AWARD NO. 445
CASE NO. 445

SPECIAL BOARD OF ADJUSTMENT NO. 910

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

STATEMENT OF CLAIM:

"Appeal of the discipline of dismissal assessed Trainman H. L. Boyd as a result of an investigation, held in absentia, on December 14, 1988, on the charge he failed to comply with Conrail Drug Testing Policy in that he refused to submit a urine sample during physical examination at M.Y. Ahmed, M.D., Medical facility, Toledo, Ohio, on November 29, 1988; plus claim for all lost earnings, if any, and that his record be cleared of all references to this charge." (System Docket: CRT-5793-D; Western Region (Toledo Division)

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.

The dispute here at issue, which arises from the Claimant having admittedly refused to provide a urine sample for a drug screening test during a physical examination on November 29, 1988, involves a determination as to whether discipline administered following such action, i.e., the Claimant's dismissal from all service, be set aside on argument that the Claimant had been denied timely notice of a company hearing into such matter, and, secondly, that the Claimant was not subject to a drug screening test at the time of this particular physical examination.

The Claimant was recalled from furlough by letter dated July 5, 1988, and was provided a return to service physical examination on August 9, 1988. At that time, the Carrier's Medical Department determined the Claimant to be disqualified for a return to active duty on the basis that: (1) He had a non-occupational disability and, (2) A urinanalysis test had revealed the presence of a prohibited drug (cannabinoids) in his system.

In this connection, the Claimant was advised by letter on August 15, 1988 that since he had tested positive for a prohibited drug that he would be required, pursuant to the Carrier's Drug Testing Policy, to provide a negative urine sample within 45 days from such date of notification.

The Claimant provided a urine sample within the prescribed time period, i.e., on September 29, 1988, which sample tested negative for abusive or illegal drugs. Despite such finding, the Claimant was not permitted to return to work. The Carrier says that this was because of the continuing nature of that off-duty disability which had also disqualified the Claimant in the first instance from returning to active service.

The Organization submits that regardless of the Carrier's medical determinations that the Claimant was not eligible for a return to service following the September 29, 1988 examination because his standing on the seniority roster, theoretically, placed him in a furlough status account a reduction in the work force which taken place some nine days earlier on September 20, 1988.

The above circumstances notwithstanding, on October 17, 1988, the Carrier's Medical Director wrote the Claimant that since review of his record "shows that your condition may have improved sufficiently by now, to consider return to work in the near future," that he should take certain described action to present himself for a return to duty physical examination.

On November 15, 1988, the Carrier's Medical Director again wrote the Claimant. The Medical Director made reference to his prior letter of October 17, 1988, and informed the Claimant that he was to now take the previously stated action relative to presenting himself for a return to duty physical examination "within 10 days; otherwise, it will be necessary for us to take disciplinary action."

The Claimant thereafter presented himself for physical examination on November 29, 1988. He was determined physically able to return to service. However, a notation or exception was made on the medical form that the Claimant had "refused urine drug screen stating that he had one 9/29/88."

On December 9, 1988 the Carrier sent a Notice of Investigation (Form G-250) to the Claimant. It charged him with a failure to comply with the Conrail Drug Testing Policy on November 29, 1988, and set a hearing on the charge for 10:00 AM, December 14, 1988.

The company investigation was held as scheduled, but in absentia, with neither the Claimant nor a representative for the Claimant making an appearance. Thereafter, by letter dated December 19, 1988, the Claimant was notified that he was dismissed from all service of the Carrier.

The Carrier submits, as set forth in the transcript of hearing, that the investigation proceeded only after the building in which the hearing was conducted had been "searched" and the Claimant had "not been found." Further, the Carrier submits that at such hearing its Road Foreman testified that at about 10:00 A.M. on that date he had "contacted the Point Place, Ohio Post Office,

and was advised that that particular Post Office had attempted to deliver Mr. Boyd's G-250 on December 12, 1988, and at that time, nobody answered the door at his residence, so they left notification for him that a registered letter was on file at the Post Office for him to pick up" and that "as of 10:00 AM, Mr. Boyd had not yet picked up his letter."

The transcript also reveals that the Road Foreman had telephoned the Medical Department to verify that the address on the notice of investigation was the same as that used to notify the Claimant to report for the past physical examinations.

