SPECIAL BOARD OF ADJUSTMENT NO. 910

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

STATEMENT OF CLAIM:

"Claim of New Jersey Division Trainman N. Moore for all time lost until returned to the service of Conrail, plus Health and Welfare Benefits and Productivity Trust Fund payments, in connection with Notice of Discipline dated November 25, 1987.

Also, it is requested that Trainman Moore be returned to service, with seniority unimpaired, and the discipline assessed against his service record, in connection with this incident, be expunged." (System Docket No. CRT-4868-D; Eastern Region, New Jersey Division; UTU File No. Rule 94)

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 had been off duty due to an on-the-job personal injury from September 21, 1984 through November 20, 1986, or the date on which his claim against the Carrier under the FELA was settled. Six months later, on July 2, 1987, Organization's General Chairman wrote Carrier's Senior Director Labor Relations stating, in part here pertinent, as follows:

"Mr. Moore called my office, this date, and stated that he hasn't worked because of an injury since September, 1984. There was an alleged settlement made in November, 1986 and [he] attempted to mark up. He further alleges that he was sent a letter stating that he must show a negative urine sample from his own doctor and supply same to the Company Doctor. Without copy of this correspondence needless to say, this office is confused as to what the facts are.

Request your office investigate and advise the employment status of Trainman Moore and to furnish this office any correspondence sent to him in regards to this so-called urine specimen that is needed for him to mark up."

Neither Claimant nor the Organization indicated when this alleged attempt to mark up for service had taken place, and Carrier maintains it heard nothing from Claimant following such FELA settlement until receipt of the letter of July 2, 1987. In any event, Carrier says arrangements were thereafter made for Claimant to be given a return to service medical examination. This examination was scheduled for August 6, 1987. For reasons not stated to this Board, the examination did not take place until August 31, 1987. The examination included, in keeping with Carrier medical standards and policies, a drug screen test. Accordingly, Claimant, in presence of a witness, executed a "Urine Screening Notification" form. Essentially, Claimant agreed to provide a urine specimen for drug testing and acknowledged that he understood, among other things, that the following statement was included on the form:

> "A positive test will result in your being removed from service and you will receive a letter from the Medical Director with instructions regarding what you should do to return to duty."

Upon receipt of the test results, Carrier's Medical Director, by letter dated September 8, 1987, notified Claimant that he could not be returned to service as the test had showed positive for benzodiazepine (valium). Claimant was advised that in pursuance of company policy it was necessary he provide a negative urine sample within 45 days or contact an Employee Counselor, who would assist in getting him into an approved program, which would also have the effect of extending the time limit for providing a negative screen. Claimant was also told that failure to comply with such instructions could result in his dismissal from service. Copy of the September 8, 1987 letter was twice sent certified mail, and acknowledged for by the Claimant. The first acknowledgment was dated September 15, 1987; the second was dated September 22, 1987. Both copies of the letter were sent to the same address.

When Carrier determined that there was sufficient reason to question why Claimant had not taken action with respect to the Medical Director's letter of September 8, 1987, it mailed Claimant, on November 12, 1987, a notice of investigation. This notice directed Claimant attend a formal hearing on November 19, 1987 in connection with the following charge:

> "Your alleged failure to comply with the Conrail Drug Testing Policy as you were instructed in the letter dated September 8, 1987 from Medical Director P. F. Marazini in that you did not, within 45 days of that letter provide a negative drug screen."

The company investigation was held on November 19, 1987, or the date scheduled, in absentia; the Claimant failed to appear or to have reportedly requested a postponement.

By letter dated November 25, 1987, Claimant was notified that he was dismissed from all service of the Carrier.

There is no question that the mailing address used by the Medical Director differed from that address set forth on Carrier's notice of investigation. This happenstance does not support, however, a contention that the notice was sent to an improper address. This address, as with the other address, was shown to be an address of record for Claimant. Therefore, the Board finds no merit in the argument that this was a location where Claimant's former spouse lives, and that if anyone signed for the notice of investigation, Claimant was never notified about such letter. The fact remains that the notice was certified as having been received at such address and Claimant had a responsibility for acceptance of mail at such location until he filed a change of address with the Carrier.

