

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33513
Docket No. CL-34474
99-3-98-3-16**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(National Railroad Passenger Corporation (AMTRAK))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11916) that:

1. Carrier acted arbitrarily, capriciously and in an unjust manner, in violation of Rule 24 of the current Amtrak/TCU Agreement, when by letter dated August 2, 1996, it assessed the discipline of termination to Claimant, Mr. Irwin Boatner, as the result of a formal investigation held on July 24, 1996.
2. Carrier shall at once compensate Claimant, an amount equal to what he could have earned, commencing with the date of dismissal, until such time he is reinstated with seniority rights unimpaired.
3. Carrier shall expunge all record of the discipline from Claimant’s work file.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the 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 were given due notice of hearing thereon.

It is unrefuted on this record that Claimant failed to punch his time card on the date he is charged with filing a false claim for time worked. Carrier alleges that Claimant did not show up for work at all and was, thus, attempting to gain pay for work not performed. Under any reasoning, according to the Carrier, this constitutes theft, and the penalty of dismissal is not excessive. The Organization acknowledges that Claimant forgot to punch in (he admitted as much in the Investigation). However, the Organization argues that Claimant was at work, engaged in his normal routine, and Carrier never looked in the normal places Claimant might be working, before concluding that he was absent without permission.

The Board has reviewed the transcript and correspondence on this case thoroughly. We find that Claimant's Supervisor concluded Claimant was absent without making even a token effort to find him in his usual work locations. It is also apparent from the record that, for better or worse, it is not unusual for the Station Supervisor's secretary at this location to complete time cards, where she is aware someone was at work, but failed to punch his/her time card properly. Under the circumstances, the Board finds that Carrier has not met its strong burden of persuasion in this case. As the Board noted in Third Division Award 16154:

"... we are confronted with conflicting evidence concerning the validity of a basic premise advanced by the Carrier in support of the disputed disciplinary action against Claimant. Were we presently concerned with determining whether the Claimant was entitled to payment for various assignments during the period in question based upon the evidence before us, a motion to dismiss such a claim might be timely. However, the instant claim arises out of extreme penalty imposed by the Carrier and the burden of proving the serious accusation involved through clear and convincing evidence rests with the Carrier.

After thorough examination of the entire record in this case, we find the evidence not sufficiently convincing to satisfy the Board that the requisite

degree of proof has been met by the Carrier to support the disciplinary action invoked.”

In this case, as in the above-referenced matter, the Board has no choice but to sustain the claim.

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 22nd day of September 1999.