

PUBLIC LAW BOARD NO. 7104

AWARD NO. 38

CASE NO. 38

PARTIES TO
THE DISPUTE:

Brotherhood of Maintenance of Way Employees
Division - IBT Rail Conference

vs.

CSX Transportation, Inc.

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Bridge Tender Vernita Rainey for violation of CSX Operating Rules General Rule A and General Regulations GR-2 in connection with falsification of her May 9, 2007 application for employment as discovered during an investigation conducted on August 8, 2008 is unjust and in violation of the Agreement (System File D70115108/2008-033027).
2. As a consequence of Part 1 above, we request that the charge letter dated September 12, 2008 and all matter related thereto, be removed from Ms. Rainey's personal file and the Claimant shall be made whole for all losses suffered as a result of the Carrier's actions. If your decision is contrary to this, please list this appeal for discussion at the next scheduled claim conference."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed from employment following an investigation hearing at which she was absent. The Organization objected at the hearing to continuing the proceeding in claimant's absence.

The facts are somewhat unusual. During an investigation held on August 26, 2008 into

claimant's failure to report an alleged on-duty injury, a medical report was introduced that showed she had suffered a back injury from an accident in the mid-April 2007 time frame. This back injury time frame was approximately one month before she applied for employment with the Carrier. According to her testimony at that investigation, she confirmed that she had the prior back injury and did not inform the Carrier of it. After that investigation concluded, the hearing officer examined her employment application materials. The Carrier's Post-Offer Health Questionnaire, which claimant completed on May 9, 2007, asked if she had ever had a back injury. She marked the box corresponding with "No."

After reviewing claimant's testimony as well as her Questionnaire response, claimant was given notice of a new investigation into whether she falsified her application materials and concealed information. She was issued notice of the new investigation by certified mail. She accepted the letter and signed the associated return receipt green card.

Thereafter, the Organization requested a postponement and the Carrier granted it. A revised notice was sent by certified mail to the same address for claimant. It went unclaimed. The Organization, however, did receive its copy of the revised notice.

The Organization requested another postponement and it was granted. The Carrier sent another revised notice with the rescheduled hearing date of October 21, 2008. The tracking record of the postal service showed that delivery to the same address was attempted. There was no evidence the letter was claimed. Once again, however, the Organization did receive its copy of the second revised notice.

The hearing convened as twice rescheduled on October 21, 2008. Claimant was not present. The transcript shows that she had not had any conversation with the Organization to explain her absence. Although the Organization verbally requested another postponement due to claimant's absence, the hearing officer declined the request and chose to proceed. The Organization left the proceeding. A record was developed that included the testimony of claimant at the August 26, 2008 investigation as well as a copy of her Post-Offer Health Questionnaire.

Based on the record developed, the Carrier determined that claimant had violated its rules as charged.

During the on-property process of appealing the Carrier's dismissal determination, no additional information was provided by the Organization or claimant to explain her absence or to provide justification for her failure to attend the investigation.

It is well settled that a claimant cannot defeat the effect of proper notification attempts by ignoring them. If an employee fails to attend an investigation where proper notification procedures have been followed and no justifiable excuse is shown then or later, the right to participate in the

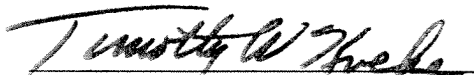
investigation is effectively waived. In such circumstances, it does not constitute a denial of due process to conduct an investigation *in absentia*.

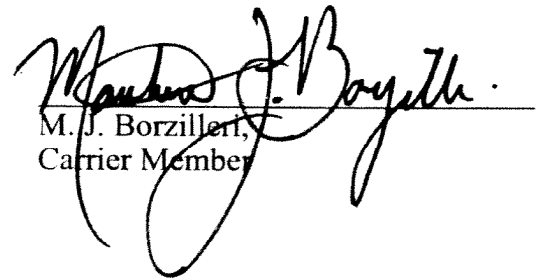
Given the nature of the conduct shown by substantial evidence, we do not find the Carrier's determination to be improper or unreasonable. Accordingly, the claim must be denied.

AWARD:

The Claim is denied.


Gerald E. Wallin, Esq., Chairman


T. W. Kreke,
Organization Member


M. J. Borzilleri,
Carrier Member

Date: July 2, 2010