The above relative to procedural argument notwithstanding, it is more importantly evident that the notice of investigation was not certified as having been received by Claimant or an agent on his behalf until November 25, 1987. This was some six days after the date of his scheduled hearing, or the date the company held it in absentia.

As set forth in this Board' Findings in Award No. 240, with this referee assisting, Carrier has an obligation to establish for the record that an employee has been duly notified of a hearing. In the instant case, Carrier apparently proceeded with the hearing in the belief that it would be able to subsequently show a certified notice had been delivered to Claimant in a timely manner or that Claimant had avoided service of the notice by the postal services. Carrier did so at its own peril, and since it is not able to show either happenstance, the hearing must be considered null and void. In this connection, and in view of the Carrier dissent to this Board's Award No. 240, attention is directed to the Findings of PLB No. 1347 in its Award No. 3, with Dr. Jacob Seidenberg assisting as the neutral chairman, wherein it was said in part here pertinent:

> "[W]hen the Carrier chooses to rely on certified or registered mail, it then incurs the risk of being put on actual notice as to whether the Notice of Investigation was delivered to the Claimant. . . . .
>
> The Board subscribes to the doctrine enunciated in Award No. 8, Public Law Board No. 863, 'we cannot agree that merely placing the notice in the Post Office, even as registered mail constituted reasonable and proper measures to notify the Claimant.'"

In the circumstances of record, it will be held that Claimant is to be restored to service with seniority and all other benefits

unimpaired, subject to his successfully passing a return to service medical examination. He shall not, however, be entitled to compensation for that period of time he has been out of service. Particular consideration is here given to the fact that nothing of record shows Claimant had offered, or was otherwise prevented from offering, probative evidence of a negative urine sample so as to have thereby placed himself in a position to have meantime been eligible for a return to service. Clearly, Claimant knew or should have known by the facts of record that he had a responsibility to show that he was drug free so as to be able to return to service. He recognized this when he told the General Chairman it was necessary that he show a negative urine sample as concerned an attempt to return to service immediately prior to the instant case; his signature on a company form in the instant case attests to an understanding that a positive test for drugs would be sufficient cause for his being held out of service; he knew further instructions would issue if he tested positive for the presence of drugs; and, it is evident that such follow-up instructions had been delivered Claimant at an address of record when he did indeed test positive for drugs. Therefore, the Board believes it may properly be held that Claimant knew or should have known that he had an obligation to mitigate any loss of compensation being sustained as a result of his personal failure to demonstrate in the first instance, even absent a formal hearing, his full compliance with those instructions he had acknowledged as having been received by certified mail from Carrier's Medical Director.

If, at a return to service medical examination, which examination shall be conducted within 30 calendar days of adoption of this award, Claimant tests positive for drugs, he shall be given full benefit of follow-up conditions not unlike those set forth in the Medical Director's letter of September 8, 1987. Should Claimant fail to report for examination, he shall be given opportunity of a prompt company hearing to determine why he should not be dismissed from service.

AWARD:

Claim disposed of as set forth in the above Findings.

Robert E. Peterson, Chairman
and Neutral Member

Robert O'Neill
Carrier Member

Eugene F. Lyden
Organization Member

Philadelphia, PA
December 15, 1988

Carrier Dissent to Award 298 of Special Board of Adjustment No. 910

The claimant in this case was dismissed from service, after a hearing held in absentia. When claimant was permitted to obtain a return to duty physical following an FELA settlement, claimant gave a urine specimen and signed a statement acknowledging that a positive test will result in the claimant being removed from service and he would receive a letter from the Medical Director regarding instructions as to what he should do to return to duty.

Claimant's drug screen was positive for benzodiazepin and was advised he must provide a negative urine sample within 45 days or accept other options for counselling that were available to him. Claimant did not choose an option and failed to provide a negative drug screen within 45 days.

