

 Award No. 18594
Docket No. TE-18952

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William M. Edgett, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC
NORFOLK AND WESTERN RAILWAY COMPANY
(Lake Region)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Norfolk & Western Railway Company, Lake Region, that:

1. Carrier violated the terms of the Telegraphers' Agreement when on November 20, 1969, it dismissed from its service Claimant J. L. Julian, without just reason or cause; and
2. Carrier shall restore J. L. Julian to its service with all rights unimpaired, and pay for all compensation lost.

OPINION OF BOARD: Mr. J. L. Julian served as agent-operator with Carrier at Fort Jennings, Ohio for approximately twenty years. His service was terminated on November 20, 1969, after a hearing on November 12, 1969 on charges that he had violated operating rules 405 and 427.

Mr. Julian was granted permission by his Chief Dispatcher to be off on October 16th and 17th because of a death in the family. When Mr. Julian completed his payroll record he indicated that he had worked on those two days, when in fact he had not.

Mr. Julian stated during the hearing that he discovered the incorrect entry on Friday, October 31st. He next worked on November 3rd and stated that on that date he tried to telephone the Assistant Manager, Payroll and Material Accounts in Cleveland to advise him of the incorrect entry. Mr. Julian said he did not complete the call because the line was busy. On November 3rd, in the afternoon, he received a notice of hearing, on charges of violating rules 405 and 427, which was delivered to him by the Carrier.

Operating rules 405 and 427 state:

"Rule 405 — Time and wages must not be returned upon the payroll except for work actually performed by the person whose name appears on the roll."

"Rule 427 — Negligence in handling Company business, sleeping on duty, willful neglect of duty, viciousness, dishonesty, insubordination, disloyalty, giving false statements or concealing facts concerning matters under investigation are sufficient cause for dismissal."

It is clear that Mr. Julian did return time for work not actually performed. If any return of time for work not performed made the employee subject to discharge, without regard to the reason for the erroneous return, the matter would end there. However, the rule must be applied on a reasonable basis. Certainly the rule is not intended to provide automatic discharge for an employee who does make an incorrect entry through error.

It is necessary to find that the record contains evidence with probative value which supports the Carrier's finding of a violation of the rules. In a disciplinary case the Carrier has the burden of proving by clear and convincing evidence that the employee committed the violation that he is charged with.

In this case, in order to sustain the Carrier, the record must show that Mr. Julian did more than simply make an error. Mr. Julian was off on the dates in question with the permission of the Chief Dispatcher. He must have known that his superiors were aware of that fact. This is consistent with his explanation of error and is inconsistent with a finding that he violated rule 405 intentionally. Mr. Julian stated that he discovered the erroneous entry on Friday October 31st and attempted to call the payroll section on November 3rd, the next day he worked.

The Carrier offered no evidence on this question, apparently relying solely on the fact that the erroneous entry was made. Thus the record supports only the fact that the entry was not correct. Mr. Julian's testimony, explaining the circumstances of the incorrect entry is uncontroverted.

This leaves the Carrier in the position of proving and relying solely on the fact that the entry was incorrect. This Board finds that in applying rule 405 in this manner the Carrier has abused the discretion vested in it. This finding does not mean that other rules may not be applied and discipline sustained solely on the basis of the fact that an act in contravention of the rule has occurred. What it does mean is that rule 405, with which we are here concerned, requires more than a technical or erroneous violation to support a discharge.

What has been said above with respect to rule 405 applies also to rule 427. The Board finds that the Carrier abused its discretion when it found that Mr. Julian had violated this rule and discharged him.

The claim is sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 violated.

AWARD

Claim sustained: Claimant to be returned to service and paid for all time lost, as provided by Rule 31(d) of the Agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1971.