

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26440
Docket Number MS-26600

James R. Johnson, Referee

(J. H. Johnson

PARTIES TO DISPUTE: (

(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of J. H. Johnson that:

(a) Carrier violated the provisions of the current Clerks' Agreement at Los Angeles, California, when it removed Mr. J. H. Johnson from service as a result of a formal investigation **held** on September 7, 1983, and

(b) Mr. J. H. Johnson shall now be returned to Carrier service and paid for all loss of wages and benefits commencing on or about September 7, 1983."

OPINION OF BOARD: This is one of three cases involving the same **employee** which presently are before this Board. The Claimant had been employed by the Carrier for some nineteen years, four of which he was on leave of absence. A formal Investigation was held on July 19, 1983, at which he was charged with failing to properly perform his duties, and for being indifferent to duty. The Investigation was postponed seven times, and finally **held on** September 7, 1983. Claimant was discharged following the Investigation, by a letter dated September 26, 1983.

Claimant raises a series of procedural objections to the handling of the Investigation, to the absence of a Union Representative, and to the timeliness of the notice of discipline. He further contends that he was innocent of the charges.

Claimant complains that he did not have proper representation, and that he was denied a fair Hearing as required by the Agreement. The record clearly shows that the Hearing had been rescheduled several times, and Claimant had ample time to secure appropriate representation. Further, there is nothing in the record to reflect that he made any attempt to secure such representation. It was made clear at the Hearing that the Representative was working nearby, but Claimant made no serious attempt to arrange his attendance at that time. **Moreover**, the Transcript reveals that the Claimant was quite skilled at representing himself, and the Board finds that he did receive a fair Hearing.

The objection with regard to timeliness of the notice is utterly without merit. Although sent via certified mail within the time limits, it was not received by Claimant until the time limit had lapsed. While the Organization cited prior Awards regarding the definition of "notice," they

are inappropriate in this case. Here, Carrier has presented evidence that the Post Office attempted delivery on several occasions and Claimant failed to claim the letter. This Board has often held that it will not enforce time limits when **employees** avoid the service of documents, and we will not do so here. It is clear that notice was properly given.

A review of the facts and evidence presented clearly indicate substantial evidence that Claimant did, in fact, fail to properly perform his duties on the date in question. It also shows that the Claimant did not promptly obey the instructions of his Supervisor; instead, he sat at his desk staring straight ahead, until again being ordered to get to work. The Board finds that discipline was appropriate.

With respect to the measure of discipline assessed, the Carrier points out that Claimant had more than nine prior Investigations, had been fired and reinstated before, and had amassed over two hundred demerits during his employment. **Moreover**, Claimant's record stood at seventy demerits at the time this discipline was assessed (in fact, he already had been terminated for excessive demerits as will be discussed in the other cases). Without regard to those other cases, Claimant's record stood at forty demerits when the offense was committed, and as few as twenty additional demerits for this offense would have subjected him to discharge under the Brown System of Discipline in effect on this property. Therefore, we can see no basis to upset the measure of discipline assessed in this case.

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 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 24th day of August 1987.