Within the requirements of the discipline rule, a letter of notification was mailed to claimant, certified mail, return receipt requested, on November 12, 1987, advising him to report for a hearing scheduled for November 19, 1987, for failure to provide, as instructed, a negative drug screen within the required 45 days. The hearing was held in absentia when the claimant failed to appear on November 19, or request a postponement. Evidence placed on the record at the hearing clearly and conclusively proved that the claimant was in violation of the Carrier's drug policy when he did not provide a negative drug screen within 45 days as directed. Discipline of dismissal was assessed.

Rule 93(1) requires "When notification in writing is required, personal delivery or proof of mailing within the specific time limit will be considered proper notification" and Rule 93(e)(1) mandates that "investigation on any matter must be scheduled to begin within ten days from the date the notice of the investigation is mailed to the trainman." The Carrier complied with both rules.

The Board majority declared the discipline null and void by following its own findings in Award 240 and setting forth as further precedent two awards issued in 1973 and 1975, on the Erie-Lackawanna Railroad. These two awards were developed by the neutral through his independent research.

The procedural contention regarding the holding of a hearing in absentia when the claimant failed to appear because he allegedly received the Carrier's notice of hearing after the date of the hearing was never raised on the property at any level of handling by the employees. This contention was raised by the neutral for the first time before the Board and then the Board majority in its award found a reversible technical procedural error based on the contention raised by the neutral.

The Board majority erred in dispensing their own particular brand of "industrial justice" by considering a contention not raised on the property and basing their decision on such contention. It has been a long standing arbitration principle that any contention or evidence which was not introduced during the handling of a dispute on the property is not admissible if it is first presented to the National Railroad Adjustment Board or other equivalent tribunal. This position has been upheld in a great number of awards, of which the following are representative, First Division A-18897, Second Division A-4296, Third Division 5469, 6657, 8324, 8784 and 12178.

In the Board majority's effort to find a reversible procedural error, they refer to their own Award 240 (an award the Carrier dissented to because it was fraught with error), and two other Awards, Erie-Lackawanna Railroad Award 3 of Public Law Board 1347 and Award 8 of Public Law Board No. 863. The latter two awards relate to different rules and facts not applicable to the Conrail rules that are applicable in this case. The procedural issues relate to an E-L discipline rule that required an investigation will be held within seven (7) days from the date the employee receives the notice. In both awards, that Carrier held its investigation in absentia after notices were sent by certified mail but before the notice was received. Thus, in both cases, there was a reversal because the hearing was not held within seven days from the date the employee received the notice.

These two awards have no precedential value in this case as the Conrail-UTU discipline rule requires hearing notification by personal delivery or proof of mailing within the specific time limits and that the hearing must be scheduled to begin within 10 days from the date the notice is mailed.

On the property, the employees argued that the claimant was not living with his wife. He had two addresses and while only one notice to his wife's address was received by her, she did not notify the claimant. On the property, the Carrier had a valid response to these allegations. As the procedural contentions considered by the Board majority were raised by the Board for the first time, the Carrier was unable to rebut at the hearing. Further, notwithstanding the fact that the agreement establishing the Board provides, "The Chairman shall have authority to request the production of such additional data, either oral or written, as he may desire from either party, to be submitted, if possible, within fifteen (15) days from receipt of request," the Chairman did not request the Carrier to provide information required in the decision making process for this case.

Subsequent to the Board hearing, the Carrier developed that the certified letter was mailed on November 12, 1987, the post office's 1st attempt for delivery was November 14, the second

delivery attempt was on November 19, and the claimant himself picked up the letter and signed the notice card on November 25th. The claimant never explained his delay in picking up his mail either on or after November 25th. In accordance with the rules in effect, the hearing was properly held in absentia on November 19th.

There are a plethora of Awards on Conrail property and other properties that have held, Carrier's burden is not to prove that claimant received the notice, but its burden is to show that it sent the notice and the use of certified mail is a means of proof that a communication was sent, not that it was received. (U.T.U. vs. Conrail, PLB-2067, Award 62, PLB 2595, Award 4 and Award 392.) These awards were issued by Neutral Arthur T. Van Wart, who was also the Chairman of Arbitration Board No. 385 that promulgated the U.T.U. discipline rule that this Board majority is incorrectly interpreting in order to buttress their views regarding due process when hearings are held in absentia.