The record further shows that prior to the close of the hearing that the hearing officer had directed there be a short recess so the Road Foreman could "make arrangements to have the premises searched to see if it's possible to discern Mr. Boyd's whereabouts." Asked by the hearing officer if he had been "successful in trying to establish Mr. Boyd's whereabouts," the Road Foreman said: "I was unable to find Mr. Boyd in the depot."

In Award No. 298, as in Award No. 240, of this Special Board of Adjustment No. 910, with this referee assisting, it was held that the Carrier has an obligation to establish for the record that an employee cited for a company investigation has been duly notified of that intended hearing.

These awards recognized that a hearing in absentia could properly proceed without the first-hand benefit of probative evidence to substantiate that the certified notice of the hearing had in fact been acknowledged by the employee or that the notice was being returned as not claimed or undeliverable by the Post Office. The Board cautioned the Carrier recognize, however, that it proceeded at its own peril with a hearing under such circumstances should it not be able to produce evidence to support the timely delivery or handling of the hearing notice by the Post Office.

In the case before us it is evident that these basic conditions of notification were not properly satisfied at the time the Carrier proceeded with its hearing against the Claimant. Actually, testimony of the Road Foreman, supra, reveals that the Carrier was aware that its notice of hearing to the Claimant was still in the custody of the Post Office at the very minute the hearing was scheduled to and did in fact commence, i.e., 10:00 AM on December 14, 1988.

Moreover, the record shows that the Post Office did not effect delivery of the hearing notice to the Claimant until December 16, 1988, or two days after the scheduled hearing. This is, according to Carrier correspondence of record, the date the Claimant was said to have signed a return receipt postal card in acceptance of delivery of the Carrier's notice. This same correspondence indicates that the Claimant had reportedly not picked up the notice until December 16, 1988 due to his having been out of

town for several days.

Accordingly, this Board believes that December 16, 1988 became the date that the Carrier had affected "personal delivery or proof of mailing within the specific time limits" of a notice of investigation to the Claimant pursuant to Rule 93(1) of the Schedule Agreement.

In the opinion of this Board, the requirements of written notice go beyond the placement of a notice in the mail with no regard to either the actual or constructive delivery of that notice to the affected employee. We would think that where use is made of the mail services for certified delivery of a hearing notice that it is intended sufficient time will be provided for delivery to be accomplished or the notice to be returned as unclaimed.

Clearly, the notice requirements of Rule 93(1), or the principles of due process, are not satisfied by testimony to the effect that a notice of hearing was sent to the same address of the affected employee as had prior correspondence by the Medical Department. Nor are these notice requirements appropriately satisfied by declarations that on the day of the investigation that a search was made of the building or the depot for the employee who is being charged, especially when it is known at such time that the notice of investigation has not even been effectively delivered. The time consumed in such endeavors would have been better spent in telephoning or writing the Claimant and a representative of the Organization to set a date for an adjourned hearing.

Under the circumstances, this Board finds that the Carrier hearing conducted on December 14, 1988 must be declared null and void since the Claimant was wrongfully denied benefit of a timely opportunity to appear at such investigative hearing. The Board will therefore direct that the Claimant be restored to active service with seniority and other benefits unimpaired, with pay for time lost, if any, or, if not subject to active service on the basis of a continued reduction in the work force, that his name be returned to the seniority roster as subject to recall from furlough.

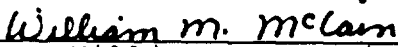
Lastly, the Board notes for the record that it does not believe that the Claimant had the right to, as he suggested, "take all of the physical or refuse any part of it" because he "mainly had the physical to see if he could return to work if he was ever called back from furlough." The Claimant should recognize that since he is an employee who is subject to the Carrier's established and recognized Drug Test Policy that when he presents himself for a physical examination, as on November 29, 1988, he is subject to a drug test screen. Moreover, and most importantly, the Claimant should be mindful that the proper course of action in questioning orders or special instructions is to follow such directives and then handle any perceived contractual infraction under the peaceful and orderly grievance appeals procedures so as not to be

placed in the position of having to defend against charges of insubordination.

AWARD:

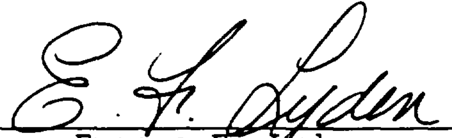
Claim sustained to the extent set forth in the above Findings.

