

PUBLIC LAW BOARD NO. 4021

Award No. 19
Case No. 17

PARTIES
TO
DISPUTE

The Brotherhood of Maintenance of Way Employes

and

The Atchison, Topeka & Santa Fe Railway Company

STATEMENT
OF CLAIM

1. Carrier's decision to remove Coast Lines Welder Helper M. L. Verdugo from service effective July 19, 1985, was unjust.
2. Accordingly, Carrier should be required to reinstate Claimant Verdugo, with seniority rights unimpaired, and compensate him for all wages lost from July 19, 1985.

FINDINGS

This Board, upon the whole record and all of the evidence, finds that the parties herein are the Carrier and the Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement dated November 26, 1985, and has jurisdiction over the parties and the subject matter.

The Claimant was employed by the Carrier for approximately one and one-half years, and was working as a Welder Helper at the time of the events giving rise to this case. As stated in Awards 17 and 18 of this Board, Claimant is involved in four separate discipline cases on this docket, of which this is the third to be adjudicated.

In the case at hand, Claimant was charged by letter dated July 8, 1985, with:

. . .alleged absence without proper authority commencing at 9:45 AM, Tuesday, July 2, 1985, and July 3 and 5, 1985, in possible violation of Rules 2, 13 and 15, General Rules for the Guidance of Employees. . . .

The Notice of Investigation was sent, via Certified Mail, to the Claimant's last address of record, and was accepted and signed for by "M. C. Negrete." Claimant did not provide the Carrier any other address, and did not communicate with the Carrier prior to the date of the Investigation. Claimant did not attend the Investigation, and it was held in abstentia.

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The Organization raised two procedural objections to the handling of this case: that Carrier lacked the authority to discipline Claimant, since he already had been discharged for a previous offense; and, that the Carrier violated the provisions of the November 10, 1982 Agreement, when it failed to provide the Organization with a copy of the Notice of Investigation.

The Board disagrees with the Organization's position with regard to the first objection. The Claimant was an employee at the time of the alleged rule infractions, and, therefore, it had the right to discipline him for any established rule violations. A previous discharge does not prohibit the Carrier from taking action if other matters subsequently come to light, because the Carrier's actions are subject to appeal, and possible reversal.

The Organization's second objection centers on the fact that it was not provided a copy of the Notice of Investigation, as required by paragraph (1) of the November 10, 1982 Agreement, which provides:

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1. In addition to that stated in Rule 13, Section (c) of the current Maintenance of Way Agreement, a copy of the notice of the formal investigation will be mailed to the General Chairman at the time it is mailed to the charged employe. (Emphasis added).

The foregoing provision clearly obligates the Carrier to provide the Organization with timely notice of the Investigation. Among other reasons, this Notice is important to permit the Union to arrange its presence, and to prepare an answer to the charges. The failure of the Carrier to comply with such provisions often has been the subject of Arbitration decisions, and the conclusion has been mixed: in some cases, such failure is fatal to the Carrier's action; and, in others, it may be remedied. In no case, should it be ignored.

The governing principle is whether the omission substantially affected the right of the Claimant to adequate representation, and a fair hearing. In the case at hand, there is no evidence that the Claimant personally received notice of the Investigation, and there is evidence that the Union received no notice whatsoever. Neither the Claimant nor his Organization attended the Investiga-

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tion, and no defense was proffered. There is no showing in the record that the Union was even expected: the Hearing Officer merely noted Claimant's absence, put on the Carrier's case, and closed the hearing.

When the issue was raised by the General Chairman in his initial appeal to the General Manager, the response was:

Because the Division inadvertently failed to send you a copy of the notice of investigation, it did not preclude his right to an investigation. Furthermore, Mr. Verdugo failed to appear at the investigation which demonstrates his lack of interest in working for the Carrier.

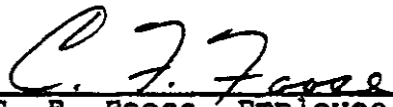
The reply contains no acknowledgement of the responsibility to provide the Organization with notice, and shows no regard for the requirements of the Agreement. We have held before that the Carrier has the right to rely upon an employee's last known address, and we have held that the Carrier may conduct Investigations in abstentia; however, if an Investigation is held in abstentia, the Carrier has the burden of showing that it complied fully with the notice requirements of the Agreement. It failed to do so in this case, and, therefore, we will sustain Part 1 of the claim.

With respect to Part 2 of the claim, this Board upheld Claimant's discharge for other offenses in Award No. 18, and, therefore, the Claimant is not entitled to reinstatement or compensation for wages lost. We will deny Part 2 of the claim.

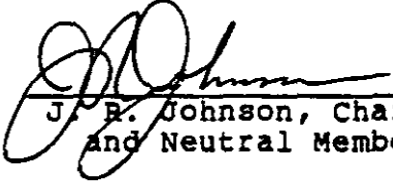
AWARD

Part (1) of the claim is sustained.

Part (2) of the claim is denied.


C. F. Foose, Employee Member


L. L. Pope, Carrier Member


J. R. Johnson, Chairman
and Neutral Member

Dated: July 22, 1986