

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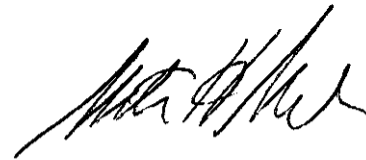
An employee required to attend a discipline investigation will be given not less than ten (10) days' advance notice, in writing, of the date of the investigation which shall set forth the precise charge against the employee with a copy to the duly authorized representative. . . .

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

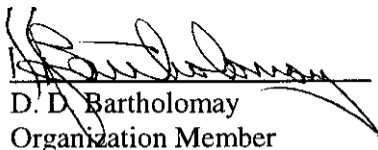
Carrier did not send a copy of the investigation notice to Mr. Beard. Instead, Carrier sent copies of the notice to Perry Geller and Jedd Dodd, General Chairman of the Consolidated and Pennsylvania Federations. Plainly, Carrier did not comply with Rule 30 when it failed to send notice to Claimant's duly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

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Interpretation No. 1

In an Award issued by the Chair on December 16, 2003, but executed by the other members of the Board in January 2004, we sustained the claim as follows:

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.

The Organization has returned to the Board seeking an Interpretation of the Award that Claimant is entitled to compensation for time held out of service from May 7, 2002, through his return to service on October 5, 2004. For the reasons developed below, we reject the Organization's request but find that Claimant is entitled to compensation for 40 hours at the straight time rate.

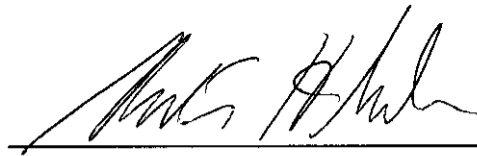
Claimant was dismissed following an investigation that resulted from his providing a urine specimen that tested positive for cocaine on May 7, 2002. In Award No. 126, we found that Carrier violated Rule 30 of the Agreement by failing to provide Claimant's duly authorized representative notice of the investigation, a procedural error that we found prejudiced Claimant's right to a fair investigation. We sustained the claim but conditioned Claimant's reinstatement and entitlement to compensation for time out of service on his completion of the DARS program because, in light of his record of substance abuse, Claimant would not be qualified to return to service unless and until he completed the DARS program.

The Organization argues that Claimant is now entitled to compensation dating back to May 7, 2002, the date he was initially withheld from service, because he completed the DARS program on September 14, 2004, thereby satisfying the condition specified in our Award. The Organization's argument misconstrues our Award. Claimant did not become eligible for reinstatement or compensation until he completed the DARS program. Completion of the DARS program did not entitle him to compensation for the period he was not qualified to work.

Any entitlement to compensation for time out of service thus turns on whether Carrier was responsible for the delay in Claimant's return to service. Claimant completed the DARS program on September 14, 2004, was released by Carrier's Medical Department on September 15, 2004, received a return-to-work physical on September 30, 2004, and returned to service on October 5, 2004. The overwhelming bulk of

the delay in Claimant's return to service between the execution of our Award and October 5, 2004, was due to the length of time it took Claimant to complete the DARS program. This was due to Claimant's lack of a telephone during much of this period which impeded his counselor's ability to contact him and to Claimant's failure to comply with various aspects of the program. Claimant's lack of a telephone was due to his severe financial problems and his failure to comply with various aspects of the program was due to his being on the road working as a truck driver. We certainly are sympathetic to the situation in which Claimant found himself, but the difficulties he encountered do not provide a basis for attributing the delay to Carrier.

On the other hand, there is no explanation in the record as to why Claimant was not given a return-to-work physical until September 30, 2004. Under the circumstances, we find that a small part of the delay may be attributable to Carrier and therefore award Claimant compensation of one week's pay, i.e. 40 hours at his straight time rate.



M. H. Malin
Chairman and Neutral Member

Issued at Chicago, Illinois on May 11, 2006