

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36728
Docket No. CL-36655
03-3-01-3-124

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Canadian National Railway
(Grand Trunk Western Railroad Incorporated)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12709)
that:

1. Carrier unjustly assessed Troy, MI Clerk J. M. King with forty (40) demerits effective December 2, 1999 which resulted in her dismissal from service effective February 22, 2000, as a result of an investigation held on February 14, 2000 in which it failed to prove the charges and failed to provide Claimant with a fair and impartial hearing and review of the record.
2. Carrier shall now be required to reinstate Ms. King to service with all rights unimpaired and remove any mention of this discipline from her record and pay her all lost earnings and benefits as a result of her suspension and dismissal on February 22, 2000.”

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.

This claim, initiated on April 19, 2000, protests the assessment of 40 demerit points to the Claimant as a result of an Investigation held on February 14, 2000 in absentia and a finding that the Claimant had engaged in theft and unauthorized use of the company (800) telephone line on December 2, 1999 by receiving two personal calls totaling 45 minutes and relaying one of the calls to a non-work related person resulting in additional an unnecessary cost to the Carrier. It also protests the resulting dismissal for accumulation of more than 70 demerit points.

The transcript of the Investigation reveals that Manager of Transportation Services T. Allen discovered that the Claimant received one personal call on the company's (800) line while she was working on the Crew Dispatch Desk on December 2, 1999, and spoke to a female for 40 minutes, and shortly thereafter received another personal call from a female she spoke with for about seven minutes before transferring that call to an outside line and a male for a conversation between them taking place on the company's long distance telephone line at its expense. Allen made cassette tapes of these conversations and a transcript of the latter conversation was read into the record. The Carrier tapes all dispatch calls and conducts random reviews of such tapes for monitoring purposes. Allen testified that he discovered the Claimant's personal calls on December 27, 1999 when he was investigating a time claim filed by another employee and was asked to ascertain when a certain crew was ordered back by locating a specific phone conversation occurring on December 2, 1999.

Allen and Assistant Director of Transportation Services T. Miller testified that they had previously counseled the Claimant about her personal use of the telephone within the prior few months. Allen admitted that there is no total prohibition against personal use of company telephones, but that a circular had

been issued stating that such calls must be limited in duration to maximize access to the Crew Management Center (CMC) and it was the length of the Claimant's calls that led to the current charges, including the cost to the company which he testified amounted to theft. No specific complaint had been received concerning access to the CMC on that shift or any adverse impact on train scheduling noted. Neither were any specific cost figures ascertained. The Claimant was not present and did not testify.

The Claimant was notified of the specific nature of the charges by letter dated January 27, 2000, as well as her removal from service pending the Investigation, and was informed in writing as to the various postponements granted as well as the February 14, 2000 date of the Hearing. The Organization asserted at the Investigation that the Claimant was not attending upon her doctor's advice, but had no written documentation supporting such fact. The Hearing was recessed on a few occasions to permit the Organization to track down any such statements, but none had been received by the Carrier or the Employee Assistance Counselor identified by the Claimant to the Organization, and the Claimant could not be reached to be advised that the Hearing would proceed in her absence. The Organization's representative objected to continuation of the Hearing, but examined the witnesses and participated in the Claimant's absence. By letter dated February 22, 2000 the Claimant was advised that she had been found guilty of the charges and assessed 40 demerit points, and that the accumulation of demerits in excess of 70 would result in her removal from service.

The Carrier initially argues that there were no procedural errors in the conduct of the Hearing in absentia, as the Organization was provided two previous postponements and the Claimant had failed to comply with the requirement that her doctor furnish a note indicating that there was a medical basis precluding her attendance at the Hearing, citing Third Division Awards 29497, 33216, 36420 and Second Division Award 13217. It also contends that there is substantial evidence in the record to support the charge that the Claimant engaged in theft of company time and money by her unauthorized use of the (800) phone line on December 2, which it first discovered on December 27, 1999, relying upon Third Division Awards 28084 and 30681. The Carrier argues that the Board must not overturn its assessment of penalty in this case unless it finds that it is arbitrary and capricious and that there is no substantial evidence validating the charge, citing Third Division

Awards 26152, 26153 and 26920. The Carrier asserts that it met its burden of proof and that the penalty was reasonable based upon the seriousness of the charges.

The Organization contends that the Claimant was denied a fair and impartial Hearing when the Carrier denied its request to postpone the Hearing on February 14, 2000 based upon the Claimant's inability to attend due to her medical condition, and continued in her absence. The Organization also argues that the Carrier failed to meet its burden of proving the charge of theft, citing Third Division Award 21122, which it asserts does not equate with misuse of the company telephone line, and attempted to trump up the charges against the Claimant in an effort to have them appear more serious than they were, in order to assess her a greater number of demerit points than the incident warranted. It asserts that the Carrier was pyramiding the charges against the Claimant in an effort to remove her from service, improperly removed her from service pending Investigation (citing Third Division Award 25118 and Public Law Board No. 4698, Award 82) and that she should be returned to work and the number of demerit points reduced to what the Board believes is appropriate under the circumstances. It relies upon Third Division Awards 29777 and 23220 in support of reduction of the penalty.

Upon a careful review of the record, the Board initially notes that we find no procedural irregularities in the conduct of the Hearing from which to conclude that the Claimant did not receive a fair and impartial Hearing in this case. The fact that the Hearing was held in absentia over objection by the Organization was not an error in this case, because the Claimant was given every opportunity to attend as well as to postpone her attendance to substantiate that there was a medical basis for her inability to attend, and she failed to do so. Thus, the Hearing Officer had no basis upon which to conclude that the Claimant's nonattendance was other than voluntary on her part. See Third Division Awards 29497, 33216 and 36420. Having found that it was appropriate for the Hearing to be conducted in absentia in this case, the Hearing Officer was entitled to rely upon the evidence adduced therein in determining whether the charge was sustained. See Second Division Award 13217.

With respect to the merits, the Board concludes that there is substantial evidence in the record to support the Carrier's conclusion that the Claimant engaged in the activities set forth specifically in the charges, that she was aware that personal use of company telephone lines for any extended period of time was

improper and had been counseled concerning this fact in the past, and that her initiating the linkup between a personal caller and an outside party to permit them to speak long distance over the company's (800) line may well be considered theft of the cost of such transaction, regardless of the Carrier's failure to quantify it. Based upon the record before us, we cannot say that the penalty imposed by the Carrier herein is either arbitrary, capricious or excessive so as to constitute an abuse of its discretion. See Third Division Award 26920. Accordingly, we find no appropriate basis to reduce the penalty herein.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 17th day of September 2003.