

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 126

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of R. L. Thomas for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for time lost as a result of his dismissal from service following a formal investigation held on May 31, 2002, in connection with his failure to comply with the Carrier's drug policy and failure to follow the instructions of the Medical Director as a result of providing a urine specimen on May 7, 2002, which tested positive for cocaine.

(Carrier File MW-DEAR-02-24-LM-079)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

Rule 30 of the controlling Agreement provides:

(a) An employee who has been in service more than sixty (60) calendar days shall not be disciplined or dismissed . . . without a fair and impartial investigation. . . . At such investigation he may be assisted by duly authorized representatives. . . .

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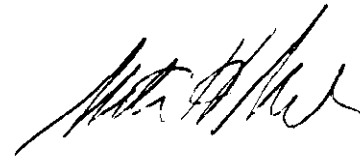
An employee required to attend a discipline investigation will be given not less than ten (10) days' advance notice, in writing, of the date of the investigation which shall set forth the precise charge against the employee with a copy to the duly authorized representative. . . .

Claimant's duly authorized representative was Paul R. Baird, General Chairman for the NKP Federation.

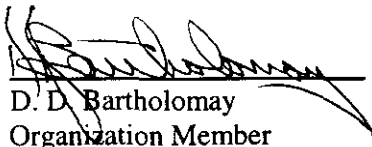
Carrier did not send a copy of the investigation notice to Mr. Beard. Instead, Carrier sent copies of the notice to Perry Geller and Jedd Dodd, General Chairman of the Consolidated and Pennsylvania Federations. Plainly, Carrier did not comply with Rule 30 when it failed to send notice to Claimant's duly authorized representative.

Carrier's failure to comply with the notice requirements of Rule 30 was aggravated by the fact that neither Claimant nor his representative attended the hearing, which was held in absentia. Although Carrier clearly sent the notice to Claimant, as evidenced by the certified mail receipt in the record, there is no evidence in the record as to what the Postal Service did with the notice. There is no return receipt showing that Claimant actually received the notice, nor is there any documentation from the Postal Service that the notice was undeliverable or that delivery was refused. Furthermore, it is clear from the record that Carrier was aware of the appropriate representative who was entitled to receive the notice. At the close of the hearing, the hearing officer remarked that Mr. Beard was not present and Carrier sent the notice of discipline and transcript to Mr. Beard.


We cannot say from the record whether, if Carrier had properly notified Mr. Beard of the investigation, Mr. Beard and Claimant would have attended or what defense they may have proffered. Under these circumstances, we think it is clear that Claimant was prejudiced by Carrier's failure to provide notice to Claimant's duly authorized representative and the claim must be sustained. Claimant is to be reinstated to service with seniority and benefits unimpaired. Claimant's entitlement to compensation for time held out of service is dependent on whether he has satisfied the DARS rehabilitation requirements. Claimant's return to service is subject to the DARS program's requirements and conditions, as existed on the date of his dismissal.



M. H. Malin
Chairman and Neutral Member



D. D. Bartholomay
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on December 16, 2003