

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 18

Case No. 18

STATEMENT OF CLAIM

(1) The Carrier violated the provisions of the current Agreement when it dismissed Extra Gang Laborer Mr. I. E. Williams on February 8, 1988, without first according Claimant a fair and impartial hearing. Said action being excessive and in abuse of discretion. (System file EMWD 88-5-23A).

(2) The Carrier shall reinstate Claimant to his former position with seniority and all other rights restored unimpaired with compensation for all wage loss suffered and this his record be cleared of all charges.

F I N D I N G S

Under date of February 8, 1988, the Claimant was sent a notice to attend an investigative hearing at 9 a.m. on February 16, 1988 in reference to his responsibility for his "alleged absence from duty without proper authority on January 25, 26, 27, 28, and 29, 1988 while assigned to System Steel Gang working

in Fort Worth, Texas". The Claimant did not appear at the hearing.

The hearing proceeded in the Claimant's absence. As to the notification letter, the Hearing Officer stated as follows:

This letter was sent registered mail on February 8. We have not had response from the Post Office on delivery. When we get that, it will be made part of the transcript, and let the record show that it was sent to the last record of address of Mr. Williamson.

The record shows that the letter was sent by certified mail, not registered mail. It was addressed to "I. B. Williams" rather than to I. B. Williamson, the Claimant's correct name. Nevertheless, it was received by the Claimant at his correct address.

The problem here is that the Postal Service noted "2-16-88" as the date of delivery. This was the same day on which the hearing was scheduled for 9 a.m. There is no record of any earlier attempt to deliver the letter to the Claimant.

Based on this delivery time, it would have been impossible for the Claimant to attend the hearing, having received the notice in Childress on the same day as the hearing set for Fort Worth. As noted above, the Hearing Officer was aware that the Carrier had not received notice of delivery of the letter.

This situation is in contrast to the non-appearance considered in Award No. 15, where the notification letter sent to the employee's address of record was returned as "unclaimed",

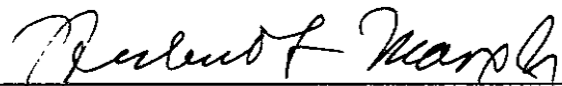
and in Award No. 17, where the employee acknowledged receipt of the notification one week prior to the hearing.

Rule 26 provides that an employee "shall be apprised, in writing, of the charges preferred against him". In this instance, such notice was not received until after the hearing had begun. There is no evidence that the Claimant was in any way responsible for the apparent delay in delivery of the letter. To afford the Claimant the opportunity to appear in his own defense, a postponement of the hearing was clearly in order.

Under these circumstances, the Award will direct that the Claimant be offered reinstatement, with compensation as provided under Rule 26 (c). Since the explanation of the Claimant's absence remains undetermined, however, the Claimant shall be entitled to back pay only if he actually accepts such proffered reinstatement.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to put this Award into effect within 30 days of the date of this Award.



HERBERT L. MARX, JR., Referee

DATED: September 29, 1989

NEW YORK, N.Y.