

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31011  
Docket No. CL-31045  
95-3-92-3-944

The Third Division consisted of the regular members and in addition Referee Dennis E. Minni when award was rendered.

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

STATEMENT OF CLAIM: "Claim of the System Committee of  
the Organization (GL-10905) that:

- (1) The Carrier acted in an arbitrary, capricious and unjust manner and in violation of Rule 24 of the Agreement when, by notice of July 19, 1991, it assessed discipline of ten (10) working days suspension against Reservation Sales Agent, Ms. Nicole Kirk.
- (2) The Carrier shall, if she is ever required to serve the suspension, be immediately required to reinstate Claimant to service with seniority rights unimpaired and compensate her an amount equal to what she would have earned, including, but not limited to daily wages, overtime pay and holiday pay had discipline not been assessed.
- (3) The Carrier shall now expunge the charges and discipline from Claimant's record."

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.

This claim protests the Carrier's allegations that Claimant, who was employed since May 17, 1989, unplugged her phone pad several times between the hours of 3:58 PM and 8:57 PM on May 7, 1991. Her record for that period showed only ten incoming calls handled by her and in one instance she is alleged to have answered "AMTRAK Reservation," then unplugged from the customer's call. Also she is charged with being seen writing a greeting card during the subject period by a supervisor.

The Investigation held on July 2 and concluded on July 9, 1991 was procured by notice dated May 14, 1991. At this Hearing the Claimant was accused of breaching Rules of Conduct "D" and "O." To wit: failure to obey company and department procedures and attend to their duties during working hours. She was found responsible, as charged, and was suspended for ten working days on July 19, 1991.

The Carrier stresses customer service and courtesy so that each new employee signs off on having read and understood the Carrier's Rules for customer contact and handling. During her tenure the Claimant has been counselled a number of times for performance related matters. Decisional authority has clearly indicated that counselling is not discipline in accordance with the terms of the parties' Agreement.

Claimant had just returned to work from two medical leaves and claimed she needed to bring herself up to speed on work related changes by reading the Carrier issued material. The Carrier stated that she had been allowed 70 minutes of such study on an earlier occasion, thus obviating the need for doing so on May 7, 1991.

Also, the Claimant maintained that for at least 30 minutes in the period she was accused of wrongdoing it was impossible to make phone calls because of "Carrier-initiated conversations with supervisors."

Besides not meeting its burden of proof, the Organization claims the Carrier imposed a disproportionate manner making it a case of discrimination towards her. Many other cases are cited by the Organization wherein a lesser penalty was imposed for at least the same if not worse conduct or performance. As a first offender a ten day actual (instead of deferred) suspension from work is excessive in the Organization's view.

The Carrier bears the burden of proof in a discipline case, and it emphasizes that its determination based upon testimony and documentation shows instead of the norm of about 75 phone calls

taken in a five hour period the Claimant handled only ten such calls.

The balance of the testimony and Claimant's own statement establishes that she failed to ask for time to read Carrier material. This makes her subject to the transgressions noted in all respects.

The Claimant received a notation of counselling on May 7, 1991 for "Not Attending to Duties."

This conduct has been established as a typical subject for counselling which is not discipline, by a wide measure in the cases submitted by the Organization. This case should not be determined differently because even if the Carrier has met its burden of proof a ten day suspension is unwarranted.

The record supports the contention that a fair Hearing was afforded the Claimant. There was notice of the Hearing furnished and the Claimant attended, was represented by her Vice-General Chairman in compliance with procedural Agreement due process.

As for the claim that the need to seek out of the overtime assignment was caused by the initial accusation by her supervisor, we cannot substantiate its veracity. But we also do not need to resolve this case on that issue. We find the arbitral evidence is controlling on the issue of the excessive nature of the penalty.

We conclude that for a first disciplinary offense the proper result should be to impose a three day deferred suspension. Claimant should be made whole for the loss of ten days compensation at the pro rata rate.

#### AWARD

Claim sustained in accordance with the Findings.

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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 26th day of July 1995.