In Public Law Board No. 2947, Award No. 3, UTU(T) vs. Conrail, Neutral David Brown held, "In argument before this Board the organization continues to challenge the sufficiency of the notice. This challenge is without merit. The written notice was properly posted, and an employee cannot escape responsibility by simply failing to accept mail."

When N.J. Transit Commuter Operations were spun off from Conrail, the Conrail rules for the most part were carried over. Neutral Fred Blackwell issued three awards which deal with the issue of proof of mailing vs. actual receipt of the notice in discipline cases. His decisions are quite clear and not open to ambiguity. In these awards, he held:

> T.W.U. vs. N.J. Transit SBA-964 - Award 2
> Fred Blackwell
>
> "The essential and paramount consideration here is that the use of Certified Mail establishes a presumption that the item certified was the subject of attempted delivery to the addressee at this regular mailing address, in accord with the Post Office Department's procedures for handling such mail. Only by means of clear, convincing evidence (which is absent from the record in this case) can this presumption be rebutted. Thus, in the case at hand, the Carrier's sending the Notice of Charges and of Hearing on the charges to the claimant by Certified Mail constitutes effective notice to him of the investigative hearing of May 2,

1985, and the claimant's contention that he did not receive the notice does not rebut the fact of notice. Accordingly, no due process or other procedural irregularity exists in respect to the investigative hearing record of May 2, 1985."

U.T.U. vs. N.J. Transit SBA-952 - A-27,
Fred Blackwell

"The record reflects that the Carrier sent Notice of Investigation of January 22, 1985 hearing to the claimant by U.S. Certified Mail on January 14, 1985. The Carrier's action in this regard constituted a reasonable effort to effect actual delivery of the hearing notice to the claimant and additionally constituted constructive notice to the claimant of the hearing notwithstanding that actual delivery of the notice was not achieved before the hearing."

U.T.U. vs. N.J. Transit SBA-952 Award 50
F. Blackwell

"...the Carrier sent the claimant a May 26, 1987 certified letter notifying him of charges and a formal hearing thereon scheduled for Wednesday, June 3, 1987. The green receipt card on the certified mailing was returned to the Carrier signed "Candace Wranity"[1]

1 The Carrier's manner of using certified mail for sending notice of charges and hearing to the Claimant was sufficient under prior authorities to establish that Claimant was given the required Agreement notice of such charges and hearing."

Another dispute on this issue involved the former New York, New Haven and Hartford Railroad. This issue was discussed in Third Division Award 15007. The following comments of Referee Benjamin H. Wolfe hit home as the facts are strikingly similar to those in the instant dispute. This award has precedential value while the former Erie-Lackawanna awards cited by the Board majority have none.

Third Division A-15007 - T.C.E.U. vs. NY, NH & H. RR
Benjamin H. Wolfe

"We have previously held that Carrier cannot be held to be an insurer of the receipt of notice (Award 13757), and that the employee has the responsibility not to avoid service of the notice (Award 13757). While the evidence is not conclusive that claimant herein sought to avoid service of the notice, there is enough to have placed the burden on him to explain his default in appearing... When he did call for it, conveniently one half hour before the scheduled time, he made no attempt to cure his default or to explain his failure. It is not enough to say Carrier should have postponed the hearing. Claimant was obliged to act promptly and diligently on his own behalf. He may not frustrate the service of a notice by absenting himself from his proper address or bv delaying to respond to the Post Office notice, without offering a reasonable explanation. His failure to receive the notice was not the fault of the Carrier but his own."

Two other awards of the Third Division, A-24129 and A-13685, also refer to constructive notice and delivery. In essence, they held that the Carrier sent the notice to the last known address which is proper constructive notice and the registered mailing of the notice can properly be held as constructive delivery.

The Board majority, in following their own particular line of reasoning, decided this case on a myopic consideration of due process, a consideration not called for, resulting in an interpretation that is injurious to arbitrarial review of specific contract language and rendering an interpretation that runs counter to the findings of a large number of eminent arbitrators. The contentions of the Board majority are not of sufficient weight to defeat the claim.

I dissent to this award. It will not be a precedent.

Robert O'Neill