Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
FIRST DIVISION

Award No. 28963
Docket No. 48999
18-1-NRAB-00001-160561

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

PARTIES TO DISPUTE: (SMART – Transportation Division
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(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of Denver Yardman D Cisneros for removal of Training 2 discipline from his personal record with compensation for all lost time and benefits lost as a result of this matter, including but not limited to time lost while attending the Investigation, all wage equivalents to which entitled, vacation benefits, and all insurance benefits and monetary loss for such coverage while improperly disciplined."

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.

At the time of the incident the Claimant was a switchman employed with the Union Pacific Railroad for 17 years. On December 26, 2015, Managers Casselman and McMillen were conducting a structured FTX of the Claimant working as the Foreman

on the YDE28X-26 with an engineer and switchman in Denver, CO. The YDE28X-26 job is taking cars on a transfer track – the East Denver Belt Line – between 36th Street and Denver North Yards.

At approximately 22:25 hours, the Claimant's crew was given an XG Crossing Order at Broadway Crossing, approximately Milepost 1 on the East Denver Belt Line. The crew followed the XG Order and provided protection on the crossing. The managers did not hear the crew call out the signal on the radio. When Manager McMillen debriefed the crew at the Yard, he observed that the Claimant did not properly maintain a Conductor's Log during this tour of duty. The Claimant stated the he was not required to do so, although he did write all the signals down on his Track List.

By letter dated January 4, 2016, the Claimant was directed to report for a formal Investigation on January 8, 2016, in connection with the charge below:

> **"On 12/26/2015, at the location of Denver, CO, near Milepost 1.0, East Denver Belt Line, at approximately 22:25 hours, while employed as a Foreman, you allegedly failed to use Conductor's Log when one was in your possession [*sic*]. In addition you allegedly wrote entries on the back of a work order/track list, failed to have all required information for entries and were missing required entries. This is a possible violation rule(s) and/or policy:**
>
> **1.47: Duties of Crew Members – Conductor Responsibilities**
>
> **Under the MAPS Policy, this Investigation is a Critical event. Based on your current status, if you are found to be in violation of this alleged charge, Training 2 may result.**
>
> **Please be advised that this hearing will also satisfy the procedural requirements as specified by the Federal Railroad Administration in 49 CFR Part 242, Qualification and Certification of Conductors and/or 49 CFR Part 240, Qualification and Certification of Locomotive Engineers/Remote Control Operator, as applicable."**

At the Carrier's request the Investigation was postponed to January 18, 2016. Subsequently the Organization requested postponement to January 25, 2016. By letter dated February 3, 2016, the Claimant was informed that the charges against him were sustained and that he was assessed MAPS Training 2 status.

The Organization argues that the Carrier committed two contractual procedural errors. First, the Carrier violated Article III, Section A of the Discipline Agreement when neither the Claimant nor Local Chairman Milligan received the Notice of Investigation timely. An attempt was made to deliver the Notice to the Claimant on January 7, the day before the Investigation was initially scheduled. However, even if the Claimant had been available to receive the Notice, the Notice would not have been furnished "sufficiently in advance to allow the employee the opportunity to arrange for witnesses and representation." Local Chairman Milligan did not receive his copy of the notice until January 9. Citing arbitral authorities, the Organization contends that the Carrier unilaterally rescheduled the Investigation without "good cause," in violation of Article V, Section A, and without the mutual consent of the Organization. Second, the Carrier failed to call all witnesses to testify. Specifically, the Carrier refused to call Engineer Wood and instead attempted to rely upon his 705 Report which made it impossible for the Claimant to receive a fair and impartial Investigation.

On the merits, the Organization argues that the Carrier failed to support its allegation with substantial evidence that this 17-year employee violated the cited Rule. First, the Investigation showed the Claimant was called to work and paid as a Yard Foreman, not as a Conductor. Train symbol "YDE28X-26" is a yard transfer job normally called as the "RC21," a remote control job. The Call Sheet also indicated an Engineer was called because the job was over tonnage. Even though the Claimant was called to work as a Foreman on a remote control job and, therefore, not required to maintain a Conductor's Log under Rule 1.47, he still kept track of signals.

Second, even if, arguably, the Claimant had been required to keep a Conductor's Log, under Rule 1.47, the Claimant was fully compliant because he recorded the information during his tour of duty in a place other than the logbook itself. Working as Foreman and not as Conductor on this tour of duty, the Claimant was not always on the head end of the train. Moreover, his logbook would not fit into his pocket. Per the rule,

"if the [Conductor's Report] form is not available, record the information as required." The Claimant maintained the required information on his track list which he kept rolled up in his pocket. Further, because Manager McMillen asked to see the Conductor Log before the Claimant had finished his tour of duty, the Claimant had not completed recording the information. The Claimant offered to transfer the information to the logbook before he gave it the McMillen.

Last, Manager McMillen erroneously claimed that two entries were missing from the Claimant's notations. However, McMillen admitted he did not know whether "dragging equipment detectors" was recorded to be recorded in the logbook.

With regards to the discipline, the Organization contends that Manager McMillen initially gave the Claimant two separate FTX's and later offered a MAPS conference as discipline for the perceived infraction. However, after McMillen spoke with Director French, McMillen discarded the paperwork and told the Claimant that it was a MAPS 2 situation based on the three-year retention period. The Organization also insists that the Claimant's assessment of Training 2 was improperly based upon his "transition" into the new MAPS Policy from his UPGRADE Policy record. The Organization considers the modification of discipline previously assessed under UPGRADE to be arbitrary. Further, it objects to the Carrier assessing more sever discipline after an Investigation than it would have otherwise assessed had the Claimant waived the Investigation and admitted guilt.

