

**PUBLIC LAW BOARD NO. 4901**

AWARD NO. 213

CASE NO. 213

PARTIES TO  
THE DISPUTE: United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company  
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained.

STATEMENT OF CLAIM:

“Request in behalf of Valley Division Yardman B. G. Carney that the alleged possible violations of Rules 1.6, 1.3.3, 1.13, of the General Code of Operating Rules, in effect April 2, 2000 and Northern California Division Superintendent’s Notice No. 8, Item 18, Attendance Violation in effect March 21, 2001, be removed from the Claimant’s personal record and that Claimant be reinstated to the service of the BNSF Railway Company with seniority and all other rights unimpaired and with pay for all time lost including the payment of Health and Welfare Benefits beginning September 18, 2001 and continuing until he is returned to service.”

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

This case confronted the Board with the dismissal of Claimant for failure to comply with the Carrier’s Availability Policy for attendance for the months of March through May of 2001. At the time of his dismissal, Claimant had less than three years of service with the Carrier. His prior record reveals a reprimand and two record suspensions for violations of the policy in the previous twelve months.

The Availability Policy prescribes a schedule of progressive discipline to correct attendance infractions. Claimant’s prior discipline is substantially in compliance with that schedule. Therefore, if the instant dispute were to prove a further infraction, the policy would provide for dismissal from all service.

Neither the Claimant nor a representative of the Organization attended the investigation held on the morning of August 21, 2001. After waiting approximately 15 minutes, the Carrier proceeded with the hearing in absentia. On September 18<sup>th</sup>, the Carrier issued its decision that dismissed the Claimant. Before addressing the merits of the Carrier’s action, we are presented with a procedural issue as a threshold matter.

During the process of appealing from the letter of dismissal, the Organization and Claimant contended he never received proper notice of the investigation. After careful review of the record,

we must agree; the record fails to establish substantial proof of proper mailing and delivery.

It appears that the Hearing Officer and the Carrier witness failed to pay sufficient attention to detail with regard to the documents purportedly showing proper proof of mailing and delivery. Rather, it appears that the witness confused this dispute with the dispute in Case No. 212, which is also before this Board. The instant case involves the attendance review period of March through May, 2001. Case No. 212 covers the next succeeding review period of April through June. The investigation for this dispute was allegedly postponed until 0900 on August 21, 2001 by letter dated August 9, 2001. The investigation for Case No. 212 was postponed until 1300 that same day by letter dated August 7, 2001.

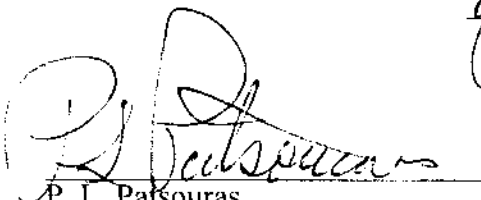
In attempting to prove successful mailing and delivery in this case, the Carrier introduced three sets of UPS documents. The record shows that only one of them applies to this case and, as it turns out, it is not the one needed to supply the proof necessary to establish proper notice of the postponement. The first set (Exhibits 1 and 2) pertains to a mailing on July 16 and delivery on July 17, 2001. However, this Case No. 213 does not contain any relevant document dated or mailed on or about July 16<sup>th</sup>. Case No. 212 does. The original notice of investigation in Case No. 212 was dated July 16, 2001.

The third set (Exhibits 5 and 6) pertains to a mailing on August 7 and delivery on August 8, 2001. However, as previously highlighted by underscoring, the alleged second notice of postponement is not dated until August 9<sup>th</sup> – two days after the mailing and one day after its delivery. In Case No. 212, however, there is a notice of postponement that was dated August 7, 2001. Once again, it appears that this third set of documents applies to the wrong case.

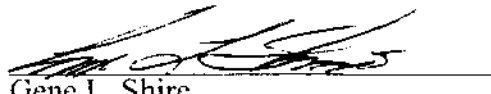
Given the previously described state of the record herein, we have no choice but to conclude that Claimant was not given proper notice of the postponed hearing. It follows, therefore, that he was denied a proper investigation before discipline was assessed. Accordingly, being founded upon an fatally defective investigation procedure, it follows that any discipline arising from the tainted investigation must be set aside in its entirety. Claimant, therefore, must be made whole for any losses resulting from the improper investigation.

AWARD:

The Claim is sustained.

  
P. L. Patsouras,  
Organization Member

  
Gerald E. Wallin, Chairman  
and Neutral Member

  
Gene L. Shire,  
Carrier Member

DATE: 12-29-03