Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8944
Docket No. 8849
2-NRPC-EW-'82

The Second Division consisted of the regular members and in addition Referee Elliott M. Abramson when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(National Railroad Passenger Corporation

Dispute: Claim of Employes:

1. That the National Railroad Passenger Corporation (AMTRAK) violated the current agreement when Electrician Gregory J. Skau was unjustly dismissed from the service on May 30, 1979 and that Electrician Skau was not afforded a fair and impartial hearing.

2. That accordingly, the National Railroad Passenger Corporation (AMTRAK) be ordered to reinstate dismissed Electrician Gregory J. Skau to his service with all rights unimpaired and reimbursed for all wage loss.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The core of the charge in this case was 59 unauthorized long distance phone calls, allegedly made by Claimant, from July 30, 1979 to February 12, 1980, charged to Carrier's engineering office telephone numbers and costing $251.18.

Carrier's Construction Engineer reviews the monthly phone bills for his office. In doing so in February, 1979 he noted calls to Dubuque, Iowa charged to a phone in the engineering office but made from a non-railroad phone. He checked this non-railroad phone and found that it was Claimant's home phone. This Construction Engineer knew that Claimant had no authority to charge calls to the Carrier. The Engineer advised a Railroad Security Agent of this information sometime in March, 1979.

This Security Agent found that some calls to Dubuque, and charged to the engineering office, on the phone bills he reviewed, were placed from phones other than Claimant's home phone. However, this Agent found that the phones from which these calls were placed were in residences in which the Agent determined Claimant had been from time to time. However, none of the individuals living in these residences knew the people to whose telephone numbers such calls had been placed. Regarding other phone calls, charged to the engineering office of Carrier, the

Agent found that they had been placed from the phone system of a hospital during a time period in which Claimant had been a patient in such hospital. Between the date Claimant entered this hospital and the date he was discharged there were 41 such calls to locations such as Chicago, Dubuque, Miami, Blue Island, Downers Grove, New York City and Mineola, New York. (This hospital was located in Evergreen Park, Illinois.)

One such call investigated by the Special Agent was to a Carrier employee. The latter made an affidavit which recited that he had been called by Claimant while the latter had been in the hospital.

The Security Agent asked Claimant about the calls in question and the Claimant then admitted that he had made them and signed a statement which reads: "I am taking full responsibility for the phone calls made from my home phone and from the Little Company of Mary Hospital."

On March 31, 1979 a certified letter was sent to Claimant advising him to appear for an investigation, on April 9, 1979, into alleged violations, by him, of Rules I and W of the National Railroad Passenger Corp. Rules of Conduct, viz; "Employees will not be retained in the service who are ... dishonest," (Rule I) and "The use of ... telephone must be ... confined to Company business..." (Rule W). The certificate for such certified mail was signed by a person with the same last name as Claimant and whose first name is David. At the request of the Organization representative the investigative hearing set for April 9th was postponed until Claimant was fit to return to work. (He was away from work for an extended period from approximately December 15, 1978, due to job related injuries.)

However, Carrier alleges that subsequent to the granting of this postponement Claimant appeared in the Construction Engineer's office to discuss the charges against him, thus indicating, according to Carrier, that he was ambulatory. (It was testified to by this Construction Engineer that the distance between Claimant's home and the Engineer's office is approximately the same as the distance between Claimant's home and the place where the May 24th hearing, to be described below as held in Claimant's absence, took place.)

In view of this development, according to Carrier, another certified letter of charges, rescheduling the investigative hearing for May 4, 1979, was sent to Claimant's address on April 25, 1979. This letter stated that the hearing was being so rescheduled because "you are ambulatory". This letter was signed for on April 27, 1979, again by a person with the same surname as Claimant and whose first name is David. On the rescheduled hearing date the Claimant's Organization representative requested that the Hearing Officer grant an additional postponement of the hearing on the grounds that Claimant was under the order of his physician not to appear at the hearing on that date. The hearing was again postponed with the Hearing Officer giving this Organization representative one week to produce medical evidence of Claimant's inability to appear. However, no such evidence was furnished to the Carrier.