Conversely, the Carrier argues that there were no procedural errors that would warrant overturning the discipline. The Notice of Investigation was delivered timely to the Claimant who, in turn, failed to pick up the Notice on that date. The Carrier postponed the Investigation to ensure procedural due process. The Claimant was not prejudiced in any way. Instead, the postponement ensured the Claimant had additional time to prepare. The Carrier also points out that the Organization may request or call witnesses on their behalf. In this case, the Organization did not request any witnesses prior to the hearing.

On the merits, the Carrier first contends that the Claimant was the Foreman and, effectively, a Yard Conductor. The Organization's argument that the Claimant did not

have to maintain a Conductor's Log because he was neither called to be nor paid as a Conductor is baseless. Rule 1.47: Duties of Crew Members states, "…yard conductors performing road service on the main track (transfer, relief service, etc.) will be required to complete the Conductor's Report Form." At that particular point in the Claimant's assignment it was a two-man conventional job, which would make him a Yard Conductor performing road service on the Main track.

Next, the Carrier rejects the argument that the Claimant kept accurate records on his Track List. During the Claimant's debriefing he explained that the reason he didn't fill out the Log Book, but instead used his work order, was that it was easier for him to carry the sheet of paper. Nonetheless, the Claimant's alleged Conductor's Log was missing multiple entries. Citing arbitral authority, the Carrier stresses the critical safety importance placed on proper maintenance of the Conductor's Report because of the communication between crew members the reporting process requires.

Last, the Carrier dismisses the Organization's contention that the assessment of Training 2 under the MAPS Policy was improper. The transition from UPGRADE to MAPS put no bargained-for employee in a worse status. In fact, the employee is in a better position under MAPS than he or she would be under the UPGRADE progression. The Carrier also rejects the Organization's assertion that the Claimant attempted to coerce the Claimant into signing a waiver. The Claimant was given the waiver option pursuant to the MAPS Policy.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence *de novo*. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary as to constitute an abuse of the Carrier's discretion. (See Third Division Award 41086.)

The Board has carefully studied the transcript and evidence presented at the Investigation as well as the cited arbitral authorities from the parties. We find in this

case the procedural arguments compelling. First, there is merit to the argument that the Claimant received insufficient notice for the hearing. The USPS attempted delivery of the Notice on January 7 for a hearing scheduled by the Carrier January 8. The Carrier argues that delivery of Notice was attempted timely and faults the fact that the Claimant did not retrieve the letter until January 9. The Notice letter was dated January 4, 2016, therefore, pursuant to Article V, Section A, the Carrier had the flexibility to initially schedule the interview no later than January 14. Nonetheless, it selected January 8 as the date to schedule the Investigation. We note further that Article III, Section A requires "[T]he notice…will be furnished sufficiently in advance to allow the employee the opportunity to arrange for witnesses and representation…" We agree with the Organization's argument that even if the Claimant had personally received the Notice on January 7 when delivery was attempted, it would not have been furnished sufficiently in advance of the January 8 Investigation. We do not find one day's notice to be "sufficiently in advance" of the Investigation to be in compliance with Article III, Section A.

Next, we find merit in the Organization's contention that the Carrier proceeded to unilaterally postpone the Investigation without showing "good cause" and without the Organization's mutual consent. On January 8, the Carrier issued a Postponement of Hearing letter which rescheduled the Investigation to January 18. Local Chairman Milligan objected to the postponement stating that Manager McMillen never contacted the organization in writing or via telephone to request a postponement. Local Chairman Milligan noted that in the Notice of Investigation, it states that a postponement request must be in writing and submitted 48 hours prior to the date scheduled. Charging Officer McMillen testified that he had spoken with Labor Relations who said it was okay for the Carrier to postpone an Investigation with less than 48 hours' notice. There were no arbitral authorities cited in the record or at oral arguments before the Board to support that assertion.

Furthermore, Local Chairman Milligan, citing PLB No. 1396, Award No. 21 (Neutral, Bergman), insisted that the Carrier is not permitted to postpone the Investigation without the mutual consent of the Organization. In that Award the Board states in relevant part the following:

> **"Based upon the opening statements at the hearing, the Board must rule that there was not the mutual consent required by the Investigation Rule for postponement of the Hearing. Carrier has no right to unilaterally postpone the Investigation Hearing."**

The Organization also cites PLB No. 5912, Award No.88 (Neutral, Lynch). In that case the Board found that – along with two additional procedural violations cited – "there was no mutual agreement between the parties to postpone the Investigation."

"Based upon our review of the case record and the authorities cited, we find the failure to provide the Claimant sufficient notice of the Investigation, and the Carrier's subsequent unilateral postponement of the Investigation without showing just cause and without the mutual consent of the Organization violated Article III, Section A and Article V, Section of the Agreement. Therefore, the Claimant was not provided with the fair and impartial Investigation as required in Article II, Section A. The Board orders that the discipline assessed be set aside. We will not address the merits. In light of this decision, we find the Organization's other procedural argument as moot.

AWARD

Claim sustained.

ORDER

The 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 28th day of March 2018