

SPECIAL BOARD OF ADJUSTMENT NO. 910

PARTIES) UNITED TRANSPORTATION UNION (T)
TO)
DISPUTE) CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

"The appeal of Mr. H. M. Jones to return him to service. Mr. Jones was dismissed as a result of an investigation conducted February 20, 1987." (System Docket No. CR-T - 4323-D)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon. Claimant was present for the Board's hearing on the dispute.

Claimant, a yard brakeman, was dismissed from all service by the Carrier on March 4, 1987 following a company hearing into charges that were described by the Carrier to be as follows:

"1. Your violation of Rules 1700(a), 1702(a), 1702(c), 1705(b), 1705(d), 1705(e) of the S7A, Safety Rules Book, resulting in you reporting a personal injury that you claim occurred on February 6, 1987, at approximately 8:30 P.M., when you got off a tank car, while you were assigned job YTRR-32.

2. Your failure to immediately inform your supervisor of the above mentioned injury, whereby, you did not report it until 10:00 A.M. on February 9, 1987.

3. Failing to conduct yourself in the performance of your duties in such a manner as to avoid personal injury which, considering the attached record, establishes that you are an unsafe and unsatisfactory employee."

The Organization contests Carrier's dismissal of Claimant on the grounds that Claimant had not been able to be present to defend himself because he had not received notification of the hearing until February 21, 1987, or the date following the scheduled hearing. It therefore submits Claimant was denied benefit of a fair and impartial hearing in violation of Rule 93, Discipline and Investigation, and which provides in part here pertinent as follows:

"(a) Except as provided in paragraph (c), no trainman

will be discipline, suspended or dismissed from the service until a fair and impartial formal investigation has been conducted by an authorized Corporation officer.

* * * * *

(d) (1) A trainman directed to attend a formal investigation to determine his responsibility, if any, in connection with an act or occurrence will be notified in writing within 10 days from the date of the act or occurrence or in cases involving dishonesty, criminal or moral offenses, or letters of complaint within 10 days from the date the Division Superintendent becomes aware of such act or occurrence. The notice will contain:

(A) The time, date and location where the formal investigation will be held.

(B) The date, approximate time and the location of the act or occurrence.

(C) A description of the act or occurrence which is the subject of the investigation.

(D) A statement that he may be represented by his duly accredited representative of the United Transportation Union.

(E) The identity of witnesses directed by the Corporation to attend.

* * * * *

(e) (1) The investigation on any matter must be scheduled to begin within 10 days from the date the notice of the investigation is mailed to the trainman.

* * * * *

(5) A trainman who may be subject to discipline and his representative will have the right to be present during the entire investigation. . . ."

There is no question that the Carrier has the burden under Rule 93, supra, to provide an employee being charged with an offense with proper and timely notice.

While it is evident that the Carrier had prepared and dispatched written notice to the Claimant on February 11, 1987, it is also evident that such notice was not delivered by the Post Office to Claimant until February 21, 1987. In this regard, the record as developed both at the company hearing and on the property is devoid of information as to why it took such period of time for the letter to be delivered to Claimant. There is nothing to show that the Carrier had contacted the Post Office to find out if the Claimant had sought to avoid service of the notice or why it was

not delivered in a more timely manner. Nor does the transcript show that an attempt was made to contact Claimant about such notice when it became evident that he was not present for the company investigation. In other words, no bona fide attempt was made by Carrier to determine if Claimant was indeed knowledgeable about being cited for investigation.

The charges contained in the Carrier notice, supra, are of a most serious nature. This is particularly evident in view of the extent of discipline which the Carrier would impose for a finding of guilt to such charges. The Carrier was, therefore, obliged to establish for the record that Claimant had been duly notified of the scheduled hearing, or to have otherwise postponed the hearing until it could do so. By proceeding with the hearing in apparent belief that it would be able to subsequently show that its certified (return receipt requested) notification had been delivered to Claimant, the Carrier did so at its own peril. Thus, when it could not show that delivery of the notice had been effected in a timely manner, the hearing became null and void.

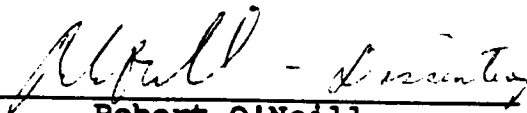
In the circumstances of record, this Board finds merit in the Organization's contention that Carrier violated the spirit and intent of Rule 93. It will be held, therefore, that Claimant be restored to service with seniority and all other benefits unimpaired, as previously set forth in an interim determination which issued immediately following the Board's hearing on the dispute, and, further, that he be compensated for all time lost, less outside earnings and unemployment insurance benefits which may meantime have been received by Claimant during the period he was out of service.

AWARD:

Claim sustained.

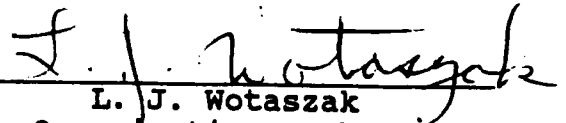


Robert E. Peterson, Chairman
and Neutral Member



Robert O'Neill
Carrier Member

*Claimant
attached*



L. J. Wotaszak
Organization Member

Philadelphia, PA
March 17, 1988

Dissent to Award 240 of Special Board of Adjustment No. 910

The Board majority failed to consider the precedential decisions the Carrier submitted, i.e., PLB 2067, PLB 2570 Third Division Award 13757, Award 15575, Award 13757, and Second Division 8694, that held "It is not Carrier's burden to prove that claimant received the notice but rather its burden is to show it sent the notice," "The employees should be aware that all that is necessary is for the Carrier to place in the United States Mail a certified letter to the last address the employee has listed with the Carrier," "This Board has previously held that a Carrier cannot be held to be an insurer of the receipt of notice" and "The Carrier is not the guarantor that the claimant will receive actual notice." This Award 240 will not be considered a precedent.



Robert O'Neill