

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **25049**
Docket Number MS-25065

John F. Cloney, Referee

(J. F. Schrader

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation

STATEMENT OF CLAIM: "This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of my intention to file an **ex parte** submission on February 8, 1983 covering an unadjusted dispute between me and the Consolidated Rail Corporation involving the question:

1. Carrier violated Rule 48 of the T-C Agreement dated July 1, 1979 when it failed to postpone the investigation of July 16, 1980, per my request, account no representation available.

2. Carrier shall now be required to restore my **name** to the **seniority** roster CRC-21, unimpaired.'

OPINION OF BOARD: In May, 1977 Claimant, a Block Operator marked off ill. Thereafter according to the Carrier he ignored repeated verbal **and** written requests to furnish documentation and take a physical examination. In a conference on June 12, 1980 Supervisor of Operating Rules Steding instructed Claimant to report for a physical examination immediately. Claimant refused saying "I'll go to the doctor when I'm ready." On June 13, 1980, Steding sent a Certified Letter to Claimant's Post Office Box instructing him to report for a physical examination on June 30, 1980. The Postal Service later returned this letter as "**refused**".

On July 2, 1980 Supervisor of **Train** Operators K. A. Peak sent Claimant a notice to attend an investigation scheduled for July 16, 1980 regarding Insubordination for failure to report for the medical examination.

Claimant signed a receipt for this item on July 15, 1980. He did not appear at the hearing nor did any representative. The investigation was conducted in absentia and on July 17, Claimant was notified he was dismissed in all capacities.

At Claimant's request oral hearing was held on July 23, 1984. Claimant appeared on his own behalf. Both prior to and at the hearing Claimant contended he had requested a postponement of the July 16 investigation by ~~sending a wire message~~ to Peak via the Carrier's Railroad Wire Service through the Willow Creek Tower on July 15, 1980. This was sent by calling the operator ~~at the Tower and asking~~ him to relay the message. On the 16th Claimant picked up a handwritten copy at the Tower which notes "Delivered to K. A. Peak" but is unsigned. Claimant argues that once the operator received the message it was ~~not his (Claimant's)~~ responsibility to determine if it was received by Peak.

WILLIAM J. HEDGECOCK
JULY 23 1984

This Board must note, as does the Carrier, that it would have been as easy for Claimant to call Peak as it was to call the Willow Creek Tower, and far more logical. Furthermore, Claimant instead of going to the Willow Creek Tower on July 16 to pick up a copy of his message could have gone to the investigation and made his request for a postponement. The Carrier denies knowledge of the request for postponement much less receipt of it. Having chosen an unorthodox, circuitous method to request postponement this Board concludes Claimant must bear the burden of proof of its receipt and cannot shift the burden to the Carrier merely by having another **employee** forward his request. He has not met this burden and we conclude the circumstances justified the in absentia investigation. The evidence adduced at the investigation was sufficient to support the charge of Insubordination. Accordingly, we will deny this claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of October 1984.

