

PUBLIC LAW BOARD NO 5850

Award No.
Case No. 106

PARTIES TO DISPUTE:
(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. That the Carrier's decision to remove Eastern Region Machine Operator R. J. Weller from service was unjust.
2. That the Carrier now reinstate Claimant R. J. Weller with seniority, vacation, all benefit rights unimpaired and pay for all wage loss as a result of investigation held 10:00 a.m. January 13, 1999 continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial, credible evidence that proved that the Claimant violated the rules enumerated in their decision, and even if Claimant violated the rules enumerated in the decision, removal from service is extreme and harsh discipline under the circumstances.
3. That the Carrier violated the Agreement particularly but not limited to Rule 13 and Appendix 11 because the Carrier did not introduce substantial, credible evidence that proved the Claimant violated the rules enumerated in their decision.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

Pursuant to the Discipline Rule, the Carrier is obligated to notify the charged employee of the time and date of an investigation with a clear notice of the charges. This notification is usually accomplished by hand delivery or by Certified mail, return receipt.

Upon receipt of the charges, the employee can choose to either attend or not attend (in most all cases), but the non-attendance does not prevent the Carrier from proceeding, presenting its evidence and levying discipline, but in the employee's absence, there must be

evidence that the Carrier did attempt notification. This can readily be done by producing the dated receipt from the post office confirming the date mailed, or if personal delivery was attempted and the Claimant refused to accept the notice, testimony to that effect by the individual who attempted delivery. In other words, Carrier must substantiate that it discharged its obligation under the rule to notify the employee. The Carrier does not have to prove that the Claimant received the notice or was aware that such notice was issued.

In this instance, the investigation was attended only by two people, the hearing officer and the employee representative who had no prior contact with Claimant, and was present only because he had received a copy of the notice of charges.

When it was evident that Claimant was not present, the hearing officer opened the investigation. When the representative inquired about whether Claimant had been notified, the hearing officer indicated that the Carrier had no signed receipt nor returned notice. When the representative requested a postponement to determine if Claimant received the notice, the request was denied. At this juncture it would have been proper to introduce the receipt stamped by the post office reflecting the date the notice was mailed.

Under any circumstances other than this case, the claim would be sustained and the Claimant ordered reinstated with pay for all time lost, but in November, Claimant was charged with his first violation of Rule 1.5. He was suspended from service by the Medical Department. He was instructed to contact a counselor and proceed with rehabilitation or whatever the counselor advised. The investigation was set up because of Claimant's alleged failure to contact a counselor (which must be done within 45 days of being notified of the suspension).

To this Board, Claimant has lost time because of the suspension, not because of Carrier's action of holding the investigation.

It is, therefore, this Board's decision that the dismissal be rescinded, and that a new investigation be scheduled allowing a reasonable time for the notice to be delivered to Claimant's address. If Claimant does not attend, the Carrier should present evidence of mailing, but that evidence, as should all other evidence deemed proper by the Carrier, should be presented by someone other than the hearing officer.

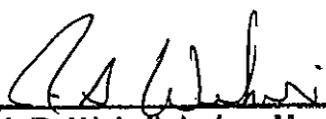
AWARD

Claim remanded to the property as set forth in the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


Thomas M. Rohling, Carrier Member

Dated: May 8, 1997