Robert E. Peterson, Chairman
and Neutral Member



William M. McCain
Carrier Member

Dissent Attached



Eugene F. Lyden
Organization Member

CONCURRING OPINION ATTACHED

Philadelphia, PA
~~October 11, 1990~~
Adopted October 23, 1990

CONCURRING OPINION
of the
Organization Member of
Special Board of Adjustment No. 910
with
AWARD NO. 445

This Award was issued after full, fair and fact-finding hearings, including an Executive Session held at the Carrier Board Member's request.

This Award is consistent with the purpose and intent of the governing rule which is clearly designed to protect the employees involved in circumstances which may result in discipline or discharge.

This Award is consistent with prior Awards of this Board (Awards 240 & 290); yet the Carrier continues to defy these decisions which interpreted the governing rule under the circumstances involved in the case at bar.

What the Carrier hopes to achieve it to merely go through the motions of sending out a notice of hearing; without regard to whether or not the employee ever receives same; and, then proceed to impose the industrial death penalty (discharge) without the employee having the benefit of facing his accuser.

This appears to be borne out in the Carrier Board Member's dissent when he states: "the record of the case shows that the act of insubordination occurred on November 29, 1988...". Converesely, the record could only show that an "**alleged**" act of insubordination might have occurred on November 19th.

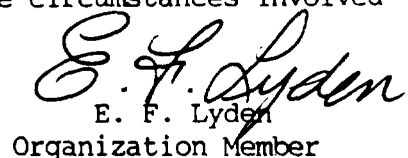
The Carrier's conduct in the case at bar demonstrates it's position that it affords little regard to offer the claimant employee in the instant case any degree of due process which clearly was intended by the provisions of Rule 93.

This Award properly interprets Rule 93, consistent with prior Awards, and affords employees of Conrail the right to receive a notice of alleged charges against said employee as the first step in the required "due process"; the basic reason for the rule to be a part of the system collective agreement.

This Award does not misconstrue the Rule, nor does it rewrite the Rule. This Award simply provides employees of the Carrier a right to receive a notice of alleged charges against them so they may be present to defend themselves in accordance with the purpose and intent of Rule 93.

Here, as in an alarming number of Awards of this Board which sustain the Employees, the Carrier dissents to such awards because the final decision does not agree with the Carrier's interpretation of a given rule under the particular circumstances involved in a given case. Ego appears to be the underlying problem the Carrier Board Member seems to have with many cases when the Board majority does not agree with his interpretation. This Board seems to be experiencing frequent and consistent Carrier dissents in disputes arising under Rule 9 and Rule 93 and, perhaps they believe repetition of dissents will somehow legitimize their erroneous interpretations.

I concur with this Award because it was adopted after full, fair and fact-finding hearings, as well as solidly based on the circumstances involved and the purpose and intent of governing Rule 93.



E. F. Lyden
Organization Member

Carrier Member's Dissent to
Award No. 445 of
Special Board of Adjustment No. 910

This employee is being returned to service on the basis of a finding by a majority of the Board that Rule 93(1) was violated. The Rule provides:

> "(1) When notification in writing is required, personal delivery or proof of mailing within the specific time limit will be considered proper notification."

The "specific time limit" set forth in the Rule is defined in Rule 93(d)(1) and (e)(1) which provides in pertinent part:

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

The record of the case shows that the act of insubordination occurred on November 29, 1988, that a Notice of Investigation was mailed on December 9, 1988 scheduling an investigation for December 14, 1988, and that the Post Office attempted delivery unsuccessfully on December 12, 1988 and finally effected delivery on December 16, 1988. Based on these facts, the Board majority concludes:

> "Accordingly this Board believes that December 16, 1988 became the date that the Carrier had affected (sic) 'personal delivery or proof of mailing within the specific time limits' of a notice of investigation to the Claimant pursuant to Rule 93(1) of the Schedule Agreement."

It is difficult to discern whether this Award misconstrues the Rule or rewrites it; in either event the conclusion is unfounded. Rule 93(1) affords the Carrier two means to effect "proper notification", i.e. either "personal delivery" or "proof of mailing." In this instance the Carrier chose to use delivery by the Postal Service via certified mail; accordingly, the "personal delivery" option has no relevance here. In using the fact that the notification was received after the investigation had concluded as the pretext for voiding the discipline, the Board has rewritten the Rule by substituting proof of receipt for "proof of mailing."

This Award creates a situation in which employees who have committed serious infractions, and who may represent a considerable danger to their fellow employees and the public as a result, may escape the consequences of those infractions through willful evasion of the serving of a Notice of Investigation. The Board majority suggests that this intolerable result may be avoided:

> "...We would think that where use is made of the mail services for certified delivery of a hearing notice that it is intended sufficient time will be provided for delivery to be accomplished or the notice to be returned as unclaimed."

