

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 6672**

Parties to Dispute:	)	
	)	
UNITED TRANSPORTATION UNION	)	<u><b>OPINION AND AWARD</b></u>
and	)	<b>CASE No. 35</b>
	)	
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY	)	<b>Claimant G. E. Bender</b>
	)	
	)	

**STATEMENT OF CLAIM:**

“Claim in behalf of Minot, ND Brakeman G. E. Bender for pay for all time spent attending investigation and complete record clearance account ten (10) day record suspension for alleged violation of GCOR 1.16 (allege miss call) on September 29, 2001.”

**FINDINGS:**

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

Claimant Bender, a 22 ½ year employee at the time of the incidents at issue, had been assigned to the Brakeman’s Extra Board at Minot, ND on September 28, 2001 when he missed a call early for service at 0042 hours on the morning of September 29 for a vacancy on N-MINMINI-29A. Since he was subject to call at the time, investigation was held on October 10, 2001, after which the discipline referenced in Statement of Claim was imposed.

The Organization takes exception to Carrier’s action on two procedural grounds. First, it contends Carrier failed to issue its investigation notice within the time limits set forth in Rule 47 of the Schedule for Trainmen. Specifically, it asserts that Claimant was not notified within five (5) days of first knowledge of the alleged violation. Secondly, the UTU argues that Claimant was deprived of a fair hearing by reason of Carrier’s refusal to allow adequate opportunity to prepare for the disciplinary hearing.

Upon careful review of the record, the Board must reject both contentions. Carrier's Road Foreman of Engines Michael Neva testified that after he had received notice from a crew office of Claimant's missing a call he left a voice mail message for Claimant, who got back to him at approximately 1630 hours on October 1. According to Neva, Claimant explained that he had checked the board around 2:30 the previous afternoon, noticed that he was "five or six times out," concluded he was not going to work, and then helped a friend move and went to bed with a sore back. According to Claimant, he never got the call in question and does not understand why, although he speculated that the phone may have been off in his bedroom. The following morning around 10:00 a.m. he then picked up voice mail dating from Saturday informing him that he had missed a call for work.

Carrier's investigation notice is dated on October 3, 2001, four days after Claimant could not be contacted. The controlling Rule reads in pertinent part as follows:

"Notice of such investigation, stating the known circumstances involved, shall be given to the employee in writing within five (5) calendar days of the date that knowledge of the offense or irregularity has been received by the Superintendent, Trainmaster or Yardmaster in charge and investigation will be held within five (5) calendar days of such notice."

Although sent by certified mail the same day, the Postal Service, for reasons not explained, did not attempt to deliver the notice until October 9, 2001, and was unsuccessful in doing so. It is, however, well established that proof of timely dispatching an investigation notice satisfies the strictures of Rule 47, which stipulates only that notice be in writing and does not condition effective service upon actual receipt. See e.g., Public Law Board 3304, Award No. 237 (O'Brien) (1990). ("These notices were mailed to claimant at his last two addresses on file...accordingly [they] met the requirements of the...Agreement.")

With respect to not allowing the Organization sufficient time to prepare prior to the investigation, notwithstanding several minutes of back and forth on the question of adequate preparedness, this issue was ultimately resolved at hearing by Mr. Allard's statement that, "We're not going to request a recess. We will proceed under protest..." Given that express waiver, and in light of the remarkably simple and undisputed set of facts at issue, the argument that Claimant was not afforded due process is unpersuasive.

GCOR 1.16 reads:


**“Employees subject to call must indicate where they can be reached and must not be absent from their calling place without notifying those required to call them.”**


Since Claimant stood to be called for service and missed a call as a result of turning off or turning down his home phone, he made himself unavailable. That conduct was inconsistent with his obligations. The discipline imposed was for just cause.

**A W A R D**

The Claim is denied.

  
Jay L. Schollmeyer  
Employee Member

  
James E. Conway  
Chairman and Neutral Member

  
Roger A. Boldra  
Carrier Member

Dated: March 30, 2009  
Great Falls, VA