Consequently, on May 15, 1979, a third notice of charges was sent to Claimant's address again rescheduling the investigative hearing -- this time for May 24, 1979. This letter stated:

"... (the hearing was) rescheduled to ... May 4, 1979 but you failed to appear and (the Organization representative) stated that you had advised him that your doctor would not permit you to attend the investigation. (The Organization representative) also stated that he would furnish a written statement to that effect from your physician. This document was to be furnished no later than May 11, 1979. Since no such document has been produced, this investigation will be held as indicated below.

... In the event that you fail to appear for this investigation, it will be held in your absence."

Although this letter was sent by certified mail it was not receipted for by the signature of anyone at the address to which it was sent.

The Construction Engineer testified that he phoned Claimant on May 23rd to check whether Claimant had received the notice of the May 24th hearing. Claimant said he had not received such notice and the Engineer informed him that the hearing was scheduled for the next day at 10:00 A.M. The Engineer testified that he called later in the day to confirm Claimant's understanding of this date and time. At this time, according to the Engineer, Claimant acknowledged that he'd received a previous notice of hearing but asserted that he had to be given seven days notice of a given hearing. The Engineer also testified that in the course of these phone calls Claimant was firm in saying that he would not attend the hearing on May 24th and also indicated that he was ambulatory and that he was in the process of obtaining a third physician's opinion respecting his illness. Claimant did not assert that the reason he would not attend the hearing related to medical causes.

The hearing was held in Claimant's absence and pursuant to its results the Claimant was advised by letter of May 30, 1979, that he was dismissed from service.

The merits of this case seem quite clear. Two witnesses, the Construction Engineer as well as the Special Agent assigned to investigate the suspicious phone calls, each clearly testified that Claimant admitted making the unauthorized phone calls upon which the charges were based. Also, as indicated above, the Special Agent testified that he obtained a written statement, signed by Claimant, stating, as outlined above, "I am taking full responsibility for the phone calls ..." The Organization has made contentions to the effect that what is purportedly Claimant's signature on this document is not really Claimant's signature. This Board is certainly not in a position to assess unsupported assertions respecting handwriting analysis but, in any event, proof of Claimant's making the unauthorized phone calls at the base of the charges hardly needs to rest on this signed statement. In addition to the testimony of the two witnesses that Claimant admitted separately, to each of them, that he made such phone calls there is also strong circumstantial evidence indubitably linking Claimant with the phone calls. For example, recall, as indicated above, the evidence indicating that they were actually made from Claimant's home phone, phones of residences of individuals with whom Claimant was acquainted to parties whom these individuals

do not know, from a hospital at times during which Claimant was a patient there, and that a co-employee to whom one such call was made from this hospital, provided written evidence that the caller, in such case, was Claimant. Thus, even putting aside Claimant's signed confession, the Board would be compelled to find that the evidence is highly probative of the charges made against Claimant.

However, several procedural irregularities in this matter are urged in behalf of Claimant. But Carrier seeks to fend off the Board even considering such objections based on the fact that they were not raised in the handling of the case on the property but, rather, only in the course of the Organization's submission and oral arguments to this Board. To this purpose Carrier points to such, what it considers, representative cases as the following:

Award No. 19928, Third Division:

> "... we must reject Petitioner's argument since the question of the charge was not raised at the hearing or at any time on the property; such omission constitutes a waiver."

Award No. 19916, Third Division:

> "The procedural question ... that Carrier failed to hold timely investigation should have been raised by the Claimant or her representative at the Hearing. Since it was not raised, the question of timeliness of the Hearing was waived..."

Award No. 7604, Second Division:

> "Petitioner claims that the notice of charges was not specific ... since no such objection was raised during the conduct of the hearing, claimant, under well recognized authority, has effectively waived any right he might have to raise such an issue belatedly..."

