

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25119

Docket No. 44751

00-1-98-1-U-2038

The First Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Union Pacific Transportation Company (former Chicago
(and North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim in behalf of Engineer R. E. Nevens, Social Security No. 037-30-7510, Union Pacific Railroad former Chicago and North Western Transportation Company, for compensation for all lost time including time spent at the investigation, that this incident be removed from claimant’s personal record and he be removed from the Union Pacific Discipline System known as Upgrade when he was investigated on October 7, 1997, on the following charge:

‘violation of GCOR 31.1.2 and GO 185, effective 8/26/97, wherein you allegedly left locomotive UP 1735 unattended without a hand brake applied on September 22, 1997, at approximately 1420 hours, while employed as engineer on Job YG203-22.’”

FINDINGS:

The First 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.

On September 26, 1997, the Carrier sent the following Notice of Investigation to the Claimant:

“Please report to office of DTO, Northlake, IL, on Tuesday, September 30, 1997 at 2:00 P.M. for Investigation and hearing in connection with your responsibility, if any for:

‘violation of GCOR 31.1.2 and GO 185, effective 8/26/97, wherein you allegedly left locomotive UP 1735 unattended without a hand brake applied on September 22, 1997, at approximately 1420 hours, while employed as engineer on Job YG203-22.’

This investigation and hearing will be conducted in conformity with applicable rule and or agreement between the Company and your Union. You are entitled to representation per the applicable Schedule Agreement rule and may produce such witnesses as you desire at your own expense.

The proposed discipline is a Level 5, which is dismissal.

Any discussions regarding this investigation including waiver/conference purposes, or any request for postponement from your Representatives or the employee, must be made personally to C.D. Turner, MOP.(708 649 5117).”

Subsequent to the Investigation the following letter was sent to Claimant:

“Refer to the Notice of Formal Investigation sent you under date of September 26, 1997.

After carefully considering the evidence adduced at the hearing held in Northlake, IL, on October 7, 1997, I find that the following charges against you have been sustained:

‘violation of GCOR 31.1.2 and GO 185, effective 8/26/97, wherein you allegedly left locomotive UP 1735 unattended without a hand brake applied on September 22, 1997, at approximately 1420 hours, while employed as engineer on Job YG203-22.’

Therefore, you are in violation of General Code of Operating Rules, effective April 10, 1994. Your personal record indicates you are at Level 4. This incident is a Level 2. Based on the UPGRADE Progressive Discipline Policy you are now assessed Level 5 discipline.

You are hereby dismissed from the service of the Company effective immediately. Please deliver all passes and any Company property in your possession to the Office of Superintendent, Northlake, IL.”

After reviewing the transcript the Board cannot agree with the Carrier that its findings are supported by substantial evidence. The evidence shows the Claimant left the UP1735 engine on track 823 at approximately 9:45 A.M. He testified he set the handbrake and went to a different area of the yard to operate another locomotive. At 2:20 P.M., an FRA inspector boarded UP 1735 and found the handbrake was not set. There were several other crews that worked in this area during the nearly five hour period after the Claimant left the unit at 9:45 A.M.

The Carriers’s evidence that no one else used the engine during this period is not “substantial.” A Carrier witness asserted with no explanation, and frankly no evidence, that the Claimant was last to use the engine. However, he did not testify that he talked to any of the other crews. It is also clear that he was uncertain who had used the engine that day because he called the Claimant at 2:30 P.M. and asked him if he had used the unit in question. This same Carrier witness was also unclear, and uncertain at the Investigation, as to when the Claimant’s crew was taken off the assignment. He thought it might have been 1:20 P.M. or 1:30 P.M.

With this kind of uncertainty, and no evidence he checked with other crews, it is difficult to credit his bald assertions that the Claimant was the last to use the unit. His statement that no other crew used the unit was equivocal. He was merely “unaware” that any other crew used the unit. Being unaware doesn’t mean he knew that no other crew moved or used the unit.

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AWARD

Claim sustained.

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 First Division**

Dated at Chicago, Illinois, this 30th day of March, 2000.