

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37274
Docket No. MW-38018
04-3-03-3-397**

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Florida East Coast Railway Company, L.L.C.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. P. W. Clarke on December 9, 2002 in connection with charges alleging he was disloyal, dishonest and violated Company rules, after being relieved from duties on August 4, 2002 and in connection with the alleged excessive costs in the amount of five hundred ninety-four dollars and twenty-three cents (\$594.23) which were chargeable to the Nextel assigned to him during the billing period August 25 through September 24, 2002 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, all references to this discipline shall be stricken from Mr. P. W. Clarke’s record and he shall be reinstated to service with all rights and benefits restored and compensated for all lost wages.”

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.

The Claimant, a Track Foreman with about four years' seniority, was charged in a letter dated August 7, 2002 with sleeping on the job (having covered his eyes and face with his hands at a Rules meeting) and then having failed to respond to his supervisor's questions. Pending the results of the Investigation, that was held on August 20, the Claimant was withheld from service. Following the Investigation, the Carrier dismissed the Claimant in a letter dated September 5, 2002 having found that he had slept on the job.

In the September 5 letter dismissing him, the Carrier directed the Claimant to "return all Company supplies in your possession, following which arrangements will be made to pay you any monies due." In addition, Carrier Special Agent R. Sacramento spoke on the telephone several times with the Claimant, trying to arrange a meeting at which he could pick up the Carrier's Nextel cell phone that had been issued to him, but was unable to make mutually acceptable arrangements. Sacramento also left several telephone messages for the Claimant, directing him to return the cell phone, but the Claimant failed to do so.

After the Carrier received the bill for the Nextel cell phone covering the period July 25 to August 24, it wrote the Claimant a letter dated November 19, 2002 advising him that \$817.98 in personal calls had been made on the cell phone, and had been deducted from monies due him. The letter also quoted Rule K, which provides in pertinent part:

"When leaving the service or when requested by proper authority, they [employees] must return all company property. Employees must not use company property for their personal use. . . ."

Because the Carrier did not confront the Claimant with the unauthorized telephone charges within the time limits set forth in the Agreement, and because the Claimant already had been dismissed, it informed the Claimant that it would take no disciplinary action against him at that time.

With respect to the Claimant's next Nextel cell phone bill in the amount of \$594.23, however, covering the period August 25 to September 24, 2002 the Carrier decided to pursue possible disciplinary action. By letter dated November 21 sent certified mail, return receipt requested, the Carrier notified the Claimant of an Investigation on December 4 with respect to a charge that he had been disloyal, dishonest, and violated Carrier Rules by continuing to use the Company's Nextel cell phone after being relieved of his duties on August 4, 2002. Attached to the November 21 letter was a form to be completed by the Claimant advising whether he wanted to have a representative from the Organization appear on his behalf at the Investigation. Neither the Claimant nor a representative from the Organization attended the December 4 Investigation, which proceeded in their absence.

By letter dated December 9, 2002 the Carrier notified the Claimant that he was dismissed again because he had been found guilty as charged of having continued to use the Nextel cell phone after he had been relieved of duties, running up excessive costs in the amount of \$594.23. Two days later, on December 11, 2002 the Claimant telephoned Gloria S. Taylor, the Carrier's Director of Human Resources Department/Labor Relations, complaining that he had not received the November 21 letter notifying him of the Hearing. (The return receipt confirmed that the Claimant did not sign the receipt for the November 21 letter until December 11.) In response to Ms. Taylor's question why the Claimant did not pick up the November 21 letter until December 11, he replied that he had not received any prior notice of the certified November 21 letter. Taylor then told the Claimant that she would reschedule the Investigation if he provided her with a copy of the envelope for the November 21 letter, provided that notations by the Post Office on the letter did not show that it had made prior attempts to deliver the letter. Because the Claimant failed to produce a copy of the envelope, the Carrier did not reschedule the Investigation.

In a December 21, 2002 letter, the Organization appealed the Claimant's December 9 dismissal. The Carrier denied the appeal.

The Organization contends that, contrary to the requirements of Rule 12(a) the Carrier failed to give the Claimant a fair and impartial Investigation because he did not receive notice of the Investigation until a week after the December 4, 2002 Investigation. Rule 12(g) governs the adequacy of a Notice of Investigation, and provides that notice shall be deemed to have been effected when a certified envelope is delivered to the U.S. Post Office, with the time limitation commencing on the date stamped by the U.S. Post Office:

“(g) Notice of the hearing, stating the charge or charges, will be given to the employee, with copy to the Organization, in writing, at least one hundred and twenty (120) hours prior to such hearing. It is understood that the Company will not discuss the charge or charges with the Organization unless and until the employee has notified the Company that the Organization will represent him at the investigation.

Employees will be required to advise, in writing at the time of receiving notice whether or not they desire a representative of the Organization to represent them or not.

Notice of the investigation to the employee shall be considered as being accomplished when a certified envelope is delivered to the U.S. Post Office and the ninety-six (96) [sic] - hour period will be counted from the time and date stamped by the U.S. Post Office.”

We note that the “ninety-six (96) hour period” appears to be a typographical error and should probably read “one hundred twenty (120) hour period,” as Rule 12(g) earlier makes reference to a 120-hour period, as does Rule 12(d).

In any event, the receipt from the U.S. Post Office showed that the November 21 certified letter was mailed on November 21, far more than 120 hours (or 96 hours) prior to the December 4, 2002 Investigation. Accordingly, under Rule 12(g) notice of the Investigation was effectuated in a timely fashion. Moreover, although the Carrier had satisfied the requirements of Rule 12(g) it offered to reschedule the Investigation if the Claimant produced a copy of the envelope accompanying the November 21 letter showing that prior attempts to deliver it had not been made.

Because the Claimant never produced for the Carrier a copy of the envelope, he is hardly in a position to claim that he was denied a fair and impartial Investigation.

The Organization also submits that the Carrier failed to comply with Rule 12(c) which provides that the Carrier may not charge an employee with a violation relating to any matter of which the Company has had knowledge for 21 days or more. Because the Nextel bill for which the Claimant was charged with improper use covered the period August 25 to September 24, the Organization contends that it is inconceivable that the Carrier did not receive the bill more than 21 days prior to November 21, the date of the letter charging the Claimant with the offense. The Organization, however, failed to produce any evidence to support its argument. Indeed, the bill in question is dated November 1, 2002. Although the Organization surmises that the November 1, 2002 date, which is handwritten, was inserted by the Carrier, it can cite no supporting evidence. Accordingly, the Board must reject the Organization's argument.

No more persuasive is the Organization's argument that the Carrier failed to meet its burden of proving that the Claimant ran up unauthorized costs of \$594.23 during the period August 25 through September 24, 2002. The Carrier provided documentary and testimonial evidence that \$594.23 was charged to the Nextel cell phone issued to the Claimant after he had been relieved from his duties on August 7, 2002, that on several occasions it directed the Claimant to return the phone, and that the Claimant failed to do so. Indeed, the Claimant ignored the Carrier's multiple requests to return the cell phone, and continued to run up personal charges on the phone.

No doubt, because the Claimant had been dismissed for sleeping on the job, he did not feel deterred from continuing his unauthorized use of the Nextel cell phone. Because that dismissal was overturned in a companion case, however, his misuse of that cell phone after he was relieved from service has taken on added significance. The Claimant's failure to return the Nextel cell phone, combined with his running up additional unauthorized personal charges in the amount of \$594.23 constituted serious offenses. Indeed, the Carrier's decision to dismiss the Claimant for these offenses cannot be termed arbitrary, capricious or an abuse of discretion.

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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 5th day of November 2004.