

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30696
Docket No. MW-31061
95-3-93-3-33

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (former
(Louisville and Nashville Railroad Company)

STATEMENT OF THE CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The suspension assessed Welding Instructor R. P. Roper for allegedly operating a private business while on duty and under pay for CSX was without just and sufficient cause and in violation of the Agreement [System File 16 (5) (91)/12 (91-1594) LNR].
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. P. Roper shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS OF THE BOARD:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee, 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 is employed as a Welding Instructor at the Carrier's Nashville rail welding facility. At times relevant to this dispute, he worked 7:00 A.M. until 3:30 P.M. Claimant worked under the supervision of Plant Superintendent Alan Rowe until Rowe's retirement in 1991.

Claimant was knowledgeable about computers and computer systems; and he helped the Carrier establish and utilize computerized data bases for maintaining inventories of rail and other items, in addition to his instructor duties. It is not disputed that Claimant's computer expertise and the programs he initiated increased the efficiency of the Plant. Indeed, Claimant served as an informal source of expertise for other Carrier employees in their railroad-related computer work. Claimant was a competent employee, who, according to uncontroverted written statements from Carrier officials, went beyond the minimum requirements of his job to help the Carrier improve its operations.

Claimant had arranged the purchase of computers, as well as related equipment and software, from various vendors. Although the purchases had, according to Claimant's un rebutted testimony, been made for railroad use at the directive of the Plant Superintendent and with his knowledge, the Carrier's regular purchasing procedures had not been utilized, and there was indication that, at least, the invoices had been manipulated to conceal from the Carrier the nature and extent of the computer purchases.

Claimant also did computer consulting "on the side," although whether as a business or a hobby is not clear in the record. According to Claimant, he provided some services to friends in business ("clients"), but made no more than enough to pay for his costs.

According to Claimant's un rebutted testimony, his former supervisors had allowed him to take and to make occasional calls for the side business, so long as it did not interfere with his railroad duties. Claimant made telephone calls, and, incidental to his performance of railroad business (e.g., getting printed safety signs) also ran occasional errands, on behalf of his clients, during working hours.

Claimant had, and paid for, a telephone beeper, which he carried while on duty. Although there was question whether the beeper belonged to the Carrier (there were two railroad-owned beepers missing) there was no proof that he had obtained it in any improper way. Although Claimant testified that he occasionally used the beeper for railroad business, allowing him to be contacted while out of his office, his railroad job did not require him to have a beeper.

Following the Plant Superintendent's retirement, C. E. Oaks took over as Plant Superintendent. He noticed Claimant's beeper and, being suspicious as to its use, ordered an investigation. Claimant was withheld from service September 12, 1991. Upon receipt of the results of the investigation, the Carrier convened an investigatory hearing to ascertain his responsibility for "operating a private business while on duty and under pay" and for "unauthorized use of Company materials and equipment in connection therewith." At the Hearing, the above facts were ascertained.

Following the Hearing, the Carrier upheld the charges against Claimant and reinstated him to service, effective November 4, 1991, with Claimant's time out of service constituting the penalty. The Carrier notified Claimant of its decision by telephone on October 30, 1991. The Carrier gave no written confirmation of the discipline at the time; and it did not transmit the transcript until April 27, 1992, despite complaint by the Organization.

The Carrier's failure to transmit the transcript within 30 days was apparently a result of internal communications failures between Carrier officials: Mr. Oakes stated that the official who had conducted the Hearing had advised him that a copy of the transcript had been sent, when it apparently had not been. He did not believe that a second transmittal was necessary.

The failure occurred despite a 1986 Letter of Agreement between the Organization and Carrier which required the Carrier to furnish it with a transcript of the Investigation within that time period, along with the disciplinary decision.

The Organization argues that the Carrier failed to meet its burden to prove the charges against Claimant. In particular, it urges that the Investigation does not provide any direct evidence that Claimant conducted outside business at any particular time while he was under pay or that he used specific Company material in conducting such business. The Organization asserts that the Carrier's assertions that he used computer memory are without support in the record. The Organization also argues that the evidence with respect to allegedly fraudulent invoices is irrelevant to the decision, since Claimant was not charged with any violation related to the invoices.

The Organization argues that the Carrier violated its contractual obligation and Claimant's right to due process by failing to furnish the transcript within 30 days of the close of the Hearing.

