

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 3850
Docket Number 3836

Referee Carlton R. Sickles

PARTIES Railroad Yardmasters of America
TO
DISPUTE: The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Allow former Yardmaster J. W. Scott one day's pay at current rate of pay for August 20, 1979 and every day thereafter until Mr. Scott has been restored to service with all seniority rights and all other rights under all Local and National Agreements in addition claiming all wages he would have earned through working overtime and/or doubling and holiday losses. Pay Mr. Scott any amount incurred for medical or surgical expenses for himself or dependents to the extent that such payments would have been paid by Travelers Insurance Company under the Applicable Group Policy. In the event of the death of Mr. Scott pay his estate the amount of Life Insurance provided for under said policy. In addition, pay by reimbursement for any premium payments he may have to make in the purchase of substitute life insurance. Also request that Mr. Scott be promptly restored to duty with vacation and other rights unimpaired and his service record be cleared of all charges and any reference therewith.

OPINION OF BOARD: After an investigation hearing, the claimant was terminated for "possessing goods stolen from interstate shipment".

A procedural issue has been raised by the claimant; namely, the lack of timely written notice of the charges to the Regional Chairman.

The Regional Chairman claims that he did not receive a copy of the charges prior to the hearing date.

The rule in question provides as follows:

"Such employee shall be apprised in writing of the precise charge against him, with copy to the Regional Chairman, and hearing will be held within ten (10) days, if possible."

This same issue of proper notice to a Regional Chairman was recently adjudicated with the same parties involved (see Award 3797 (Sickles)) and unless such award is palpably erroneous on its face or clearly distinguishable from the instant case, we are prepared to support the conclusion therein that the notice is mandatory and will therefore support the claim herein.

This is not a novel question. The many cases involving notice have been reviewed, and we do not find Award 3797 palpably in error.

We interpret the rule to mean that the Regional Chairman should be provided with a written copy of the charges prior to the hearing.

Two questions are specifically raised which may possibly distinguish this case:

(1) Is the verbal notification of the Regional Chairman that a notice of charges is on its way to him an adequate substitute for his actual receipt of the written notice, and

(2) When the Regional Chairman alleges that he did not receive a copy of the notice prior to the hearing date, is the documentary proof of the mailing of a copy of the charges adequate to satisfy the requirement of the rule?

With respect to the first question, "verbal notification", it is clear from the testimony that the Regional Chairman was informed by telephone that the charges were being mailed to him and informed of the date of the hearing. The Regional Chairman was instructed by his superior not to attend such hearing unless he received a written copy of the charges as required by the agreement.

We find, however, that the language of the agreement clearly requires a written notice to the Regional Chairman prior to the date of the hearing, and that verbal notification is not a substitute for a written notice.

With respect to the second question, we find, in conformance with a long line of awards, that the mere mailing or proof of mailing of a notice or other document is not sufficient to establish that it was, in fact, received if the alleged recipient denies having received the document. There is no duty on the part of the alleged recipient to prove that he did not receive it. The burden of proving receipt is on the sender by the use of registered mail or whatever device is appropriate which will evidence the actual receipt. In the instant case, the carrier did not establish that the Regional Chairman received the notice.

It has also been alleged that, in this case, the claimant waived his right of representation at the investigation. In reviewing the evidence, it is not clear that the response of the claimant can be interpreted as a waiver of his rights. More significantly, the comments of the claimant cannot, in any way, be interpreted as waiving the right of the Regional Chairman to receive a timely written notice. In any event, the claimant does not have the right to waive timely notification to the Regional Chairman.

The Carrier has raised the issue of the unavailability of the claimant by virtue of his being in jail starting immediately subsequent to the hearing. However, since the claimant was terminated by the carrier, not because of his unavailability for work but because of the crime for which he had been convicted, it was impossible to put to the test the fact that he was unavailable for work.

This does not preclude, however, the taking into consideration in the awarding of compensation in the instant case the actual time when he would have been physically unavailable for employment because of the imprisonment as well as take into consideration any other income and fringe benefits that the employee has received since he was released from his jail sentence.

For the reasons set out herein, we find for the claimant and allow his claim exclusive of the period that he spent in jail and subject to reduction for any income and fringe benefits earned by the claimant up until the time of his reinstatement by the carrier.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

Form 1

-4-

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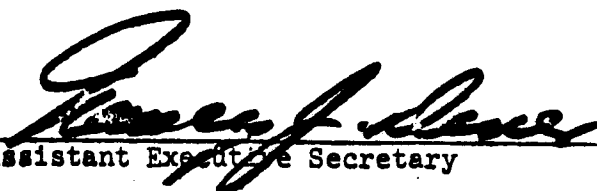
Claim is sustained to the extent set forth in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By:


Assistant Executive Secretary

Dated at Chicago, Illinois, this 13th day of August 1981.