Award No. 7411, Second Division:

> "Claimant ... urges that the investigation notice was not adequate ... the answer provided by Carrier is that such objections were not timely made in that they were not raised during the investigation. The awards of this Division are clearly of the view that failure to object at the investigation will be considered a waiver of such objections ... Moreover, there is no indication in this record there was any discussion of this notice insufficiency on the property. Under the well established rules here, such an objection cannot be made before the Board for the first time."

As might be expected Organization contends that a just procedural objection, whenever made, ought to be taken into account in determining whether Claimant has been accorded the rights to which he was entitled. We find it unnecessary

to resolve, in this case, this question of whether procedural objections not "timely" made may still be heard by this Board. We reach this conclusion because, as indicated below, the procedural objections even if considered on their merits evince no merit.

The first procedural objection asserted on Claimant's behalf was that the fair and impartial hearing required by Rule 23, of the Agreement was not accorded him because he did not receive proper notice of the May 24th hearing and because, in any event, the hearing held in his absence on that date, should have been again postponed since Claimant could not attend on that day because of medical reasons.

The Organization contends that the notices of the first two hearings were improper because not receipted for by Claimant, himself, and that as to the third notice there is no evidence of any receipt, for it, by anyone. Additionally, as to notice of the third hearing, the Organization asserts that the telephone advice on May 23, by Carrier's Construction Engineer to Claimant, that the hearing was to be held on May 24th does not comply with the rule's requirement of a written notice.

The Board observes that the first two notices were receipted for at Claimant's home by a person with the same last name as Claimant. It defies credibility to entertain the motion that, these notices were not passed along to Claimant. In any event, according to unrebutted testimony of the Carrier's Construction Engineer, Claimant acknowledged, in a phone conversation of May 23rd, with this Engineer, that he had received a notice regarding a previous hearing. There is authority to the effect that Claimant must be presumed to have received the first two notices, in view of their having been receipted for, at his address, by an individual with the same surname as Claimant. Third Division Award No. 20768 is strongly apposite. In that case the Board stated:

> "It is undisputed that the Notice of Investigation was in fact mailed to Claimant on the date and in the manner detailed above, that it was addressed to him at his residence, and that it was in fact received and signed for by his sister who resided with him. The Notice spells out quite clearly the gravamen of the charged violation of the Rules regarding 'being absent from duty without proper authority'. This is a serious charge and merited immediate attention. The contention, therefore, that Claimant's sister did not deliver the letter to him flies in the face of normal behavior. It is inconceivable that upon receipt of a certified mail letter from Claimant's employer, with return receipt requested, that the sister was not impressed with the importance of the letter and that she did not immediately deliver it to her brother."

In any event, Claimant's representative admitted that he received a notice of the May 24th hearing. Additionally, at the hearing this representative was asked, "... have you spoken to (Claimant) relative to the investigation today?" His answer was "No comment". This response must suggest that the representative

had, indeed, spoken to Claimant regarding the notice respecting the May 24th investigative hearing. (It should also be recalled that this notice contained the statement: "In the event that you fail to appear for this investigation, it will be held in your absence.")

On these facts there is little doubt that the purpose of providing Claimant with notice of an investigative hearing was forthrightly served, viz; sufficient notice of the hearing so that a defense to the charges may be prepared. Since Claimant and his representative were clearly afforded this right it would make no sense to condemn the May 24th hearing as not in compliance with Rule 23's fairness standard because of inadequacy of notice.

Authority in this vein is provided by Award No. 11575, Third Division. In this case the certified letter bearing the notice of investigation was not actually delivered until the day following the date on which it advised that the investigative hearing was to be conducted. Nevertheless, the Board observed:

> "... Petitioner asserts that Claimant was denied an opportunity to be present at the investigation and had no opportunity to cross examine witnesses.
>
> ... The evidence is conflicting concerning whether or not Claimant actually sought to avoid service of the notice prior to the investigation. However, his representative received notification in ample time to appear and participate on his behalf, including the examination of Carrier's witnesses."

