

Award No. 4855
Docket No. CL-4788

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA
(TEXAS AND NEW ORLEANS RAILROAD COMPANY)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(a) That the Carrier arbitrarily, capriciously, wholly without cause, and in violation of the Agreement, removed Mrs. Esther Lynch from service May 24, 1949, and

(b) That Mrs. Esther Lynch be restored to service with full seniority rights unimpaired, without impairment of her vacation rights, without prejudice to her reputation and record as an honest, faithful and loyal employe of the Carrier, and with payment for all wage losses sustained on and after May 25, 1949, until reinstated to service.

OPINION OF BOARD: Claimant was dismissed from the service of the Carrier for having assisted Jeffrey Bruning, the Assistant Freight Claim Agent at Houston, Texas, in defrauding the Carrier of \$8,700 by means of processing spurious freight claims and forging the endorsements on drafts issued in payment thereof. Claimant contends that the charge upon which the investigation was held was not in compliance with the disciplinary rules of the Agreement and that the evidence was not sufficient to sustain the Carrier's action in dismissing her from the service.

Claimant was charged as follows:

"You are charged with assisting J. Bruning in a scheme to defraud this Company by opening a joint bank account under the fictitious names of Esther and John Bruen, using your address for that purpose."

It is the contention of Claimant that the foregoing does not constitute a precise charge as required by Rule 25(a), current Agreement. We think it does. The information contained in this charge was adequate to inform Claimant of the act alleged to warrant disciplinary action. It is not required that a charge be in the form of a criminal complaint or that the details of the offense be set forth. It is sufficient if the charge reasonably advises the employe of the act for the doing of which he is to be tried. It is not required that the evidence to be used be set forth or that the information in the possession of the Carrier be revealed. If it advises the employe sufficiently so that

he may have the opportunity to call witnesses and produce evidence on the issues to be tried, the purposes and requirements of the rule have been met.

The Organization contends that the evidence does not sustain the action of the Carrier in dismissing Claimant from the service and demands that she be restored to service with seniority unimpaired and be paid for all time lost.

Claimant is a young woman, thirty-three years of age, who was holding the position of Loss and Damage Investigator in the Freight Claim Agent's Office. She had entered the employ of the Carrier about seven years prior to her dismissal and had been an investigator for six years. She had been efficient in her work and was being paid a salary of \$317.43 per month. She worked in the same office with Jeffrey Bruning who was her superior.

The record shows that between the dates of February 26, 1948, and March 29, 1949, Bruning processed spurious freight claims through the Carrier's freight claim office and executed drafts for their payment. He was authorized to countersign drafts for the payment of valid freight claims. During this period he executed 37 fraudulent drafts in the total sum of \$8,700, which was appropriated to his personal use.

The record shows that early in 1948, Bruning requested Claimant to go to the City National Bank, Houston, and open a joint saving account under the names of John and Esther Bruen and give Claimant's address. On the following day, Claimant went to the bank and made application for a joint savings account under the names of John and Esther Bruen. She signed the application card as Esther Bruen instead of her true name, Esther Lynch. She represented herself to be the wife of John Bruen. She represented John Bruen to be an engineer and that they had only recently become residents of Houston. In opening the account she deposited \$20.00 or \$30.00 in cash which had been given to her by Bruning for that purpose. She delivered the application card and savings account book to Bruning. She says that she never made another deposit in the account nor did she ever make a withdrawal therefrom. She says she had the savings account book in her possession from time to time but never knew that any of the money deposited in the account was stolen from the Carrier. Claimant says that she inquired of Bruning why he desired to use fictitious names in opening the account and his reply was that he had an outside business and he was afraid that the Carrier would find out how much income he had on the outside. She says she knew that Bruning had a restaurant in New Orleans from which he received revenue. With this explanation by Bruning, she agreed to open the account without suspecting that there was anything wrong in connection with it. The evidence does not disclose who prepared the spurious claims and the papers necessary to their processing. Claimant contends that she knew nothing of the fraudulent transactions until it was uncovered and she was called upon for an explanation of her part in it.

That Claimant participated actively in the carrying out of this fraud is admitted by her. That the establishment of a bank account that would bring about a method of cashing the drafts without suspicion was a very important step in the success of the scheme, is self apparent. The defense of this Claimant is that she did not intentionally or knowingly participate in the theft. The primary question to be determined is the intent with which Esther Lynch did the things she admits she did.

The intent with which an act is done is not susceptible to direct proof. Intent is an intangible thing which is usually hidden away in the recesses of the mind when cases such as we have here arise. It becomes necessary, therefore, to establish intent by the conduct, actions, demeanor, character and credibility of the individual involved, together with the reasonableness of the story told in connection with the known circumstances of the case.

The record shows that Esther Lynch was a widow with one daughter. Bruning was a married man with a wife and two children. The evidence shows that they became good friends and associated together throughout the period that the thefts took place. The willingness of Claimant to pose as the wife of Bruning under a fictitious name does not point toward Claimant's innocence.

Her acceptance of the reason given by Bruning for creating a bank account under a false name appears to have been something more than pure gullibility. No reason appears to have been given as to why the account should have been in her name except as a means of concealing Bruning's identity from the bank. Neither is it explained why a fictitious bank account was suddenly required to prevent the Carrier from finding out that Bruning had an outside income. Nothing is shown as to why the Carrier would have any interest at all in this fact unless, of course, it had an interest in the funds. Claimant's possession of the savings account book at various times and the opportunity she had to examine it, does not indicate complete innocence. The joint nature of the account, her right to make withdrawals and her survivorship interest in it, are not attributes of innocence under the circumstances here shown. The relationship of these two parties, the manner in which the scheme was put into operation, the acts contributed by Esther Lynch under the circumstances described, her apparent willingness to falsify the bank records and to pass as the wife of Bruning, when all are considered together, does not leave the writer with the feeling that innocence has been besmirched. Claimant is an experienced woman of mature years. Her very training has been such as would prevent her from believing such a fantastic story as Bruning told her. It would strain the credulity of the writer to the breaking point to say that the evidence establishes the innocence of this Claimant.

We think the evidence is sufficient to sustain the Carrier's dismissal of this employe from the service. The fraud perpetrated resulted in the loss of \$8,700 to this Carrier. Claimant was an accessory to it. The Carrier is not required to retain people in its employ who have not been faithful to their trust. While there are mitigating circumstances favorable to Mrs. Lynch which lessen the moral turpitude involved, we are obliged to say that the Carrier was within its managerial prerogative in dismissing her from the service.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of May, 1950.