

The Third Division consisted of the regular members and in addition Referee Stanley E. Kravit when award was rendered.

(Transportation Communications Union
PARTIES TO DISPUTE: (
(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10243) that:

1. Carrier violated the TCU (formerly BRAC) Agreement when, on date of April 29, 1987, it dismissed Mrs. A. E. Oestreich from its services following investigation held on April 23, 1987.

2. Carrier's action violated Rules 23, 24, and 29 of the Agreement in the assessment of such discipline which was harsh, arbitrary and unwarranted due to the facts and circumstances as brought out in the investigation.

3. Carrier shall now be required to reinstate Claimant (Mrs. Oestreich) to service, with pay for all time lost, seniority, vacation, hospitalization, sick leave, personal leave days, and all other rights unimpaired and; interest at the rate of 10% to be in addition to the claim."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

Claimant was employed as a Master Roster No. 3 Clerk attached to the extra board at Madison Yards, Madison, Illinois. On April 2, 1987, she was first to be called out for any Crew Clerk vacancy arising after board making. The Agreement between the parties specifies that the calling time for the third shift is between 9:00 and 11:00 P.M. and Claimant, as a protected employee, must be available for call during those hours.

Claimant has a seniority date of July 17, 1978. The majority of her employment has been as a Crew Clerk marking the various Crew Boards and she has been an extra board employee for a number of years as well. She was therefore well aware of the rule in question.

The record shows that on April 2, 1987, she was first called at 7:30 P.M. as a courtesy and at her own (previous) request. This call has no bearing on the discipline at issue. She was then called at 9:00 P.M., 9:05 P.M. and 9:18 P.M. There was no answer to any of these calls. Having alerted the clerk next to be called out after Claimant did not answer the first 2 calls, Mrs. Brown, the Crew Clerk, filled the vacancy.

On April 3, 1987, Claimant was notified that an investigation would be held on April 9, 1987, to determine,

"your alleged failure to protect the extra board with respect to your not being available for an assignment, #2 Crew Clerk, 11:00 P.M. start, April 2, 1987...."

At the request of the Organization, the investigation was postponed until April 23, 1987. Despite a number of contradictions in Claimant's testimony, some of which are irrelevant, the record is clear that on April 2, 1987, she was not available, as required, to answer the Clerk's 9:00 P.M. call. She received the consideration of two extra calls and did not answer either of these. Whatever the nature of the obligation at her church parish, it does not relieve her of her primary obligation under the Agreement.

It is clear that Claimant's dismissal on April 29, 1987, was due to her disciplinary record, rather than to the incident of April 2, 1987, as noted in the Carrier's November 23, 1987, letter.

"As I explained in conference, in view of Claimant Oestreich's long history of missing calls for service, failure to protect assignments, suspensions, reprimands, verbal consultations and warnings, coupled with the fact that the investigation transcript conclusively proved Claimant's guilt for this latest offense, justifies Carrier's action of dismissing Mrs. Oestreich from the service of this Carrier. I am attaching copies of relevant information concerning Mrs. Oestreich's discipline record."

In response to the STATEMENT OF CLAIM the Board finds no violation of Rules 23 or 24. The letter of April 3, 1987, was adequate to inform Claimant of the precise offense for which the investigation was to be conducted and enabled her to prepare a defense. The record bears out that she understood the charge and was afforded ample opportunity to offer a defense.

Nor does the order of proof demonstrate any apparent violation of Claimant's right to a fair and impartial investigation. Matters of exact procedure are for the parties, not for the Board, except to the extent

required by present Agreement rules. Calling the Claimant first does not alter the requirement that the Carrier prove justification for the discipline imposed by substantial evidence.

It appears to be railroad industry practice that witnesses may be called in any order desired, (e.g., 4th Division Award 3227.)

Cases reviewed substantiate the general principal that:

"In discipline cases the Board sits as an appellate forum. As such, our function is confined to determining whether: 1.) Claimant was offered a fair and impartial hearing; 2.) The finding of guilty as charged is supported by substantial evidence; and 3.) The discipline imposed is reasonable." (Third Division Award 13179)

The primary issue in the present matter is whether dismissal is reasonable given the nature of the offense and, particularly, Claimant's past record. The record contains the Claimant's disciplinary record which the Carrier contends constitutes a history of flagrant violations of rules almost from the start of her employment.

As to the present offense, the Claimant is plainly in violation of the call-in rule and, although she knew that she had an important personal obligation that likely would interfere with being available to be called at 9:00 P.M., she made no effort to be relieved in advance of this obligation. In view of her record, which was known to her as well, her conduct is inexcusable and this finding is fully substantiated by the record. The only factor even remotely in her favor is that the Carrier was not substantially harmed by her failure to obey a clear rule.

Carrier summarizes Claimant's record as follows:

- Failure to fulfill the duties of her assignment nine times;
- Failure to be available when required six times;
- Failure to comply with specific instructions, three times.

The parties have also supplied two past awards involving the Claimant. Third Division Award 23298 overturned a 15 day suspension for an incident on November 27, 1978, on the basis that Claimant then had only 4 months seniority and had not been adequately instructed in the procedure of protecting an assignment. This plus some uncertainty on the part of the Crew Clerk were found to be mitigating circumstances.

Third Division Award 26035 upheld a 15 day suspension for carelessness in filling a vacancy on November 28, 1982, when Claimant was herself a Crew Clerk.

An additional Third Division Award, 26119, overturned a 30 day suspension.

The record cited in support of dismissal on the basis of the Claimant's record reveals the following summary of actual, sustained or non-appealed, disciplinary penalties or actions:

- 4 15 day suspensions, 2 in 1984, 2 in 1982; one served, 3 held in abeyance. One of the latter was for failure to be available in 1984.
- Written warnings in 1984 (failure to be available), 1983 and 1981.
- A verbal reprimand in 1981.

While there are other indications of errors in the performance of duty, if the Carrier did not discipline for these, they cannot be cited against Claimant in this case as weighing in favor of discharge. Some of the work cited is complicated and the Carrier, aware of the Claimant's record, chose to afford her some degree of error.

The 8 instances of discipline, above, and Claimant's conduct in the present case are hardly an exemplary record. But, analyzed in depth, and spread over a ten year period they do not form an adequate or reasonable basis for discharge. The commitment to progressive discipline requires at least one more opportunity for Claimant to demonstrate, on the job as well as during an investigation, that her interest in saving her job will be matched by a firm commitment to observing the rules.

It is not a positive sign that most of the more recent Exhibits denoting discipline or suggesting difficulty in following instructions relate to failure to be available for duty or violation of specific instructions. Repetition of either offense, if proven, will almost certainly justify dismissal.


Claimant will be restored to service with seniority and all other rights unimpaired, but without pay for time lost.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1988.