

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24180
Docket Number CL-23842

Robert E. Peterson, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9385)
that:

1. Carrier acted in an unjust manner when it dismissed Mr. D. L. Scheurwater from its service effective October 2, 1979, as a result of an investigation held on September 24, 1979 in absentia, thus violating Rule 24 of the current Clerks Agreement.

2. Carrier shall now be required to restore Mr. Scheurwater to service with all rights and privileges unimpaired and compensate him for all time lost beginning October 2, 1979, and continuing until corrected.

OPINION OF BOARD: The primary issue in this dispute concerns a question as to whether Claimant was properly or timely notified to attend an investigatory hearing.

On Wednesday, September 19, 1979, Carrier addressed and mailed a letter to Claimant, directing him to attend an investigation scheduled for 10:00 A.M. on Monday, September 24, 1979 in connection with a charge that Claimant had allegedly absented himself from duty without authority on his regular assignment since September 14, 1979. The timing of the notification and the date for the hearing was in pursuance of Rule 24 of the Rules Agreement, which provides, in part, that investigations "shall be held within ten (10) calendar days of the date when charged with the offense or held from service."

Although the letter was sent by certified mail, return receipt requested, to Claimant's last known and proper address, for reasons best known to the postal authorities, the letter was date-stamped as having been routed through the Evergreen, Colorado Post Office on Friday, September 21, 1979. Evergreen, the Organization submits, is located in the foothills of Colorado's Eastern Slope, a short distance from Denver, whereas Claimant's residence and work location is approximately 168 miles from Denver, in northwestern Colorado. In any event, Claimant maintains he did not receive the letter until the afternoon of September 24, 1979, after the time scheduled for the hearing to commence.

Notwithstanding an apparent awareness that its letter might not have been effectively or timely delivered to Claimant, the Carrier proceeded to conduct the hearing in absentia. After introducing statements which Carrier desired be made a part of the record, the hearing officer stated: "We will

recess this investigation until a later date to determine from the post office as to delivery of this certified notice of investigation." The hearing was thereafter reconvened at 3:00 P.M. on Monday, October 1, 1979 for the stated purpose of having a Carrier witness report on what he had developed in connection with the certified notice of investigation which had been sent to Claimant. In this regard, the witness stated:

"The letter was mishandled by the Post Office Department and forwarded on to Mr. Scheurwater at P. O. Box 216 at Phippsburg, Colorado and the certified return card was received in this office indicating that Mr. Scheurwater had properly received the notice."

At the reconvened hearing the Carrier also introduced into the record the fact Claimant had not personally made any contact with any party on the railroad since September 14, 1979, but that a representative for Claimant and of the Organization had contacted the Carrier on September 25, 1979. The Carrier witness who introduced these statements into the record also stated that the representative was advised that the Carrier was agreeable to discussing the matter with Claimant, and that Claimant had not, as of the date of October 1, 1979, shown up for this discussion.

Under date of October 2, 1979, Claimant was sent a letter advising him that he was dismissed from the Carrier's service. He was, however, subsequently reinstated to service by the Carrier, the latter notifying Claimant by letters dated November 27 and 29, 1979, that he was reinstated without payment for time out of service and subject to Claimant's passing a physical examination. The Claimant returned to work on December 5, 1979. Thus, the claim before the Board actually involves pay for time lost from October 2, 1979 through and including December 4, 1979.

It is the Carrier's contention that when Claimant did receive the notice of investigation on September 24, 1979 he had an obligation to have made contact with the Superintendent's office or his work location from that date on, but "for obvious reasons" sought to avoid being in contact with the Carrier.

It is the Organization's position on behalf of Claimant that the Carrier did not provide timely notice, much less sufficient time for Claimant to prepare a defense against the charge or even allow him to appear at the hearing. It also submits that neither Claimant nor the Organization were placed on notice that the hearing was to be reconvened on October 1, 1979.

