C&NWT FILE NO: D-2-3-1432
UTU CASE NO: H781-329-23

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 235

AWARD NO: 2424
CASE NO: 7682

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION
CHICAGO AND NORTH WESTERN TRANSPORATION COMPANY

Statement of Claim:

"Request and claim of Yardman D. R. Gibbons, Boone Yard, for reinstatement to service with seniority and vacation rights unimpaired and that he be compensated for all time lost."

FINDINGS: This Board upon the whole record and all the evidence, finds that:

The carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

Claimant was dismissed, after investigation, for failure to protect his assignment on July 12, 1978. The investigation was held on August 7, 1978 at 2:00 P.M.; neither Claimant nor anyone representing him was present. Before proceeding with the investigation, Carrier made an unsuccessful attempt to contract Claimant by telephone. At the outset of the investigation, the presiding Carrier official read into the record the original notice of investigation dated July 13, 1978, setting the investigation for July 14, with the additional statement that the notice had been signed by Claimant in acknowledgment of receipt of same. The presiding official then stated that a notice of postponement was issued on July 14 addressed to Claimant at "Boone, Iowa" advising that the investigation was postponed to August 7 because of the inability of the investigating officer to attend; no statement was made that Claimant had acknowledged receipt of the postponement notice, nor was evidence of such receipt offered.

Subsequent to the investigation and notice of dismissal, Claimant's Local Chairman wrote to Carrier's Division Manager requesting Claimant's reinstatement with compensation for time lost, stating that Claimant "was not properly notified of the investigation." In subsequent correspondence between the parties, Carrier stated that Claimant was properly notified and the Organization stated that he was not, but neither submitted any additional evidence on the point. There is no statement from Claimant submitted by the Organization, and there is no return receipt or similar evidence submitted by the Carrier. Subsequent to the argument of the case before the Board, Carrier submitted an undated statement from the official who presided at the investigation that Claimant was "properly notified by telephone and in writing" of the investigation, and also submitted a copy of the postponement notice which had been read into the record at the investigation.

This Board has had occasion in numerous awards to deal with the requirement that proper notification be given to employees of the date, time and place of investigation, and with the problems which arise when investigations are held in the absence of charged employee, among them Awards 1678, 1683, 1685, 1689, 1707, 1744, 1751, 1752, 1896 and 2307. It should be clear to Carrier from those awards that when an employee is not present at his investigation and contends that his failure to be present was because he did not receive proper notice, it is incumbent upon Carrier to prove that proper notice was in fact given. In this case, Carrier proved that Claimant had notice of the original notice by producing the notice and Claimant's written acknowledgment of receipt. But as to the notice of postponement, Carrier produced only notice addressed to Claimant at "Boone, Iowa", with no street address, no acknowledgment of receipt and no witness who testified that he gave the notice to Claimant or read it to him on the telephone or even put it in the mail. The post-Board hearing statement by the presiding official that "Claimant was properly notified by telephone and in writing" is simply a conclusion - it does not provide the kind of facts which the Board has held to be necessary: who mailed the notice?; to what address?; on what date?; who telephoned Claimant?; at what number?; on what date?

We do not relish reinstating employees with compensation for time lost on procedural grounds, who might be subject to dismissal on substantive grounds if those substantive grounds could be considered by the Board; however, we have stressed the importance of notice and Carrier should be aware that when it proceeds with an investigation in the absence of the charged employee, it must meet the burden of proving that notice was properly given if it is to successfully defend against claims like the one before us here.

Award: Claim sustained for reinstatement and compensation for time lost less deduction for outside earnings. Carrier shall comply with the Award within 45 days of the date issued.

F. D. Tuffley, Employe Member

R. W. Schmiege, Carrier Member

H. Raymond Cluster
Neutral Member and Chairman

Chicago, Illinois
November 14, 1979

C&NWT FILE NO: D-2-3-1432
UTU CASE NO: H781-329-23

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 235

CASE NO: 7682

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Interpretation of Award No. 2424

On November 14, 1979, the Board issued Award No. 2424 sustaining the claim of D. R. Gibbons, who had been dismissed by the Carrier, for reinstatement to service with compensation for time lost. The Award read:

> "Claim sustained for reinstatement and compensation for time lost less deduction for outside earnings. Carrier shall comply with the Award within 45 days of the date issued."