The Organization urges that the discipline was imposed in violation of Claimant's rights to due process and must be overturned. In the event that the Carrier's action were to be determined to be procedurally proper, the Organization argues that the Carrier failed to prove the charges. It urges that the claim be sustained and Claimant made whole for all wages and benefits lost.

The Carrier argues that the Organization's challenge on the basis of denial of due process is without merit, since the Organization ultimately received a copy of the transcript and there is no indication that the delay damaged or prejudiced the Organization, in the absence of which there is no remedy provided for or allowed under the Rules. It further asserts that the language of the Letter of Agreement is advisory, rather than mandatory, because of the absence of such penalty. The Carrier also argues that the Organization did not notify Mr. Oaks of the failure or contest his December 1991 assertion that the Organization had received the transcript.

The Carrier argues that the record establishes Claimant's guilt; and it asserts that he was not dismissed only because of his positive prior record and his cooperation in the investigation of fraudulent billing and fraudulent acquisition of a computer. It asserts that Claimant admitted doing personal business on Carrier time; and it contends that his use of Carrier time and equipment is a dishonest act, tantamount to stealing. The Carrier argues that it cannot tolerate dishonesty, for which dismissal is the presumptively-appropriate penalty. It asserts that Claimant's activity is particularly inappropriate because the purpose of time spent at a computer terminal and the use of Carrier computer time and storage space is so difficult to detect.

The Carrier denies any procedural violation. It asserts that Claimant's guilt is established by substantial evidence and that the penalty was lenient, and not arbitrary or capricious. The Carrier urges that the claim be denied.

Employees who steal from the Carrier violate their duties of honesty and loyalty to the Carrier and their obligations to devote their attention to the Carrier's business and to conserve and protect its property and assets. Stealing includes theft of time and the misuse or conversion of Carrier property, including intangible property such as computer time and space. For employees who steal from the Carrier, dismissal is the presumptively-appropriate penalty. Numerous Awards of this Board have so held.

It is, however, also a basic principle of this Board that employees can only be found guilty of the offenses with which they

are charged and that the evidence adduced must be considered in light of those charges. In the instant case, Claimant was charged with "operating a private business while on duty and under pay" and for "unauthorized use of Company materials and equipment in connection therewith." He was not charged with converting the computer equipment or altering the invoices in connection therewith. There is no evidence that Claimant took it. Indeed, it cannot be ascertained from the record whether the equipment was used for other than railroad purposes or what happened to all of it. Similarly, although Claimant's use of a pager triggered the Investigation, there is no evidence that he took or used it improperly.

Further, although the Carrier states that Claimant was using computer hardware, time, and storage space for his personal business, there is no proof in the record of such use. The Carrier's assertions in this regard are a product of suspicion and innuendo, not evidence; as such, the charge fails for lack of proof.

What remains are the approximately 29 telephone calls Claimant concededly made to persons at the two businesses to which he provided some services. The Carrier correctly asserts that employees have an obligation to devote their full time and attention to Carrier business. However, Mr. Oaks also conceded that some personal telephone calls are allowed at work. And Claimant testified that he had been given permission by the previous Superintendent to make a limited number of such calls, so long as they did not interfere with his job.

In light of the permission given by Claimant's prior supervisor, and without diluting the general obligation of employees to devote their time and attention to the Carrier's business, the standard becomes one of whether Claimant abused the limited permission or whether the calls interfered with his job. The Board is not persuaded that evidence supports a conclusion of abuse or interference.

The Carrier may set tighter limits on personal activities for employees in pay status than it did in Claimant's case, but it may not do so through retroactive invocation of discipline. Such change in the rules might appropriately be accompanied by counselling to ensure compliance by employees in special situations, as Claimant was, but a 50 day suspension was arbitrary and excessive. The Award so reflects.

The Carrier failed to meet its obligation to furnish the transcript of hearing to the Organization. The Board is not persuaded that the Letter of Agreement was advisory, merely because

it did not specify a penalty. However, neither is the Board persuaded that the claim should be allowed, solely on that ground, in the absence of a showing that the delay resulted in loss or damage or otherwise prejudiced the Organization. Because of our conclusion with respect to the merits of the claim, we do not rely on the Carrier's failure to furnish the transcript in a timely manner.

The Carrier failed to prove that Claimant committed the violations with which he was charged. Claimant shall be made whole for wages and contractual benefits lost as a result of the Carrier's action of withholding him from service, and his record shall be cleared of the charge and discipline.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of January 1995.