 1999 in South Hutchinson, Kansas, the proceedings of which were transcribed by a certified Court Reporter. Claimant was subsequently found responsible for violating Rule 6.28 of the General Code of Operating Rules and Rule 31.2.3 of the Air Brake and Train Handling Rules cited above, and by letter dated February 26, 1999, was suspended from service for a period of thirty days. In due course, Organization General Chairman D. E. Thompson, in compliance with applicable Schedule Article 71.5, appealed Carrier's decision to Superintendent Dan Shudak, asserting the following, *inter alia*, in his April 8, 1999 letter:

For your information, Engineer Adcock is an SSW Engineer. On the date of the incident, he was working under the BLE/SSW/CBA. The investigation was conducted under the SSW Agreement and this appeal is being made as per the SSW Agreement. Copy of Article 71, Rights to Hearing Rule is enclosed for your ready reference.

...

I have been advised by BLE/SSW Local Chairman, Brent Johnson, Pratt, Kansas that the investigation was held to a conclusion at Hutchinson, Kansas on February 19, 1999 and as of this date he has not been provided a complete transcript. He has provided this office with a copy of the discipline letter plus his remarks as to what was developed in the investigation.

...

At this juncture, the Board takes special note of the following stipulation in applicable Article 71.10:

Article 71.10 – Section 2

When the Carrier uses a court reporter to transcribe the investigation, the court reporter will be expected to furnish a printed transcript to the Carrier within five (5) days after the closing of the investigation. The employee's representative and the General Chairman will subsequently be furnished a copy of the transcript not to exceed fifteen (15) days from the closing of the investigation.

In closing, General Chairman Thompson's April 8, 1999 appeal also contained the following pivotal request in accordance with Schedule Article 71.5:

Appeal is hereby directed to you under the current provisions of BLE/SSW Article 71 as amended, to expunge the discipline letter of February 26, 1999 from the personal record of Engineer Adcock and pay him for all time lost, plus any and all expenses resulting from the investigation. If you are not agreeable, please advise date and time for on-property, in person or via telephone, conference as per the agreement to further discuss this matter.

With respect to Carrier's obligation to conference appeals at the first level, Article 71.5 of the controlling Agreement states:

71.5. Appeals taken under the provisions of Article 71.4 of the Engineers' Agreement must be filed in writing to the Superintendent within sixty (60) days of the date discipline is assessed. The Superintendent will render written decision on the appeal within sixty (60) days of receipt; if conference is requested in the initial appeal, such conference will be granted within sixty (60) days and prior to decision being rendered.
(Emphasis added)

The record indicates that by letter dated April 23, 1999 (BLE Exhibit-4), Superintendent Shudak denied the April 8, 1999 appeal, even though the conference requested by General Chairman Thompson under Article 71.5 never took place. (In fact, the Organization states that it attempted to contact Superintendent Shudak by telephone once before processing the April 8, 1999 appeal and once afterward, both with specific intent to discuss the investigation and discipline. Neither call, according to the Organization's assertions, was returned. See BLE Exhibit-5 at Pg. 1.) The Board notes that Shudak's written denial of April 23, 1999 did address the alleged transcript time limit issue, asserting that "...all records indicate the notice of discipline, transcript and exhibits were mailed at the same time to the employee, Local Chairman and General Chairman. The employee copy was mailed certified and received March 2, 1999. In the future all

union copies will also be mailed certified." Of additional import, Shudak closed his letter, allowing: *"Should you desire to conference on this issue as provided by agreement, please contact my office..."*

In his second level appeal to Labor Relations dated May 3, 1999 (BLE Exhibit 5), (subsequent to Superintendent Shudak's April 23, 1999 denial), General Chairman Thompson steadfastly maintained before Carrier that as of that date, nearly three months after the investigation, he *still* had not received a copy of the hearing transcript as required by Article 71.10. In addition, Thompson's letter of that date argued for the first time during the handling of the instant case on the property, that Carrier also erred fatally under Article 71.5 when it denied his April 8, 1999 first level appeal of Claimant's discipline before a conference on the matter had been conducted. The Board notes that Labor Relations Officer Nash's response of May 29, 1999 addressed neither of these procedural concerns, but confined itself exclusively to the merits elements of the dispute.

