

PUBLIC LAW BOARD NO. 6045

PARTIES	UNITED TRANSPORTATION UNION	)	
	(CSX-Chesapeake & Ohio-Proper)	)	
		)	AWARD NO. 8
TO	and	)	
		)	CASE NO. 8
	CSX TRANSPORTATION, INC.	)	
DISPUTE	(Former Chesapeake & Ohio Railway)	)	

STATEMENT OF CLAIM:

Claim is made to reverse the discipline of Conductor W. C. Police, ID No. 077460, and to have him made whole with full compensation for lost time, including benefits, account being suspended from service on or about February 22, 1995.

HISTORY OF DISPUTE:

On January 12, 1995 Claimant marked off for a one-day appointment at 11:35 p.m. Claimant next reported for service at 9:09 a.m. on January 14. On January 25 after requesting two days personal leave but being allowed only leave for a one-day appointment Claimant marked off at 2:50 a.m. He next reported for service at 3:14 a.m. on January 27.

By letter of February 7, 1995 the Carrier notified Claimant to appear for formal investigation on the charge that he had been off work without authority following his January 14 and 25 mark offs. The investigation was held on February 15, 1995. Neither Claimant nor a representative of the Organization appeared. By letter of February 22 the

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Carrier notified Claimant that as a result of evidence adduced at the investigation he had been found at fault for being off duty without authority for which he was receiving five days overhead suspension. However, the notice further advised Claimant that inasmuch as he had been assessed previous discipline of five days overhead suspension less than three months before the instant case, Claimant would serve the discipline administered in that case while the discipline in the instant case would be withheld unless Claimant was assessed further discipline within the following three months.

The Organization grieved the discipline. The Carrier denied the grievance. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the dispute remains unresolved, and it is before this Board for final and binding determination.

FINDINGS:

The Board upon the whole record and all the evidence finds that the employees and the Carrier are employees and Carrier within the meaning of the Railway Labor Act, as amended, 45 U.S.C. §§151, et seq. The Board also finds it has jurisdiction to decide the dispute in this case. The Board further finds that the parties to the dispute, including Claimant, were given due notice of the hearing in this case.

This case is before the Board upon the procedural argument by the Organization that the Carrier denied Claimant a fair and impartial investigation when it failed to give proper notice of the investigation as required by Rule 87 of the Conductors', Assistant

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Conductors' and Trainmen's Agreement and Rule 55 of the Yardmen's and Switchtender's Agreement. The Organization maintains that the Carrier's failure in this regard mandates that the discipline be set aside. We agree.

Among the arbitral authorities cited to this Board by the Organization is Award No. 178 of Public Law Board No. 3882, Mar. 27, 1994 (Cluster, Neutral) on this property and involving the same parties. In that case the Carrier properly notified the Claimant to attend the investigation and also notified him of several postponements. However, the Claimant did not appear at the investigation. Instead, a representative of the Organization appeared and raised the objection that the record contained no proof the Claimant had received the last notice of postponement before the investigation. Upon hearing that the representative had been authorized by the Claimant to represent him, the Hearing Officer proceeded with the investigation over the representative's objection. Claimant was found guilty of the charge and assessed discipline. The Board set the discipline aside.

The Board acknowledged the general principle that holding an investigation in absentia does not deprive an accused employee of a fair and impartial investigation but observed that the right to proceed in such manner is contingent upon proper notification to that employee "... of the charges against him and the date and time of the investigation," The Board noted that in such circumstances if an accused employee fails to attend the investigation, he does so at his peril. However, the Board further found that:

... 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.

The Board went on to hold that although the Carrier should have been aware from the arbitration awards upon which it relied of its burden to show proper notification and of the type of evidence required to sustain such burden, it failed in that regard. Instead the Carrier proceeded with the investigation by simply placing the notice of postponement into evidence without offering any proof of receipt by the Claimant or any other proof of delivery or attempted delivery.

Our analysis of the foregoing award leads us to conclude that it is not palpably erroneous. It is a clear statement of the Carrier's burden of proof in a situation very similar to the instant case. We find it persuasive.

Here, neither Claimant nor a representative of the Organization attended the investigation. This should have doubly alerted the Carrier that it may be forced to meet the burden outlined by Public Law Board No. 3882 in Award No. 178. In that case the notice of postponement of investigation not only was addressed certified mail to the Claimant at his correct address, as apparently was the situation in the instant case, but the notice also was copied to the Organization's representative. In the instant case the notice of investigation does not show that it was copied to the Organization's representative. Additionally, while we note that in this case the Carrier officer who signed the notice of investigation rendered testimony at the investigation that the notice was mailed to

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Claimant, there was no signed return receipt, no evidence of attempted delivery and no evidence of attempts to contact Claimant by telephone. In the case before Public Law Board No. 3882 the Carrier made several unsuccessful attempts to contact the Carrier by telephone, but they apparently did not persuade the Board.

In view of the holdings of Public Law Board No. 3882 in Award No. 178 we find that in the instant case the Carrier has failed to meet its burden of proof that Claimant was notified properly of the investigation. In view of this finding we must agree with the Organization that the discipline should be set aside.

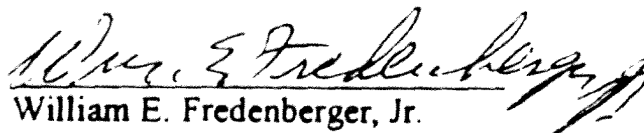
However, we must agree with the Carrier that the portion of the claim seeking compensation for lost benefits is without agreement support. We so found in Award No. 1, Case No. 1. We reach the same result here.

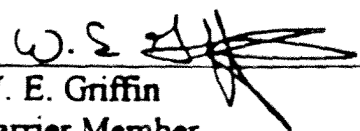
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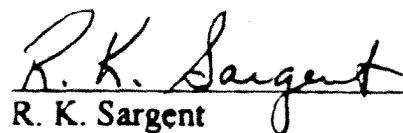
Claim sustained to the extent that the discipline assessed Claimant is reversed and Claimant will be compensated for all time lost, excluding compensation for fringe benefits lost.

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The Carrier will make this award effective within thirty days of the date hereof.


William E. Fredenberger, Jr.
Chairman and Neutral Member


W. E. Griffin
Carrier Member


R. K. Sargent
Employee Member

DATED: 11/23/98