It may also be observed that it was made clear at the postponment of the May 4th hearing, and in the subsequent letter rescheduling the hearing for May 24th, that if Claimant wished an indefinite postponement of the hearing it would be necessary to present medical evidence proving Claimant was incapable of appearing at a hearing. This action was taken in view of Claimant having demonstrated himself sufficiently ambulatory to appear at the Construction Engineer's office, to discuss the charges against him, during the period when hearings were being postponed because of Claimant's alleged medical incapacity to appear at them. In the event, no such medical evidence was ever presented to the Carrier. In explanation, regarding the lack of such medical evidence, the Organization has contended that the Organization representative could not obtain it because of the physician-patient privilege and that the Carrier did not specifically request it after it was indicated that it would be provided. The lack of merit in these contentions is apparent almost from the mere statement of them. If Claimant wished the hearing postponed, indefinitely, because of his medical incapacity to attend, he could have arranged that his physician provide such documentation to his Organization representative. Saying the Organization representative could not have obtained such documentation from Claimant's physician without Claimant's authorization in no way justifies Claimant's not having arranged for such authorization so that the requisite documentation could have been provided. The Claimant and the Organization representative, who is representing him in the case cannot pretend that there can be no communication between them respecting matters relating to the case. That one cannot justify his failure to act by saying that it presupposed appropriate action by the other.

Thus, failure to produce the requested medical evidence cannot be justified on any such basis as the Organization representative could not get the material relating to Claimant's physical condition, from the latter's physician, without Claimant arranging for a waiver of physician-patient confidentiality but Claimant did not know he should so arrange because the representative never told him the documentation was needed. Also, once the Carrier made known its requirement for medical evidence, in support of a request for indefinite postponement of the hearing, failure to produce such evidence cannot be justified on the ground that it then became Carrier's burden to follow up this request with specific particular requests to Claimant. Once Claimant and his representative knew presentation of such medical evidence was necessary it was their responsibility, to arrange for its presentation. Failing the presentation of such evidence justifying an indefinite postponement of the hearing it was reasonable for the Carrier to reschedule the hearing with an indication that if Claimant failed to appear it would be held in his absence.

The Organization contends nevertheless, that it was improper to go on with the hearing on May 24th in Claimant's absence, and over the protests of the Organization representative, since, on that particular date, Claimant could not attend the hearing because of medical reasons. The Organization presented, along with its June 29th appeal of Claimant's dismissal a note typed on the prescription pad of physicians whose practice is limited to orthopedic surgery. This note, which was not signed by any particular physician, or, for that matter, anyone else stated: "(Claimant) was seen in the cast room 5/24/79." By its own terms the note states nothing about Claimant's condition. Indeed the fact that Claimant was seen in the "cast room" on May 24th suggests he was ambulatory. There is no indication that the time at which he was seen conflicted with the time set for the May 24th hearing. Further, and most importantly, the note contains no suggestion that Claimant's medical condition was in any way inconsistent with his attending a hearing such as, was scheduled for May 24th. This omission is, of course, particularly striking in view of the fact that Claimant obtained this note presumably with the specific purpose of employing it to prove his inability to attend the May 24th hearing. In the light of such purpose the non-committal content of the note seems glaring. It says nothing about the Claimant's physical condition and, in particular, completely fails to establish that Claimant was medically incapaciated from attending the May 24th hearing. Consequently, the Board finds that holding the hearing on May 24th, in Claimant's absence, did not deprive Claimant of a fair hearing.

A final procedural objection raised by the Organization relates to Rule 23(b) of the Agreement. The Organization asserts that since it provides that "No charge shall be made that violates any offense of which the Company has had actual knowledge 30 calendar days or more..." and since the first unauthorized phone calls respecting which Claimant was charged, in this matter, were made in July, 1978, while the first notice of investigation was dated March 31, 1979, the 30 day provision of Rule 23(b) was not complied with.