After a thorough review of the entire record, we, however unfortunately for Carrier, find it unnecessary based on the above, to even visit the merits of this case. We have already demonstrated in Award 2 of this Board our lack of hesitation to hold both parties to the *letter* as well as the *spirit* of the clear and unambiguous requirements of their argument.. Therefore, with respect to Carrier's apparent failure to provide the Local and General Chairmen with complete copies of the investigation transcript within the time limits set by Article 71.10, we find, as we did in Award 2, that:

The [transcript time limit] Rule is the parties' "statute of limitations", openly developed for their continued conduct. A failure to comply to the letter of this "statute of limitations" flaws the discipline if the failure is on the part of the Carrier, and negates any appeal entitlements if the failure is on the employee or the Organization. When such failures occur, neither party is privileged to escape the consequences because they did not act timely or in literal lock-step compliance with the requirements of the Rule, even when the error is alleged to have been harmless.

While for all intents and purposes the outcome of instant claim does turn on the above issue alone, we are compelled to comment upon Carrier's second fatal error in its handling of this dispute on the property. The Organization's objection to the denial of Claimant's appeal at the first level without redress of a conference (in violation of Article 71.5), is a powerful one. In support, it cites a Carrier directive, dated April 7, 1997 regarding this very question, and interestingly, Superintendent Shudak was a designated recipient (See BLE Exhibit 11). Ms. Kelly Sheridan, Manager of Labor Relations, issued the following instructions to Mr. Shudak *et al* regarding SSW/BLE discipline provisions, copies of which were furnished the Organization at the time of their writing:

Recently, several cases were sustained in arbitration due to procedural errors in the handling of the local appeals...Specifically, it was decided that not allowing a local level conference within the time limits and/or declining the local appeal prior to granting the conference constituted a fatal error. The Arbitrator did not even address the merits in many of the cases.

Superintendent must render written decision within sixty (60) days, unless conference is requested in the appeal. If conference is requested in the appeal, the conference will be granted within 60 days and prior to a decision being rendered. (That means when an appeal is received in a superintendent's office a letter should go out acknowledging receipt and suggesting a date and time for conference only. Do not deny the claim at that time if a conference has been requested.)

Carrier argues on this point that because Superintendent Shudak's denial letter indicated a willingness on his part to conference on the matter of Claimant's discipline, his obligation under Article 71.5 was satisfied. This Board notes, however, that Referee Arthur Van Wart expressed a different opinion in Award 24 of PLB 5345 (BLE Exhibit 13) on this property, with which we embrace as correct. In that particular case, the first level denial was handled in exactly the same manner as the one at issue before us, up to and including an identical invitation to hold a conference after the claim had already been denied. Mr. Van Wart held in that case, as he did in prior Awards 1 and 10 of the same Board that:

The Superintendent's procedural failure to hold conference and deny the case within said 60 days time validated the claim as made. Payment should have been made at the local level because the merits of the case cannot be reached.

This Board can find no valid reason to disrupt the prior authoritative standards already in place on this property with regard to each of the valid procedural arguments raised by the Organization in this case. Therefore, we will, as Referee Van Wart has done before us, remain "virtuously consistent," and sustain the instant claim on that basis, without prejudice to its merit or lack thereof.

Carrier is hereby directed to remove the Level 4 30-days suspension and all references to the incident of January 25, 1999 from Claimant's service record, and compensate him for any and all time lost as a direct result of that discipline.

AWARD

The germane issue before this Board:

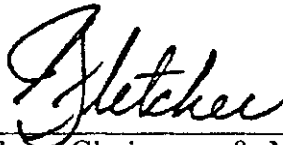
Does Carrier's alleged mishandling of the instant dispute on the property present just cause for this Board to sustain the instant claim on procedural grounds alone?

is answered in the affirmative, "Yes."


The claim is sustained without prejudice to its merit as set forth in the findings, excepting that portion of the claim reading "plus all expenses resulting from the investigation" or similar phrase, unless such is provided by the controlling Agreement.

ORDER

Carrier is directed to comply with this award within thirty (30) days of the date indicated below.



John C. Fletcher, Chairman & Neutral Member



T. M. Stone, Carrier Member



Don M Hahs, Organization Member

Dated at Mount Prospect, Illinois, July 31, 2000