Carrier was reinstated to service on January 1, 1980. On February 12, 1980, Carrier wrote to Claimant that the gross amount due him for the time he was out of service amounted to $7,353.60; but that since the total amount of required tax deductions plus unemployment benefits received by Claimant during the period exceeded the gross amount due him, the net amount due him was $0.

Carrier reached the figure of $7,353.60 by first comparing the earnings of Claimant during the twelve-month period preceding his dismissal with the earnings of the two employes junior to him on the seniority roster; this comparison showed that Claimant's earnings during the period were 25.16% of the earnings of the other two. Carrier then applied the 25.16 percentage factor to the average earnings of the other two employes during the period Claimant was out of service to determine the amount Claimant would have earned during that same period, producing the gross figure of $7,353.60. In making this computation, Carrier considered Claimant's period out of service to have started sixty days after his actual dismissal because he had received a sixty-day suspension effective that date as discipline in another matter, which discipline was never appealed.

It is the Organization's position that the Carrier had no right either to consider the sixty-day suspension or to apply a percentage factor in computing the amount of compensation lost by Claimant because Carrier did not indicate during discussion of the case prior to the Board Award that it would make the computation in that manner. The Organization's submission states:

> The crux of this case revolves around the failure of the carrier to make an issue of the type of settlement and the fact that they are barred from doing so after the case has been put to rest by the Board."

Further, the Organization states that it "cannot perceive of any right the Carrier may have to alter any award rendered by Special Board of Adjustment No. 235."

The Organization neither states nor offers any evidence that the application of a percentage factor is irrelevant or unfair in computing compensation lost by Claimant in this case, it limits argument to the procedural grounds.

Finally, the Organization objects to the Carrier's basing its computations on the two junior employes; according to the Organization, an equitable method would have been to use the immediate junior and senior man on the roster, and the method should have been discussed between the Division Manager and the Local Chairman, not unilaterally decided by the Carrier.

There is no merit to the Organization's contention that Carrier is barred from consideration of the sixty-day suspension or the earnings percentage factor in computing compensation for time lost due the Claimant, because these methods of computation were not discussed on the property or raised before the Board. It has never been the custom in claims for reinstatement with compensation for time lost submitted to the Board, for the parties to raise or argue the question of computation of time lost. Rather, the parties have limited their arguments to the merits of the case and the Board has always fashioned its award as it did in this case - simply ordering the reinstatement of the dismissed employe with compensation for time lost and leaving it to the parties to work out the method of computation. In issuing such awards, it is the Board's intention to place the dismissed employe as nearly as possible in the position he would have been in had he not been dismissed. It has always been clear to all

parties that the amount of compensation lost by a dismissed employe cannot be determined with exactitude, but must be approximated. The approximation must be made fairly and reasonably, using data and factors which are applicable to particular cases. There is no one correct computation formula for complying with awards simply ordering reinstatement with compensation for time lost; what is required in every case is "a" formula, perhaps only one of several possibilities, designed fairly to carry out the intent of the order.

The parties here have been nearly totally successful in the past in working out such formulas, and such formulas have several times included the application of an earnings percentage factor; it is therefore difficult for the Board to understand why the Organization has taken the blanket position which it has in this request for interpretation. If the Organization disagrees with elements of the formula adopted by the Carrier, e.g., the employes or time periods used for comparison purposes, its recourse should be to propose its own formula and attempt to work out its differences with the Carrier. If no resolution can be reached and the parties wish at that time to submit their respective formulas with supporting data and arguments to the Board, we can then attempt a definitive interpretation.

H. Raymond Cluster
Neutral Member and Chairman

CHICAGO, ILLINOIS
OCTOBER 22, 1980

A