The Board should realize that this is not an option available to the Carrier. The 10 day time frame imposed by Rule 93(e)(1) quoted above precludes scheduling the investigation to ensure prior delivery or a return of the certified mail receipt. That is the reason Rule 93(1) requires "proof of mailing" rather than proof of receipt.

This Award cites as authority for its determination Award Nos. 240 and 298 of the Board. The same Neutral authored all three Awards. Repetition of an error does not legitimize it. I dissent.

William M. McCain

William M. McCain
Carrier Member

SPECIAL BOARD OF ADJUSTMENT NO. 910

The Carrier dissent completely fails to comprehend the principles and basis of the award. It disregards the controlling facts of record in a specious attempt to have Rule 93 be interpreted that the mere placement in the mail of a notice to an employee to report for a disciplinary hearing on a Carrier-scheduled hearing date constitutes appropriate notice regardless of the delivery of such notice to the employee.

The Carrier dissent seeks to direct attention away from the fact, as related in the award, that the Carrier hearing officer was fully aware that the notice to the employee was sitting in a local post office at the time he proceeded to conduct the hearing.

Certainly, if Rule 93 intended that "personal delivery or proof of mailing" requires nothing more than the dropping of a hearing notice into the mail then it is difficult to comprehend why the Carrier would assume the additional expenses of: 1) the higher cost of certified return receipt postal delivery of the hearing notice as opposed to the lower cost of certified mail or the minimal cost of first class mail; 2) the cost of telephoning the post office to ascertain the status of delivery of its notice on the date of the hearing; and, 3) the manpower expense and time to twice search the hearing site to determine whether the Claimant was in the building.

The dissent also alleges that "this Award creates a situation in which employees who have committed serious infractions, and who may represent a considerable danger to their fellow employees and the public as a result, may escape the consequences of those infractions through willful evasion of the serving of a Notice of Investigation." In this regard, the dissent takes exception to an opinion set forth in the Award that where use is made of the mail services for certified delivery of a hearing notice that it would seem appropriate that sufficient time should be provided for delivery to be accomplished or the notice to be returned as unclaimed. The Carrier dissent alleges that such an option is not available to the Carrier.

In making such an assertion the Carrier Member would ignore comments offered in executive session when such a concern came to the forefront. The undersigned expressed the belief that Rule 93 could not be so narrowly interpreted as to prevent the Carrier from rescheduling a hearing date when it had knowledge, such as here, that certified return receipt delivery procedures had not been completed by the postal authorities. The author of the dissent also fails to give attention to the expressed opinion that an alternative manner of handling such a concern would be to open and then recess the company hearing to a date certain to permit

the completion of the prescribed certified delivery procedures and thereby give the employee opportunity to attend the company hearing when it was reconvened.

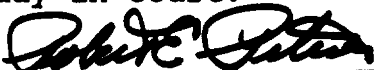
The last principal point of the dissent challenges the authority of the award. The author of the dissent says the award cites as authority only Award Nos. 240 and 298 of this SBA No. 910, which this same neutral authored, and then declares that "repetition of an error does not legitimize it."

Obviously, the dissenter has not carefully read the past awards of SBA No. 910 and the awards of other boards of adjustment, or if so, is deliberately endeavoring to mislead those persons who may only read the dissent.

One of the referenced awards, for example, Award No. 298, includes citations of awards authored by other neutrals. In this respect, particular attention was directed to Award No. 3 of PLB No. 1347 (Dr. Jacob Seidenberg, neutral) wherein it was stated in part as follows:

> "[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.'"

Further, Award No. 220 of this same SBA 910, with Harold M. Weston as the neutral, essentially expressed concern that the Carrier had proceeded with a hearing in the absence of the cited employee when it was evident that the employee had not received notice of the hearing until the day after the date set for the company hearing. Although mitigating circumstances in that particular dispute were held to sanction a measure of discipline, it was nevertheless stated that the extreme penalty of dismissal could not be validly upheld since the Carrier had not established at a duly held hearing that the claimant had not complied with the conditions of the rules violation for which he was charged. Award No. 220 thus concluded: "Our Board will go along with hearings held in absentia, even in dismissal cases, where the record shows that reasonable efforts were made to protect the employee's right to a day in court."



Robert E. Peterson, Chairman
and Neutral Member

November 2, 1990