In reviewing the transcripts of the hearings it is interesting to note that while the hearing officer found need to recess the hearing of September 24, 1979 to determine from the post office as to delivery of the letter, the Carrier's witness had testified that although the post office had not returned the receipt indicating delivery, he, the witness, could state that the letter had been delivered but signed by other than Mr. Scheurwater, yet at the October 1, 1979 hearing could state "the certified return receipt card was received in this office indicating that Mr. Scheurwater had properly received the notice." The Carrier not having introduced copy of the return receipt card into evidence, we may not speculate as to what

the Carrier witness meant by "properly received," nor may we speculate as to the time it was delivered absent the receipt or some supporting document from the post office.

Based upon the facts of record, we do not find that Claimant had been provided with timely notice to attend the reconvened hearing in question, and that he was therefore deprived of opportunity to defend himself against the charges of record. Claimant thus did not receive the benefits of a fair hearing to which he was entitled under Rule 24 of the current Agreement. The Board would also note for the record that although Carrier did make reference to the General Notice rule or regulation which it alleged Claimant to be in violation of by his conduct, the Carrier did not show on the record when, where, or how the Claimant had so violated this rule. The mere act of but reading into the record the statement of charge is not sufficient to establish there had been a violation at a given time and place.

In progressing this claim on the property and to this Board, the Organization has also alleged that by reason of Carrier holding the investigation at Denver, Colorado instead of at the home terminal of the employee involved, namely, Phippsburg, Colorado, that this too represented a violation of Rule 24. In this respect, Rule 24(b) reads:

"(b) Investigation shall be held whenever possible at home terminal of employee involved, and will also be held at such time as not to cause employees to lose rest or time whenever possible."

On the property, the Carrier stated the necessity to be present and oversee the operations of the Colorado Division required the presence of "Investigation Board Officers" as well as other persons at the Colorado Division headquarters - Denver, Colorado - and it was not possible to hold the investigation at Phippsburg, the home terminal of Claimant. However, in its rebuttal submission to this Board the Carrier offers as its reason the following unsubstantiated argument:

"(The Organization admits) that Claimant's home is considerably less distance from Denver than his home terminal. Since Claimant had absented himself from duty effective September 14, 1979 and had no other home address on file at his home terminal (Phippsburg) it was logical to notify him at his home address (Evergreen) on file with Carrier and hold an investigation within a reasonable distance of where he was staying."

The record as presented does not reveal that Claimant's home address as on file with the Carrier was in Evergreen, as Carrier has stated above. Furthermore, Carrier's letter was addressed to Claimant in Phippsburg, and the address on the envelope that carried this letter to Claimant was the same

as that on the letter itself. And, while Carrier makes reference to what it terms an Investigation Board of Officers, the only persons of record at the initial hearing was the Superintendent, who served as the hearing officer, and the Chief Clerk to the Superintendent. At the reconvened hearing, the Carrier's Assistant Superintendent served as the hearing officer and the Chief Clerk again as a witness.

Under the circumstances, and in view of the Organization's unrefuted statement that the Carrier has held investigations involving other employees subject to the applicable Agreement at Phippsburg, it is our opinion and finding that Carrier did violate Rule 24(b) in this instance.

There being sufficient evidence in the record to support the conclusion that Carrier did act in an unjust manner when it dismissed Claimant from its service effective October 2, 1979, the Board is compelled to hold that Claimant be compensated for all time lost from October 2, 1979 through and including December 4, 1979, the Claimant, as hereinbefore stated, having been returned to work as of December 5, 1979.

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 Employees involved in this dispute are respectively Carrier and Employees 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.

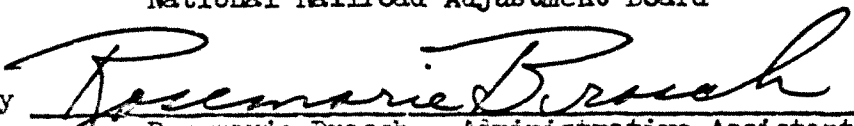
A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of February 1983.