NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 3
and)
) Award No. 7
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
R. B. Wehrli, Employee Member
D. A. Ring, Carrier Member

Hearing Date: April 6, 1998

STATEMENT OF CLAIM:

(1) The dismissal of Track Machine Operator L. Tom was in violation of the Agreement, based on unproven charges, and an abuse of discretion (Organization File D-260; Carrier File 1046834D)

(2) All charges must be dropped and cleared from Claimant Tom's record, the discipline must be canceled and Claimant must be compensated for all time unjustly withheld from service subsequent to and including November 24, 1996.

FINDINGS:

Public Law Board No. 6089, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On October 29, 1996, Carrier sent a notice to Claimant to report for an investigation on November 4, 1996. The notice was mailed to the most recent address that Claimant had on file with Carrier, an address in Gallup, New Mexico. The notice charged Claimant with failing to ensure that a switch was properly lined before passing through the switch on October 9, 1996.

Claimant did not appear for the November 4, 1996, hearing. Consequently, on November 4, 1996, Carrier addressed a second notice advising Claimant that the investigation scheduled for November 4, 1996, was canceled and directing Claimant to report

for an investigation on November 7, 1996. Carrier sent this second notice to Claimant's address in Gallup, New Mexico and to an address in Grand Island, Nebraska. Claimant did not appear for the November 7 hearing. Carrier conducted the hearing in absentia and on November 27, 1997, Carrier notified Claimant that he had been found guilty of the charge and dismissed from service.

The only issue presented to this Board is the adequacy of the notice of investigation. The parties are in dispute as to whether Claimant's address was in Gallup or Grand Island. Carrier contends that Claimant moved to Grand Island. The Organization maintains that Claimant's residence was in Gallup and that Claimant rented an apartment in Grand Island because the gang had been informed that they would be working in that area for up to six months and an apartment was cheaper than staying at a motel. During the processing of the claim on the property, the parties submitted conflicting written statements. Carrier submitted a statement from the Track Supervisor attesting that the First Vice Chairman had told him, after Claimant failed to show for the November 4 hearing, to send the notice to Grand Island. The Organization submitted a statement from the First Vice Chairman attesting to having told the Track Supervisor to send the notice to Grand Island and Gallup. This dispute is beside the point because the record shows that Carrier sent the notice of the November 7 investigation to both addresses.

Rule 48(c) of the Agreement provides:

> "Prior to the hearing, the employe alleged to be at fault shall be apprised in writing of the precise nature of the charge(s) sufficiently in advance of the time set for the hearing to allow reasonable opportunity to secure a representative of his choice and the presence of necessary witnesses. The General Chairman shall be furnished a copy of the charges preferred against an employe."

The U.S. Postal Service certified mail receipts in the record reflect that the notice was post marked Shawnee Mission, Kansas on November 4, 1996. One receipt shows the notice addressed to the address in Grand Island and one receipt shows the notice addressed to the address in Gallup. Both were mailed first class, certified, return receipt requested. The question is whether Carrier's actions apprised Claimant sufficiently in advance of the November 7 hearing to allow him a reasonable opportunity to secure representation and witnesses.

It is extremely unlikely that a notice mailed first class on November 4, 1996, from Shawnee Mission, Kansas to either Grand Island, Nebraska, or Gallup, New Mexico, would be delivered on November 5, 1996. It is possible that it could be delivered in two days, i.e. on November 6, but also reasonably possible that

it would take three days for delivery.

If delivery was attempted on November 6, Claimant could not avoid the notice by failing to pick up his mail. However, there is no evidence in the record that the Postal Service attempted delivery at either Grand Island or Gallup prior to November 7. Nor is there any evidence that Carrier attempted to inquire of the Postal Service as to what its records of attempted delivery of the certified, return receipt requested, letter showed. On this record, we simply cannot say whether Claimant avoided service of the notice by failing to pick up his mail, or whether the notice was not delivered in time for Claimant to receive it before the hearing.

Carrier argues that it had to reschedule the hearing for November 7 because of the Agreement's time limits for holding investigations. It further observes that it made heroic efforts to ensure that Claimant received the notice, sending the timekeeper to look for Claimant at the Grand Island address and having the Track Supervisor telephone Claimant's neighbor in Grand Island.[1] Of course, if Carrier had been successful in reaching Claimant, no alleged defect in the notice could be raised. However, Carrier was not successful and it chose to rely on first class mail.

Carrier could have ensured that the notice would reach Claimant in time at either address by sending it Express Mail with a guaranteed next day delivery. Carrier did not do so.

Carrier urges that prior awards have recognized that certified mail is a reasonable means of serving a notice. We agree, provided that the distance the notice must travel and the time between the date it is sent and the date the hearing is scheduled are such that it is reasonably likely that the charged employee will receive the notice in advance of the hearing so that he can secure representation and prepare his defense. In the instant case, the record does not reflect that three days between the mailing of the notice and the date of the hearing was sufficient.

Accordingly, we conclude that the record fails to reflect that Claimant was apprised of the charge in writing sufficiently in advance of the time set for the hearing to allow reasonable opportunity to secure a representative of his choice and the presence of necessary witnesses. Therefore, the claim must be sustained.

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[1] Apparently, Claimant did not have a telephone.

AWARD

Claim sustained.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.

Martin H. Malin, Chairman

D.A. Ring,
Carrier Member

R.B. Wehrli
Employee Member

Dated at Chicago, Illinois, September 21, 1998.