

PARTIES TO DISPUTE:

UNION PACIFIC RAILROAD COMPANY
AND
BROTHERHOOD OF LOCOMOTIVE ENGINEER AND TRAINMEN

STATEMENT OF CLAIM:

"Request the removal of level 2 discipline from the record of engineer G. R. Kendrick with him being made whole, which includes but not limited to lost earnings. All vacation rights, cobra payments and any other penalties associated with this discipline."

FINDINGS:

On July 10, 2003, Engineer Kendrick was counseled for excessive absenteeism. During the counseling session and in follow up letter, he was advised to improve his attendance record – particularly, with regards to weekends. He was, further, advised he must seek permission to layoff for any reason and to apply for leave of absence under provisions of the Family Medical Leave Act (FMLA) if absenteeism were related to family health issues.

On September 17, 2003, Carrier mailed Engineer Kendrick a certified letter advising:

"You are hereby notified to be present in the General Superintendent's Conference Room, 200 Crest Building, Centennial Yard, Fort Worth, TX at 10:00 A.M. September 25, 2003, for a formal investigation and hearing.

The purpose of this investigation is to develop the facts and place responsibility, if any, in connection with your alleged failure and refusal to comply with instructions directing you to minimize absences from work and meet the employment requirements of your assignments issued in letters dated May 14, 2003; June 4, 2003; June 19, 2003; conference on July 10, 2003 and follow up letter dated July 21, 2003, confirming absenteeism assessment. In addition you allegedly continued to fail to follow instructions and protect employment by excessively absenting yourself from service between July 21, 2003 and September 17, 2003, while employed as an engineer with the Union Pacific Railroad.

This investigation will be conducted in accordance with the applicable provisions of the collective bargaining agreement between the company and organization representing your craft or class. You are entitled to representation and witnesses as provided in the agreement.

The proposed discipline for the charges contained herein may result in a level 2 discipline being assessed. Should you desire a conference/waiver you may contact Glenn Neasbitt on (817) 878-4514."

After mutually agreed upon postponement, formal investigation was held on October 9, 2003. After reading transcript of investigation, Carrier found Engineer Kendrick responsible for violating rules, as charged. Upon a finding of responsibility, Engineer Kendrick was assessed Level 2 discipline.

Discipline was timely appealed in accordance with labor agreement. Partisan parties have been unable to resolve this dispute on property, and it comes, now, before this Board for final and binding adjudication.

During formal investigation, Carrier introduced evidence indicating Engineer Kendrick was absent approximately 40% of the time in question – having worked 38 days of the 91 days period.

Organization argued that Engineer Kendrick's due process rights were violated when Carrier failed to issue proper notification of charges. Organization maintained that – Carrier's mailing of notification letter via certified mail, notwithstanding – the letter of notification never reached Engineer Kendrick. For that reason, according to Organization, this dispute should be resolved on the basis of defective procedure, and this Board should not get to its merits.

Carrier argued that Engineer Kendrick's appearance at the investigation was evidence enough he had been properly notified.

Organization contended Engineer Kendrick appeared at the formal investigation after having received a telephone call from his representative; and that he appeared at the formal investigation to avoid possible discipline for failure to follow instructions.

OPINION OF THE BOARD:

We have read and carefully considered positions staked out by both sides. This Board is quite familiar with procedural rules established within this industry and practiced on this property; and we find some credence in Organization's argument that Engineer Kendrick's due process rights were violated when Carrier failed to properly notify.

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As we read the transcript, we noted that the formal investigation was recessed on two occasions in order to verify that letter of notification had been mailed, and that it had either been delivered or there had been an attempt to deliver. The onus is on Carrier to introduce such evidence, and no evidence either of delivery or an attempt to deliver was shown. The fact that Engineer Kendrick appeared at the hearing is not – as Carrier suggested – sufficient to satisfy the requirement of proper notification.


An employee charged with an offense is entitled, at a minimum, to know – in advance of the hearing – the nature of charge, date, time and location of alleged offense; and the date, time and location of the formal investigation. This is not a mere technicalities; it is based on the fundamental principle of fair play. Without such knowledge the accused employee can neither perfect a defense nor appear at the formal investigation. Any such proceeding is, per se, fatally defective; and any discipline flowing from such an illicit proceeding is nullified, ab initio.

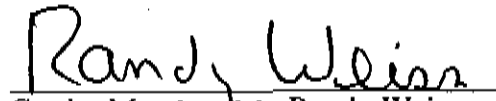
In the case before us, Carrier's notification failed the test of adequacy, and we find in favor of Engineer Kendrick. Since this dispute is resolved on the basis of a fatal procedural defect, we need not address its merits.

AWARD:

Claim is sustained per findings above.


J. E. (Jim) Nash – Arbitrator, Chairman and Neutral Member


4-25-06
Employee Member, Mr. Lee Pruitt
Brotherhood of Locomotive Engineers &
Trainmen


Carrier Member, Mr. Randy Weiss
Union Pacific Railroad Company
April 26, 2006