

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30681
Docket No. CL-31491
95-3-93-3-493

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International
(Union
(Chicago, Central and Pacific Railroad
(Company

STATEMENT OF CLAIM:

- "1. Carrier violated the Agreement between the Parties when it wrongfully discharged Clerk Joan C. Horan, Waterloo, Iowa, from service of the Carrier on March 17, 1993.
2. Carrier shall now be required to compensate Clerk Joan C. Horan for all time lost, beginning March 17, 1993, when dismissed from service following an investigation held on March 8, 1993, and her record be cleared of all charges as a result of the investigation."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of 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 waived right of appearance at hearing thereon.

On February 5, 1993, Claimant was notified of an Investigation, to be held February 12, 1993, concerning her responsibility in connection with her alleged misuse of Carrier's property and funds and her alleged failure to devote herself exclusively to Carrier's service while on duty. The Investigation was postponed to and held on March 8, 1993. On March 17, 1993, Claimant was notified that she had been found to have violated Rules 5, 8 and 10 and that she was dismissed from service.

Claimant was employed by Carrier at Waterloo, Iowa, to do OIS computer work and handle intermodal bills. She had almost seven years' tenure with Carrier with no formal discipline on her record. Claimant's shift ran from 7:00 P.M. to 3:00 A.M. During her shift, Claimant was the only employee with access to an incoming 800 telephone line. Her duties included answering calls which came in on that 800 number.

The Manager of Station Operations conducted an audit of the 800 line covering a six month period during Claimant's shift. The audit showed numerous calls from Trainmen not on duty at the time, from employees who had been furloughed, from Claimant's brother, from an Organization Local Chairman in Jackson, Mississippi, and from unidentified numbers in Des Moines, Iowa. The duration of the calls ranged from 0.5 minute to 128.3 minutes.

The Organization contends that Carrier violated Rule 35 of the controlling Agreement by auditing Claimant's 800 line for six or seven months. The Organization observes that Rule 35 prohibits bringing charges of which the employing officer had knowledge for 30 days or longer. Thus, in the Organization's view, the audit could only go back 30 days.

The Organization further argues that Claimant, who also served as the Organization's District Chairman, engaged in a heated argument with the Manager of Station Operations concerning a Rules violation two weeks before the audit. In the Organization's view, the audit represented a personal vendetta by the Manager of Station Operations against Claimant.

The Organization also contends that Carrier failed to carry its burden of proving Claimant guilty of the violations. The Organization argues that Carrier's proof rested on the Manager of Station Operation's audit, rather than the actual telephone bills, which were not made a part of the record of the Hearing. Furthermore, the Organization maintains that Claimant had no control over incoming calls, and frequently placed calls on hold or transferred them to the Dispatcher. In the few instances in which Claimant admitted receiving personal calls, Claimant made up the time by working extra hours and was never given an opportunity to make restitution for the cost of the calls. Furthermore, the Organization argues, Carrier never presented evidence of the volume of calls that the line received on other employees' shifts, thereby making it impossible to determine the reasonableness of the volume of calls that Claimant received.

Finally, the Organization observes that Claimant had a perfect work record for almost seven years prior to the incident in question. Furthermore, Claimant was never given an opportunity to make restitution for the personal calls that she admitted receiving. Consequently, according to the Organization, the penalty of discharge was excessive in this case.

Carrier argues that substantial evidence supports the finding of Claimant's guilt made on the property. Carrier contends that the record establishes that Claimant conducted personal and Organization business on numerous occasions while on duty, using the 800 number. Carrier observes that Claimant admitted receiving such calls, including calls from her brother and from the Jackson, Mississippi Local Chairman. Carrier contends that Claimant's explanation that she placed calls on hold was not credible, considering that many calls ranged from 30 minutes to two hours.

On the property, Carrier argued that the audit resulted from the Manager of Station Operation's observation that Claimant was behind in her work. Carrier also argued that the failure to place the original phone bills in the record did not detract from Carrier's showing of substantial evidence of Claimant's guilt.

Carrier contends that Claimant received a fair Hearing at which her guilt was established. Carrier argues that discharge was warranted because the violations involved acts of dishonesty.

The Board finds that Claimant was afforded a fair Hearing. The Manager of Station Operations' audit was made a part of the record. During the Hearing, the Organization requested to see the original telephone bills. The bills were provided and a recess was taken to enable the Organization and Claimant to review them. After the recess, the Organization and Claimant questioned the Manager of Station Operations about the bills.

The Board rejects the Organization's contention that the audit and Investigation represented a personal vendetta against Claimant as a result of Claimant's pursuit of an alleged Rules violation two weeks earlier. The Manager of Station Operations testified that she conducted the audit because Claimant had fallen behind in her work. This explanation was credited on the property and we generally defer to such credibility determinations. Furthermore, there is no evidence in the record of personal animosity or anti-union animus on the part of the Manager.

We also find that Rule 35 was not violated. The charges alleged that Claimant failed to devote herself exclusively to Carrier's service while on duty and misused Carrier's property. It was the audit of the telephone records, not the mere receipt of the phone bills, which gave rise to the Manager's knowledge of the alleged offenses.

Our review of the record leads us to conclude that substantial evidence supports the finding of guilt made on the property. Claimant admitted taking personal calls from her brother and taking calls from an Organization official in Jackson, Mississippi. The evidence also showed that many of the other calls were from off-duty employees or furloughed employees who had no reason related to Carrier's business to call the 800 number during Claimant's shift. Others were from locations where there was no reason to believe anyone would be calling with business to conduct with Carrier.

Many of the calls were quite lengthy. Claimant's explanation that she placed these calls on hold or transferred them to the Dispatcher was not credible in view of the length of those calls.

In reaching our conclusion, we do not rely on the calls received from Des Moines, Iowa. Carrier was unable to track the actual phone numbers from which those calls originated. Carrier admitted having customers in Des Moines who would have reason to call the 800 number during the regular business day. Although the Manager of Station Operations testified that she did not believe those customers would call during Claimant's shift, she admitted that without the actual phone numbers she could not state as a fact that the calls were not transacting business with Carrier.

Having concluded that the record supports the finding that Claimant was guilty of the charges, we now turn to the penalty. After a careful review of the record of this case, the Board finds that the penalty imposed by the Carrier to this point has served its purpose and the Claimant should be reinstated. In making this decision, the Board has taken into account Claimant's previously unblemished work record. Claimant should consider this Award as a "last chance" and should, in the future, make every effort to be an exemplary employee.

Accordingly, the claim will be sustained to the extent that the Claimant shall be restored to service on a last chance basis with seniority and other Agreement benefits unimpaired, but without any compensation for time lost while out of service. In addition, Claimant shall make full restitution to the Carrier for erroneously billed calls, except for those charges emanating from Des Moines, Iowa. Such reimbursement shall be accomplished on a payroll deduction basis, with the parties to work out the details. (See Third Division Awards 26121, 26113, and 26053.)

AWARD

Claim sustained in accordance with the Findings.

O R D E R

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.