

PUBLIC LAW BOARD NO. 3882

AWARD NO. 178
NMB CASE NO. 180

PARTIES TO
THE DISPUTE:

UNITED TRANSPORTATION UNION

VS.

CSX TRANSPORTATION, INC.
(former Chesapeake and Ohio Railway - Proper)

STATEMENT OF CLAIM:

"Claim is made to reverse the dismissal of Conductor Tyrone Fitchett and to have him reinstated to service with full compensation for lost time, including benefits, account being dismissed from service on or about February 6, 1995."

FINDINGS:

On November 8, 1994, Claimant allegedly tested positive for cocaine during an FRA random drug test. He had previously tested positive on February 14, 1994, and participated in a rehabilitation program under the Bypass Agreement. Under the terms of that program, any non-compliance with the terms of his after-care plan within five years of returning to service, would result in a hearing on the original Rule G charge. Accordingly, Carrier, by letter of November 22, 1994, charged him with violation of Rule G on November 8 and instructed him to attend investigation on November 30, 1994.

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On November 29, Local Chairman Downer requested a postponement, (according to Carrier's submission, Claimant had been admitted to Hampton Roads Clinic, a substance abuse facility), and by letter of that date, Carrier notified Claimant that the investigation was rescheduled for December 7. By letter of December 6, Vice-Local Chairman Smoot requested a further postponement on the grounds that Claimant could not attend due to medical reasons, and that Smoot had not had time to prepare himself; by letter of that same date, Carrier notified Claimant that the investigation was rescheduled for January 9.

On January 4, Smoot requested a further postponement, but Carrier replied by letter of January 5 that in view of the delays which had already occurred, the investigation should proceed on January 9. When the investigation convened, Claimant was not present. His representative, Smoot, stated that Claimant was in hospital and requested a postponement. The Board granted a two-week continuance on the record, the investigation to reconvene on January 23.

On January 20, Smoot requested another postponement due to prior commitments. By letter of January 20, Carrier notified Claimant that the investigation was rescheduled for January 30. By letter of January 26, Smoot requested another postponement on the ground that Claimant had to appear in court on January 30. By

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letter dated January 27, Carrier notified Claimant that the investigation was rescheduled for January 31.

When the investigation convened on January 31, Smoot was present but Claimant was not. The Board entered as exhibits all of the postponement letters referred to above. Each letter was addressed certified mail to Claimant at his correct address, and the certified mail number was shown. Each letter was copied to Smoot, also certified mail with the certified mail number given. No return receipts or other evidence of delivery was placed in evidence; nor was there evidence by any person of the actual mailing or attempted delivery of any of the letters. Carrier's trainmaster testified that he had attempted to telephone Claimant three times on January 30 and four times on January 31, prior to the convening of the investigation, but on all occasions the phone rang and no one answered. Approximately one hour after the investigation commenced, the trainmaster attempted again to telephone Claimant with the same result.

Mr. Smoot objected to the investigation proceeding without Claimant being present. He pointed out that there was no proof that Claimant had received the latest notice postponing the investigation from January 30 to January 31. He stated that he had not talked to Claimant to find out whether he had received the notice. The Conducting Officer asked: "Did Mr. Fitchett (Claimant) request you to be his representative in these matters?", and upon Mr. Smoot's

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reply in the affirmative, ruled that he found no reason "to cease this investigation at this time." Smoot reiterated his objection to the investigation going forward, and that Claimant was being denied due process.

Carrier proceeded with the substantive part of the investigation. At the close, Smoot again objected that Claimant had been deprived of a fair and impartial hearing, including the right to hear the evidence and cross-examine witnesses, in violation of due process and the rights guaranteed him by the Discipline Rule, by virtue of the fact that Carrier had produced no evidence that he had been properly notified of the January 31 date of investigation.

Based upon the substantive evidence adduced at the investigation, Carrier concluded that Claimant had been in violation of Rule G, and by letter of February 6, 1995, notified him that he was dismissed from the service of CSX Transportation.

The claim for reinstatement and back pay is before the Board not on the substantive issue of Rule G violation, but on the procedural issue of whether Carrier's proceeding with the investigation in Claimant's absence without proving that he had received notice of the investigation, deprived him of the fair hearing to which he was entitled under the Discipline Rule.

Carrier's position as stated in its submission is that it is well established by arbitral precedent that holding an investigation in absentia does not deprive an employee of a fair and impartial

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investigation if he has been properly notified of the charges against him and the date and time of the investigation, yet chooses not to appear at the hearing. Carrier asserts that it notified Claimant of the charges and of all postponements in writing and further attempted to reach him by telephone. Carrier concludes that "[o]bviously, Mr. Fitchett chose not to attend the investigation, and cannot now contend that his right to a fair and impartial investigation was denied because he was not in attendance."

Carrier is correct that arbitrators have held in many cases, on the theory that it is subversive of the discipline process for employees to delay or prevent that process simply by failing to appear at scheduled investigations, that holding an investigation in absentia does not deprive an employee of a fair and impartial investigation if he has been properly notified of the charges against him and the date and time of the investigation, yet chooses not to appear at the hearing. But the defining requirement is proper notification, and if the issue is raised that the employee did not receive proper notification of the time and place of the investigation, it is the Carrier's burden to prove such notification by appropriate evidence, the most usual form of which is a return receipt or other document signed by the employee indicating his receipt of the notice in question. Here, Carrier, although met at the outset and throughout the investigation with the objection by Claimant's representative that there was no proof that Claimant had

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received the notice of postponement of the investigation to January 31, 1995, nevertheless proceeded with the investigation without offering any proof of receipt by Claimant or any other proof of delivery or attempted delivery of the letter of postponement which was placed into evidence.

Carrier should have been well aware, from the very arbitration awards on which it relies, of its burden to show proper notification and of the kinds of evidence arbitration boards have required in order for that burden to be met, if it chose to proceed with the investigation in Claimant's absence. Under the circumstances, little as the Board relishes reinstating employees on procedural grounds who appear to be subject to dismissal on substantive grounds if those substantive grounds could be considered by the Board, we have little choice but to uphold the Organization's procedural objection here, and to order Claimant's reinstatement. However, we do not think that an order for compensation is justified in this case. It appears from collateral evidence that subsequent to his alleged positive test for cocaine and during the period Carrier was attempting to schedule the investigation, Claimant was hospitalized and being treated for substance abuse. Whether or not Claimant was fit for service at that time or during the time subsequent to his dismissal is not known to the Board. We think that an order of reinstatement without compensation for time lost, subject to passing

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the usual physical examination, is an appropriate remedy under all of the circumstances of this case.

Award: Claim sustained for reinstatement without compensation for time lost, subject to passing the usual physical examination.

A. R. Cluster

H. R. Cluster, Chairman and Neutral Member

R. K. Sargent

R. K. Sargent, Employee Member

W. E. Griffin

W. E. Griffin, Carrier Member

3/22/94

Date