

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 52

Case No. 52

STATEMENT OF CLAIM

The System Committee of the Brotherhood claims, in behalf of M. A. Sandoval, Social Security Number 522-86-6346, Payroll Number 793979-6, Seniority date October 10, 1979, that his discipline of 15 days for alleged violation of Rule 570 and subsequent discipline imposed of an additional 15 days for waivers previously signed for a total of 30 days is arbitrary, capricious, and on the basis of unproven and disproved charges and in violation of Rule 26 of the Agreement. It is respectfully requested that the claimant's discipline of 30 days be stricken from his record and that claimant be returned to service with all seniority and other rights unimpaired and compensated for all wage loss suffered.

FINDINGS

As stated by the Carrier, the Claimant was absent from duty without permission on Friday, April 10, 1992. On the same date, the Trainmaster sent a letter to the Claimant's address of record, directing him to attend an investigation on Thursday, April 16, 1992 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged

failure to obtain authority to be absent from your position on Friday, April 10, 1992".

The record indicates that the notice sent by certified mail was "unclaimed" on April 11 and on two dates subsequent to the scheduled investigation. However, the Carrier cannot be found at fault for mailing the notice to what it asserts was the Claimant's address of record.

The hearing commenced as scheduled on April 16. Neither the Claimant nor an Organization representative on his behalf was present. The hearing officer was advised of the mailing of the hearing notice but did not inquire if receipt of delivery had been obtained.

According to the Organization's undisputed contention, the Claimant was on duty on April 16 and could readily have been contacted as to his failure to appear at the hearing. The Board also notes, as pointed out by the Organization, that no attempt was made to deliver the hearing notice by hand to the Claimant (as could have been done prior to April 16) and no copy of the notice was sent to the Organization. While Rule 26 requires neither of these procedures, the Organization contends that such procedures are usually followed but were not in this instance. The Organization also points out that the Claimant's supervisor initiated the hearing notice on the same day of the absence, without waiting for any discussion with the Claimant when he did report for duty.

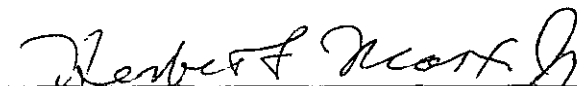
Rule 26 states that an employee "shall . . . be present" at an investigation. This is not of a case of an employee who has been

continuously absent without notice and his absence from an investigation could logically be anticipated. This is also not a case where there is proof of receipt of notice or one where an employee has repeatedly failed to appear, despite postponements. In this instance, it is reasonable that Carrier representatives at the hearing would know if the Claimant was on duty at the time; if so, contact could have been made with him. Alternately, a single postponement could have been provided to insure that notice of the hearing was indeed received.

A hearing officer may proceed with an investigation in the absence of the cited employee, but this is done at considerable risk. There must be substantial justification for such action. Consider the elements in this instance -- hearing notice initiated on the same day as the offense; no proof of delivery; no Organization involvement; no consideration that the Claimant was and had been on duty (rather than having "disappeared"); no move to postpone the hearing. All of these put together lead the Board to the conclusion that a fair hearing was not provided, and the resulting disciplinary action must be rescinded.

A W A R D

Claim sustained. The Carrier is directed to place this Award into effect within 30 days of the date of this Award.


HERBERT L. MARX, Jr., Neutral Referee

NEW YORK, NY

DATED: December 17, 1993