In support of this posture the Organization points out that the Construction Engineer testified that he reviewed the phone records at the end of every month. Since the first calls charged to the Engineer Department's phone numbers, but made from Claimant's home phone, and other phones available to him, were

made in July 1978 and continued through to February, 1979 Organization contends that the Construction Engineer had knowledge regarding many of the calls for far more than 30 days prior to the date on which charges were preferred.

However, Rule 23(b) speaks in terms of the charge having to be brought within 30 days of "actual knowledge" (emphasis supplied) of the offense being charged. The pages of phone bills on which the unauthorized calls appeared were considerable in number and the unauthorized calls, which is the ground of the offense charged in this case, would have been included in listings containing many, other, authorized calls. Thus, while the calls may have appeared on bills which were reviewed as early as, e.g. August, 1978, this does not mean that the Construction Engineer who testified that he made such reviews, spotted what turned out to be unauthorized calls, as then unauthorized. If he did not so spot them, at that time, he would not have had actual knowledge of their unauthorized nature and, therefore, that the making of them constituted a violation of Carrier rules.

It may be that because the phone bills are so volumimous the reviewing supervisor should not even be considered to have been in a position where he should have had knowledge that unauthorized calls were being made. However, be that as it may, the language of Rule 23(b) speaks clearly in terms of actual knowledge as differentiated, e.g. from "reason for having knowledge". "Actual knowledge" is a decisive term of art in legal terminology and is used to mean what it literally signifies. Thus even if the supervisor was negligent in not realizing before he did, in February 1979, that unauthorized phone calls were being made this does not mean that his failure to bring a charge, in a timely manner after he should have been aware of the unauthorized calls results in Carrier's transgression of Rule 23(b). For it is only within 30 days of knowledge, in fact, that an offense has been committed that Rule 23(b) requires the bringing of a charge.

It should be pointed out that once the Construction Engineer's suspicions were aroused by his spotting of calls, which he couldn't readily account for in his own mind, he moved, expeditiously, to have a Special Agent investigate so as to determine what the circumstances of such calls were. This Agent carried out the expedient investigation which seemed to verify the calls as unauthorized and once this report was rendered to the Construction Engineer he caused charges to be brought within the 30 day period specified by Rule 23(b), i.e. within 30 days from the time an appropriate Carrier official had knowledge that an offense had, in fact, been committed. Consequently, the Board finds that there was no violation of the stated specifications in Rule 23(b) regarding the timeliness with which charges are preferred.

Such a determination is also consistent with what must be considered to be the purpose and spirit of the 30 day specification in Rule 23(b). The objective of such 30 day requirement would seem to relate the necessity of expeditious determination of charges based on facts which are likely to become increasingly hazy and vague in the memories of those who will have to testify to them at an investigative hearing. It represents an effort to insure that what is being testified about it yet, at least, fairly fresh in the minds of the witnesses. It can be seen that such a concern would relate chiefly to situations in which a clear determination of the occurrence, e.g. did A push B before B struck A, or did C employ abusive language containing epithets against D.

While it may be that such freshness of recollection is useful respecting the underlying facts of just about any charge it is apparent that the charge in this case is supported by a very different form of evidence than that of the "he pushed him first" or "he cursed him out" variety. For here there is, in the form of the monthly bills rendered by the phone company, imperishable documentary evidence relating to the allegedly offending acts. They contain permanent notations of calls made from Claimant's phone, but charged to Carrier's phones, to individuals who had no relation to Carrier business. This record does not grow dimmer, hazier or more vague as time passes. Additionally, Claimant himself is highly unlikely, when such documentary evidence is brought to his attention, including the name of the person to whose phone many or, in other cases, several of the allegedly offensive calls were made, to have no recollection of the calls, and of whether and why he may have made them.

