

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23082  
Docket Number MW-23236

Paul C. Carter, Referee

PARTIES TO DISPUTE:

{Brotherhood of Maintenance of Way **Emploes**  
{**Missouri Pacific Railroad Company**  
{(**Former Chicago and Eastern Illinois Railroad Co.**)

STATEMENT OF CLAIM: "Claim of **the** System Committee of the Brotherhood **that:**

(1) **The dismissal** of Welder J. E. Hamm for alleged violation of Rule G was without just and sufficient cause and wholly disproportionate to the charge leveled against the **claimant (Carrier's File S 214-108).**

(2) Welder J. E. Hamm shall be reinstated **with** seniority and all other rights **unimpaired** and he shall be compensated for all wage loss suffered."

OPINION OF BOARD:

On November 16, 1978, the Carrier wrote claimant, certified mail, at his last **known** address:

"Report to the Office of the **Superintendent, Missouri Pacific Railroad Company** Office Building, Sibley Boulevard and Indiana Avenue, **Yard Center, Dolton, Illinois** at **10:00 a.m.** November 20, 1978, to develop the facts and place your **responsibility**, if any, **in** connection with your reported violation of Rule G at or about **12:00** noon on November 15, 1978 while on duty **in** a company vehicle on company **prop-**erty at **Dolton, Yard Center Illinois.**

Arrange attendance of witness and/or **representative** as provided for by schedule **agreement."**

On the **same** data, Rovember 16, 1978, the Carrier wrote claimant another letter, **stating:**

"Refer to **my** letter of **November 16, 1978** setting **formal** . **investigation in** the Office of the Superintendent, Missouri Pacific Railroad Company Office **Building, Sibley Boulevard** and **Indiana Avenue, Yard Center, Dalton, Illinois** for **10:00 a.m. November 20, 1978,** to develop the facts and place **your responsibility, if my, in** connection with your reported violation of Rule G at or about **12:00** noon on **November 15, 1978** while on duty in a company vehicle on **company** property at **Dolton, Yard Center, Illinois.**

"At the request of the carrier, this investigation is postponed and rescheduled to be held at **10:00** a.m. on **Tuesday**, December 5, **1978**, at the same location.

Arrange attendance of **witness** and/or representative as **provided** for by schedule agreement."

**The Organization** contends that **Carrier's unilateral** postponement of the investigation was **in violation** of those **portions** of Rule 34 reading:

"Notice of such Investigation, stating the **known circumstances** involved, shall be **given to the employe** and the investigation will be held within ten (10) **days** of date when **charged** with the offense or held out of **service**.

\* \* \* \*

"Investigation shall be **held, so far** as possible at the home **terminal** of employee involved, and at such **time** as to cause **employes** a minimum loss of rest or **time**. When necessary to secure **presence** of witnesses or **representatives not immediately available**, reasonable postponement at the request of **either the Company or Employe may** be had, but in any event, such investigation shall be held within thirty (30) days of the **date** of notice."

**The Organization** contends that no request for a postponement of the investigation was **made to any** representative of the **Organization, or to the man charged**. The **contention is also made** that the extension of **time** in which to conduct the **investigation** was not necessary to secure presence of witnesses or **representatives not immediately available**, and, therefore, the **only exception to limit specified in Rule 34 had** no application.

The **record** shows that in the investigation conducted on December 5, 1978, the General **Chairman** raised the Issue that he **was** not contacted **regarding** the **postponement** of the **first** scheduled investigation **and** contended that the **investigation** was not conducted within the ten-day **time limit** as provided in Rule 34 of the **Agreement**. It has often been held that objections concerning notice of charge, the timeliness of **the investigation, and similar issues, must** be raised prior to or **during** the course of the investigation, or they are **considered** waived. In this case the objection was **timely** raised.

The Carrier contends that the postponement of the investigation was in accordance with **accepted past practice** on the **property**. However, no evidence has been submitted concerning **past practice**. As stated in Award 14491:

"If Carrier relied on practice as its affirmative defense it was **obliged** to prove it . . . ."

See also Awards 13928 and 14583.

Award go. 41 of Public Law Board No. 1844, involving the same Organization as herein and another Carrier considered a situation similar to what we have in our present case. In that Award it was held:

"The instant claim **mounts** no serious **challenge** to the **sufficiency** of the evidence nor the appropriateness of the **penalty imposed**. **Indeed, were those the only** issues we would deny the claim. **But** the claim comes to us **on the** procedural jurisdictional **complaint that Carrier violated Rule 19(a) which reads** in pertinent **part** as follows:

'The investigation will be postponed for **good and sufficient reasons** on request of either party.'

"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 postponement prior to **August 30, 1977**. The Organization articulated its objection 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.

"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 **re-**  
**quirement** 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 **justific-**  
**ation** 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 **fiat 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.

"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."

This Board does not find the reasoning set forth in the above-quoted award to be in palpable error. In our present case the **Carrier** has offered no reason for postponement of the investigation from November 20 to December 5, 1978.

This Board is always reluctant to **decide** claims on **technicalities**, but we have no choice but to apply the **Agreement** as written. We cannot **ignore** the clear language thereof. We find that the **Carrier violated** the **Agreement** in postponing the investigation in the **manner** that It did.

Without passing upon the merits of the **dispute**, the claim will **be** sustained; however, in line with many **awards** issued by this **Division**, the Carrier is entitled to take credit, for the **earnings claimant** may have had in other **employment** while out of service of the Carrier.

**FINDINGS:** The **Third Division** of the **Adjustment Board**, upon the whole record and all the evidence, **finds** and holds:

**That** the parties **waived** oral hearing;

**That** the **Carrier** and the **Employee** involved in this dispute are **respectively** **Carrier** and **Employee** within the meaning of the **Railway Labor Act**, as approved June 21, 1934;

**That** this **Division** of the **Adjustment Board** has jurisdiction over the **dispute** involved herein; and

**That** the **Agreement** was violated.

A W A R D

Claim sustained in accordance with the **Opinion**.

**Findings.**

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

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, **this 15th day** of December 1980.