

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24129
Docket Number MW-24109

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Colorado and Southern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Section Laborer T. J. Vallejos for alleged violation of 'Rule 665' was without just and sufficient cause, an abuse of justice and discretion by the Carrier and in violation of the Agreement (System File C-3-80/MW-423).

(2) Section Laborer T. J. Vallejos shall be reinstated with seniority and all other rights unimpaired, his record be cleared and he shall be compensated for all wage loss suffered beginning January 21, 1980."

OPINION OF BOARD: The Carrier directed the following notice of investigation to the Claimant via certified mail -- return receipt requested:

"Attend investigation in the Trainmaster's Office at Trinidad, Colorado at 9:00 a.m., August 7, 1979, for the purpose of ascertaining the facts and determining your responsibility in connection with your alleged absence from duty since July 17, 1979. Arrange for representative and/or witnesses, if desired in accordance with governing provisions of prevailing schedule rules."

It should also be noted that the letter of investigation indicated a carbon copy was sent to the General Chairman. The investigation was held as scheduled. However, the Claimant was not in attendance and there was no receipt indicating that the Claimant had received notice of the investigation.

At the investigation, Mr. D. D. Noel, foreman, testified that the Claimant sustained an injury on May 14, 1979, to his thumb, which ultimately required surgery. He also testified that on July 17, 1979, the Claimant presented him with a statement from a doctor dated July 16, 1979, which read:

"To Whom It May Concern:

This is to certify that Tim Vallejos has been under my care from May 15, 1979 to July 16, 1979 and is able to return to work on July 17, 1979. If you have any questions, please feel free to contact my office.

Sincerely yours,

Stanley H. Biber, MD."

Mr. Noel further testified that the Claimant did not report July 17, 1979, and, as of the date of the investigation had not yet reported for work. Moreover, Mr. Noel testified that he had not granted permission to the Claimant to absent himself from duty.

On August 31, 1979, the Carrier directed a letter to the Claimant dismissing him from the service of the Carrier. The next development in the case was on January 18, 1980, when the Claimant appeared for work with a doctor's release from the same doctor who had certified him fit for duty on July 17, 1979. The second doctor's release was dated January 18, 1980, and stated, "This is to certify that Tim Vallejos has been under my care from 5/23/79 to 1/21/80 and is able to return to work on 1/21/80." This time the Carrier refused to allow the Claimant to work inasmuch as he had been dismissed August 31, 1979.

On February 21, 1980, the General Chairman filed a claim alleging violation of the Agreement inasmuch as Carrier refused to allow the Claimant to work.

The Organization argues that Rule 26-Discipline was violated by the Carrier inasmuch as the Claimant was not advised in writing of the charges preferred against him. The clear language of Rule 26 requires this, according to the Union. Moreover, the Organization argues that the Claimant failed to receive a copy of the dismissal notice as required by the Agreement. The Organization next argues that the claim which was presented on February 21, 1980, was timely within the rule inasmuch as the Claimant was notified of the dismissal on January 18, 1980. They believe that the Carrier's arguments regarding the timeliness of the claim are without foundation.

The Carrier argues that the investigation notice dated August 2, 1979 was proper and as a result there is no procedural defect in the Carrier's disciplinary action against the Claimant. The Carrier notes that the notice of investigation and dismissal were sent to the only address known to the Carrier, this being the address as listed on the Claimant's IRS W-4 form as "San Juan Plaza, Trinidad, Colorado 81082." This form was dated April 23, 1979. Carrier also notes that the notice of investigation was sent to this address and was returned by the post office stamped "Addressee Unknown". Moreover, the Carrier directs attention to the notice of investigation where it is shown that a copy of the notice was sent to the General Chairman. Based on this, they believe that the Organization had ample time and opportunity to appear and participate on the Claimant's behalf or seek postponement or help mitigate the Claimant's position. The Carrier argues that inasmuch as every attempt was made to deliver the notice, they cannot be held responsible for the Claimant's non-appearance at the investigation. In this regard they direct attention to Third Division Award 15575 which states:

"This Board has previously held that a Carrier cannot be held to be an insurer of the receipt of notice (Award 13757) and that an employee has the responsibility not to avoid service of such notice. (Award 13757). We have further determined an employee may not frustrate the service of such notice

by absenting himself from his proper address or by delaying in some other manner a response to a Post Office Notice without offering a reasonable explanation. (Award 15007)."

They also cite Third Division Award 13685, which stated:

"*** the registered mailing of the notice to appear and answer the charge can properly be held as constructive delivery of such notice."

Carrier next argues, based on the belief that the notice of investigation and of dismissal were proper, that the Organization was obligated to file a claim within 60 days of August 31, 1979, the date of the dismissal. They note that the claim was not filed until February 21, 1980, thus, they conclude that the claim is procedurally defective and not properly before the Board.

Most critical to the consideration of this case is the issue of notice. Rule 26 clearly requires, that the Claimant be notified of the charges against him and have an opportunity to appear at the investigation. Under the clear language of Rule 26, if it is determined in this case that proper notice was not affected, the disciplinary action cannot be upheld. However, if it is determined that proper notice was affected, the issue of timeliness of the claim appealing the discharge must then be considered.

In respect to the issue of notice, it is the conclusion of the Board that the proper notice was constructively given to the Claimant regarding the matters under investigation. The notice was sent to the last address of the Claimant known to the Carrier. Notably this address had been given to the Carrier only a few months before the investigation. The Carrier can do little more than send the notice by registered mail to the address provided to them by the Claimant. If the address was improper or the Claimant was unknown at the address he gave the Carrier, it is beyond the control of the Carrier and they cannot be held responsible. It is in this respect that we subscribe to the thoughts of the Board in Third Division Awards 15575 and 13685 cited to us by the Carrier on this point. Accordingly the claim is dismissed.

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 dismissed.

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 14th day of January 1983.