Thus, in a case such as this one, even though we have in fact found that the 30 day requirement of Rule 23(b) has been complied with, even were it not, literally, the purpose sought to be served by the 30 day requirement and the spirit of the rights it seeks to accord Claimant would not necessarily have been frustrated.

One further point might be mentioned regarding the 30 day requirement of Rule 23(b) as it infringes upon the facts of this particular matter. In the instant case the alleged offenses, i.e. unauthorized phone calls, were a continuing course of conduct which transpired from July 1978, through February 1979. In specific, Claimant allegedly made considerable numbers of unauthorized calls in January and February of 1979. If analysis of the situation is confined simply to those calls it may be said that the Construction Engineer acted as expeditiously as possible in investigating a suspicious situation and then preferred charges within 30 days of having had his suspicions confirmed by a duly launched internal investigation. From such a perspective there seems no room whatsoever, for it to be argued that the 30 day requirement of Rule 23(b) was violated and with it its underlying purpose or the spirit of the rights it seeks to accord Claimants.

Of course, on this last analysis the amount of unauthorized phone calls allegedly made by Claimant shrinks. But documentation of less dishonesty is not to imply that there's been no dishonesty. And this Board has dealt severely with dishonesty, in any form, in the past, e.g. in Award No. 17463, First Division, Claimant was charged with failure to turn in two ten cent fares he'd collected. The Board sustained his dismissal for such an offense, stating: "One so careless of his obligations even in small matters is an unsafe employee, so his dismissal was not arbitrary." Also, in Third Division Award No. 16168 Claimant was charged with failure to issue a meal check to a guest, on one particular day, while Claimant was a Waiter-in-charge on a diner train, and for failure to remit to the Carrier monies paid to him for a cold turkey sandwich and tea. Claimant was dismissed for these acts and the Board said:

"Dishonesty, in any form, is a matter of serious concern and dishonesty usually and frequently results in dismissal from the service of a Carrier.

... Claimant has been in the service of the Carrier for approximately 12 years. Years of service alone does not give an employee a right ... to commit dishonest acts.

...

The penalty assessed in this case was solely within the discretion of the Carrier and we will not seek to substitute our judgment for that of the Carrier since we do not find or consider it arbitrary or capricious."

In Award No. 13130, Third Division, Claimant was charged with taking and drinking two ½ pints of milk belonging to Carrier, with a retail value of approximately 15¢. In upholding Claimant's dismissal the Board stated: "Unhappily in a charge of this serious kind the worth of the items in question is not the bellwether of the import of the offense. As has been observed ... 'The comparatively small value of the articles involved is not a mitigating circumstance'."

Also in Award No. 8715, Third Division, Claimant's dismissal from service for appropriating, for his own use, two pounds of Carrier owned butter was upheld.

Further, it is clear from previous Board decisions that unauthorized phone calls, in particular, have been considered such a form of dishonesty as warrants dismissal. In Third Division Award No. 23252 the dismissal of an employee who had been making unauthorized phone calls on 5 different dates was upheld by the Board. In Award No. 23251, Third Division this dismissal of an employee who made four unauthorized long distance phone calls and charged them to the Carrier was upheld. Here, the Board said: "The charging of personal telephone calls against the Carrier constituted fraud."

It might be noted that in each of these cases the "personal" nature of the unauthorized calls, although established to the satisfaction of the Board might be considered much less flagrant than in the instant case. This is so because the calls in these cases were made to Organization offices respecting what the employees conceived as Carrier obligations to the employees. Thus, there was arguably, however faintly, some colorable connection between the calls and "Carrier business." No such even tenuous connection existed in the instant case between the allegedly offending calls and Carrier business.

The procedural objections of Organization, even if appropriate for consideration, are without merit. Also, the charges against Claimant have been clearly proved while the discipline assessed in relation to them is appropriate.

A W A R D

Claim denied.

Award No. 8944
Docket No. 8849
2-NRPC-EW-'82

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 3rd day of March, 1982.