

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30892
Docket No. CL-30732
95-3-92-3-684

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

(Transportation Communications International
(Union
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the
Brotherhood (GL-10860) that:

1. Carrier violated the Agreement between the parties at Milwaukee, WI when the Carrier assessed a 20 day suspension for June 27, 1990, plus a 10 day suspension that had been deferred for 1 year from May 29, 1990 to Ms. Lee Ann Lewin account she allegedly failed to properly protect her position of Yard Clerk at the Muskego Yard Office on these days. An investigation was held for each incident with the result of the June 27, 1990 investigation being a 30 day suspension that included the 10 day deferred suspension.
2. Carrier shall now be required to pay Ms. Lee Ann Lewin all pay that she would have received in the 30 day period in which she was suspended and her record cleared of all charges."

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 waived right of appearance at hearing thereon.

A review of the record in this dispute, reveals the Claimant was notified by letter dated May 15, 1990, to attend a formal Investigation to determine her alleged failure to be available for call on May 11, 1990. The Investigation was continued to May 29, 1990.

On June 4, 1990, the Carrier notified the Claimant that she was assessed a 10-day deferred suspension with a one year probation.

While this deferred suspension was being appealed through appropriate Carrier channels. On November 26, 1990, Carrier denied the appeal because the Claimant had signed a waiver in lieu of an Investigation on April 9, 1990 and accepted a record notation for missing calls on March 23 and 24, 1990.

In July, 1990, the Claimant was again notified to attend an Investigation for failing to protect her assignment on June 27, 1990.

The Carrier concluded the evidence supported the charges and since the Claimant had been issued a deferred suspension in May, 1990, with a one year probation. It issued the Claimant a 30-day suspension.

The Organization appealed on behalf of the Claimant. Time limits were extended and the matter was properly appealed on the property. When the matter was not resolved, the Organization appealed the Carrier's decision to this Board.

The Organization urges the Board to declare the Carrier violated the Agreement when they arbitrarily suspended the Claimant for 30 days for allegedly failing to protect her assignment on two different occasions. In neither instance did the Carrier cite a specific rule. Additionally, the Carrier did not release the call sheets requested by the Organization. This evidence was necessary to prepare an effective defense for the Claimant. The Carrier, by its behavior, controlled the facts and prevented a fair hearing. This is contrary to numerous Third Division Awards, especially Award 17151, which held:

"Award 12814, involving a dispute on this property held that the Carrier failed to appraise Claimant properly of the charge against him in violation of the rule, and thus denied Claimant due process.

The 'charge' and the rule in Award 12814 are substantially identical to those in the instant dispute. This Board is not prepared to hold that award palpably erroneous, and is consequently bound thereby. Claim sustained."

In the first case, the Organization argues that the only thing proved by the Carrier was the Claimant's absence at the location of either phone number she registered with the Carrier. However, the Claimant's son was at one of the locations and accepted the call on behalf of his mother. In addition, the Claimant left an alternate number with the Carrier and that number was not called. In any event, the Claimant did show up at work prior to the start of the shift for which she was called.

According to the Organization, the situation which caused the Claimant to be charged in the second case was merely a matter of miscommunication. The evidence shows the Claimant followed standard procedures in calling off sick. On June 26, 1990, she called in to report off work because of illness. She obtained a signed receipt from the doctor's visit which showed the illness to be legitimate. While the Claimant contends she called to report off, the individual who received the call testified that she did not report off for the second day. On the basis of this individual's recollections, the Carrier suspended the Claimant for 30 days. It was inappropriate for the Carrier to find the Claimant guilty on the basis of the word of one individual whose story conflicted with hers.

The Carrier points out that the evidence was sufficient to demonstrate the Claimant failed to protect her assignment on May 11, 1990. The ten day deferred suspension was reasonable and lenient. This is particularly true in light of the fact that in addition to the waiver to an Investigation the Claimant signed on April 9, 1990, resulting in an entry in her record for missing calls on March 23 and 24, 1990, her record contained other incidents of rule violations.

Following these incidents, the Claimant once again failed to protect her assignment. As the evidence adduced at the Hearing on July 18, 1990, clearly proved, the Claimant failed to protect her assignment on June 27, 1990, when she failed to call in to report she would be absent from work due to illness on June 27, 1990.

In view of all of these circumstances, the Carrier was justified in issuing a deferred suspension with a one year probation in the first case and a 30 day suspension, including the 10-day deferred suspension in July 1990.

The Board has reviewed the evidence carefully. It appears the Claimant did not do everything she could to report off and to protect her assignment.

The Carrier has gone a long way to assure it is fully staffed on all shifts. Therefore, they have established Extra Lists. In order to entice employees to the Extra Lists, the Carrier promises them a full week's pay, as long as they make themselves available to be called out to work when daily vacancies occur on short notice. That is the quid pro quo for employees on the Extra List.

In the instant case, the Board does not believe the Claimant has been in complete compliance with the requirements either reporting off or making herself available during her call in hours. The Carrier is appropriately concerned about apparent lapses in her call-in procedures and in her elusiveness during her assigned call-in hours. The Board believes the Carrier has shown sufficient evidence to sustain the charges. However, there does appear to be an element of misunderstanding on the part of the Claimant and her failure to get the call in a timely manner in the first case, which may not have been because she did not make the effort, but, because she was let down by her son whom she mistakenly relied upon. While that in no way excuses the Claimant, it leaves open the possibility that she was not indifferent to her responsibilities. This is further supported by her effort to get to work that same day before the shift started.

When you are dealing with phone conversations, as in the second incident, it is impossible to guarantee an accurate reiteration of the conversation. Therefore, even though it was the Claimant's responsibility to be certain the Carrier was properly advised of her pending absence on June 27, 1990, there is some room for a benefit of a doubt that she at least thought she had complied with the proper procedure.

In light of these circumstances, the Board believes the charges should be sustained, but the penalty should be reduced to a 15 day suspension. The Claimant must be aware she has a responsibility to remain at a location where she can be reached during the time she may be called in to work and she must be certain the Carrier is aware of the proper location. Furthermore, she has an obligation to state with certainty when she will not be available for work due to illness or any other reason.

AWARD

Claim sustained in accordance with the Findings.

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 postmarked date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of May 1995.