

PUBLIC LAW BOARD NO. 6394

Award No. 13

Parties to Dispute:

Brotherhood of Maintenance of Way Employees
(Consolidated and Pennsylvania Federations)

and

Norfolk Southern Railway Company

Statement of Claim:

Claim on behalf of R. Kaczynski for removal of a ten (10) day actual suspension assessed following a formal investigation held on November 29, 2001 in connection with his failure to follow instructions, performing an unsafe act, and violation of Safety Rule 1202 on October 9, 2001, resulting in a personal injury to himself.

(Carrier File: MW-DEAR-01-61-LM-404)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

Claim disposed of as follows: By letter dated October 12, 2001, Carrier notified Claimant to report for an investigation on October 31, 2001. By letter dated October 17, 2001, the Assistant General Chairman, as Claimant's representative, requested a postponement of the October 31 hearing. By letter dated October 22, 2001, Carrier confirmed that the hearing had been postponed by mutual agreement to November 6, 2001. By letter dated November 2, 2001, Carrier confirmed that the investigation had again been postponed by mutual agreement, this time to November 20, 2001. On November 20, 2001, Claimant and his representative attended the hearing, waited forty minutes and, when the hearing officer had yet to arrive, declared the investigation abandoned and left. By letter dated November 27, 2001, Carrier notified Claimant and the Organization that the hearing had been rescheduled for November 29, 2001. By letter dated November 28, 2001, the Assistant General Chairman advised Carrier that the Organization considered the case abandoned and that the Organization and Claimant would not attend the

November 29 hearing. The November 29 hearing proceeded in absentia, after which, Carrier found Claimant guilty of the charge and assessed him a ten day suspension.

Carrier contends that the Assistant General Chairman acted precipitously by declaring the case abandoned instead of trying to find out what had happened to the hearing officer, and again by boycotting the November 29 hearing. We agree. By far, the more prudent course of conduct would have been to attend the November 29 hearing and protest the claimed violation of the Agreement.

Nevertheless, we must determine whether Carrier's actions violated the Agreement. Rule 30(a) of the Agreement provides:

An employee who has been in service more than sixty (60) calendar days shall not be disciplined or dismissed without a fair and impartial investigation, at which investigation he may be assisted by duly authorized representatives. He may, however, be held out of service, except for minor offenses, pending such investigation.

The employee will be given not less than ten (10) days' advance notice, in writing, of the date of the investigation which shall set forth the precise charge against him with a copy to the general chairman. The investigation shall be held within 30 days of first knowledge of the offense. At the request of either party the investigation will be postponed; however, such investigation will not be postponed in excess of ten (10) calendar days beyond the date first set except by mutual agreement.

The postponement to November 29, 2001, was not by mutual agreement. Indeed, no request for postponement was ever made to the Organization. The hearing officer simply failed to show up for the November 20 investigation and Carrier unilaterally served notice on Claimant and the Organization to attend an investigation on November 29. Such conduct was in clear violation of the Agreement. See, e.g., Third Division Awards Nos. 24731 & 23082.

Carrier relies on Public Law Board 4561, Award No. 43. In that case, the investigation was originally scheduled for November 18, 1993, and postponed by mutual agreement to November 23, 1993. Fifty-five minutes before the hearing was scheduled to begin, Carrier notified the claimant and the Organization that the hearing was postponed. Carrier rescheduled the hearing for November 25, 1993. The unilateral postponement was due to emergency conditions caused by derailments that prevented Carrier from having a hearing officer available on November 23. The Board held that Carrier had violated the Agreement but that the violation was insufficiently serious to warrant setting aside the discipline. The Board explained:

With regard to the Organization's objection to the Carrier unilaterally postponing the November 23, 1993 Investigation, it was a contractual error, but under all the circumstances not such a material error that requires the Board to vacate the assessed discipline. Since the delay was only for two days and since the Carrier did not act arbitrarily and without cause, and because the exigencies of the situation compelled the Carrier to act in the manner in which it did, the Board concludes that the procedural error was not of such magnitude that required the discipline be either vacated or modified.

In the instant case, the delay was for nine days, considerably longer than in PLB 4561, Award No. 43. Indeed, it wasn't until seven days after the scheduled hearing that Carrier even provided notice of the postponement. Most significantly, the instant case presents no exigent circumstances justifying the unilateral postponement. There were no derailments or other good cause for the postponement. The hearing officer simply failed to show up. The only explanation offered for this was provided at the November 29 hearing as follows, "[F]or some reason there was some mix-up in communication that people involved in the investigation for the carrier did not get the information." This rather cryptic reference to "some mix-up in communication" neither explains nor justifies Carrier's failure to carry out its responsibility to notify all parties involved of the date set for an investigation and to assure that the hearing officer attends and presides. Claimant should not bear the burden of Carrier's failure to fulfill its responsibilities. Accordingly, the claim is sustained. Carrier shall remove the suspension from Claimant's record and shall make him whole for lost compensation for time held out of service due to the suspension.



M. H. Malin
Chairman and Neutral Member



P. K. Geller, Sr.
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois, March 10, 2003.