

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25664

Docket Number CL-25524

Nicholas Duda, Jr., Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers. Express and Station **Employees**

PARTIES TO DISPUTE: {

(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9849)
that:

1) Carrier violated the Clerks' Rules Agreement at St. Paul, Minnesota when it charged, held investigation and assessed discipline of termination to **Employee** P. F. Bowman on October 8, 1982.

2) Carrier shall now be required to clear **Employee** P. F. Bowman's record of charges, investigation and subsequent discipline of termination, return him to his former position and compensate him for all lost earnings caused by his termination.

OPINION OF BOARD: Claimant had been employed **for** seven years by the Carrier, most recently as a Yard Clerk. On October 1, 1982, the Carrier sent Claimant an envelope by regular mail containing the following letter:

"Formal investigation will be held at 10:30 A.M., on Tuesday, October 5, 1982, in the Assistant Superintendent's Office at St. Paul, Minnesota, for the purpose of developing the facts and circumstances in connection with your alleged failure to properly perform your duties as a yard clerk at South Minneapolis on September 18 and September 23, 1982, involving mishandling of 'Code 2' cards and 'Code 5' cards those dates, of which your Supervising Officer had knowledge of these alleged incidents on September 24, 1982.

If you intend to have representation as provided for in schedule, rules and agreements, it will be your **obligation** and responsibility to see that such representation is present on the date scheduled. There will be no exceptions.

You are hereby instructed to be present **at the** above time, date and place. Any reasonable request for a postponement must be made **a** sufficient time prior to the date of investigation:

The investigation was held on October 5, 1982, but neither Claimant nor his representative were present. On October 8, 1982, the Carrier sent a letter notifying Claimant that he was terminated effective October 9, 1982.

In Third Division Award 13179, the functions of the Board were stated as follows:

In discipline cases, the Board sits as an appellate forum. As such, **our** function is confined to determine whether:

- (1) Claimant was afforded a fair and impartial hearing;
- (2) The finding of guilty as charged is supported by substantial evidence; and
- (3) The discipline imposed is reasonable.

The parties agreed to Rule 22 which provides, among other things, that an employee:

"...shall not be disciplined or dismissed without investigation and prior thereto the **employee** will be notified in writing of the precise charge... [and] shall have reasonable opportunity to secure the presence of representatives and/or necessary witnesses."

In the Railroad Industry, mailing a notice to an **Employee** has long been recognized as constructive delivery provided the notice was sent properly addressed and postmarked in adequate time. Here the Carrier sent the letter in **an** envelope addressed to Claimant with an incorrect zip code. Because of the improper zip code, the envelope went to Deer Lodge, Montana, rather than to Claimant in Minneapolis, Minnesota. Sometime later, (**the** record does not show exactly when), the incorrectly addressed envelope was returned to the Carrier. The record does show that after the hearing, the Carrier inserted the misaddressed envelope and its enclosed letter into another envelope along with their dismissal letter which Carrier then mailed to Claimant's correct address. In other words, the Carrier did not send the letter to the proper address until after the hearing had been held.

The Carrier is entitled to a presumption of the delivery, constructive delivery, only where it properly addressed the envelope. Here, the original envelope was not properly addressed. The letter within that envelope could not be, and was not delivered to Claimant. The second envelope was entitled to the presumption of delivery, but it was posted after the hearing and was the termination letter therefore inadequate to satisfy Rule 22.

The Carrier failed to provide the **Employee** with notice in writing of the precise charge prior to the investigation; in addition, Claimant did not have a reasonable opportunity to secure the presence of his representatives and/or necessary witnesses.

This Board does not believe the Carrier intentionally misaddressed the envelope, however, its innocence of that intent does not excuse its negligence or justify disregard of Claimant's rights under Rule 22.

Accordingly, this Board finds that Claimant did not receive a fair and impartial hearing. For that reason, the claim must be sustained.

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 **Employes** involved in this dispute are respectively Carrier and Employes 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:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1985.