Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38371
Docket No. CL-39552
08-3-NRAB-00003-060357
(06-3-357)

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

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-13144) that:

1. Carrier violated Rule 45 of the Collective Bargaining Agreement. The letter of Notice of Investigation, dated April 1, 2005 is defective. Carrier fails to indicate precise times and dates as required by Rule 45 - Discipline Procedures, Paragraph (b).

2. This denied Ms. Gilliam the right to a fair and impartial hearing as required by the Collective Bargaining Agreement. The Organization maintains that the charges are without justification. Ms. Gilliam is only six months away from completing her thirtieth (30) year of service. Her employment record is unblemished.

3. Carrier shall now be required to return Ms. Gilliam to duty with all rights unimpaired and with full compensation for each date withheld from service."

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.

At the time of her April 27, 2005 dismissal, Claimant Mai Gilliam had more than 29 years of service (some of which was with the Southern Pacific) and was employed by the Carrier as a Utility Clerk. Her primary job was to haul crews to and from trains in the Tucson, Arizona, terminal complex during the 8:00 A.M. to 4:00 P.M. shift using a company vehicle.

By letter dated April 1, the Claimant was notified to report for a formal Investigation on April 4, 2005, to develop the facts and place responsibility, if any, in connection with:

> "Information has been received that while you were on duty and on company time, between the dates of January 20, 2005, and March 30, 2005, there are 21 documented incidents wherein you left company property without proper authority and proceeded to Mid Valley Athletic Club. In addition, you utilized a Company vehicle for your personal use. This is in possible violation of Rule 1.6 Conduct (Dishonest), Rule 1.15 Duty-Reporting or Absence (Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority), and Rule 1.19 Care of Property (Employees must not use railroad property for their personal use), as contained in the General Code of Operating Rules effective April 2, 2000."

Facts developed at the Investigation, which was ultimately held on April 19, 2005, following two postponements, reveal that on March 30, Manager of Administration & Purchasing N. L. Quinn reported seeing the Claimant at the Mid Valley Athletic Club (a Union Pacific system health facility) near the Carrier's terminal at approximately 1:50 P.M. during her working hours. Director of

Terminal Operations J. R. Farmer and Senior Manager of Terminal Operations B. H. Crehan went to the Mid Valley Athletic Club to investigate. They saw the Claimant leaving the club at approximately 2:40 P. M. Crehan asked her what she was doing. She said that she was working out at the gym during her lunch period. The Carrier officers got into their vehicle and followed the Claimant, who, at first, disappeared from sight and was then seen in a sign store using the telephone. The Carrier officers waited until she left the store and then watched her walk hurriedly down a sidewalk to an apartment complex. Observing from their vehicle, the Carrier officers saw the Claimant get into a vehicle, which they identified as a Union Pacific carryall van used at the Tucson terminal. The area in which the van was parked in the apartment complex parking area could not be seen from any location in the club parking lot.

The Carrier officers followed the Claimant back to the terminal. After they arranged for Administrative Supervisor/Chief Clerk W. S. Hauver to bring the Claimant into the office of the Director of Terminal Operations, the two Carrier officers questioned her about her presence at the club. It is significant to note that Mr. Hauver, who was the Claimant's TCU-represented supervisor, remained in the office while the Claimant was questioned about her presence at the club. The Claimant admitted being at the club in a Union Pacific van and said that she was on her lunch period. She acknowledged that the allotted time for the lunch period was 20 minutes. After the Claimant admitted that she was in the wrong and apologized and promised not to do it again, she was permitted to return to work for the remainder of her shift.

The next day, March 31, 2005, the Director of Terminal Operations learned that on 20 additional workdays beginning on January 20, 2005, the Claimant had signed into the Mid Valley Athletic Club during her workday as follows: January 20, 1:19 P.M.; January 21, 2:17 P.M.; January 25, 2:31 P.M.; January 26, 1:04 P.M.; January 28, 1:30 P.M.; February 1, 12:57 P.M.; February 8, 2:02 P.M.; February 9, 1:58 P.M.; February 10, 2:46 P.M.; February 11, 2:05 P.M.; February 17, 1:47 P.M.; February 18, 11:07 A.M.; February 26, 2:19 P.M.; March 8, 1:25 P.M.; March 9, 12:03 P.M.; March 10, 1:09 P.M.; March 11, 1:39 P.M.; March 15, 1:37 P.M.; March 16, 12:58 P.M.; March 23, 1:38 P.M. As a result of this new information, the Director of Terminal Operations again called the Claimant into his office. He handed her a list showing the different dates and times that she had signed into the club and told her that he had to pull her out of service pending a

formal Investigation in connection with her alleged dishonesty. On all 21 days that the Claimant went to the club she signed her department time sheet stating that she had worked eight hours that day.

On Sunday, April 2, 2005, the Director of Terminal Operations and the Manager of Terminal Operations timed the driving time for a round trip from the terminal to the club. Using the shortest route, it took them five minutes and 30 seconds to travel from the terminal to where the Claimant had parked on Wednesday, March 30, 2005. It took them six minutes and five seconds to drive back to the terminal from the parking location. It took two and one-half minutes to walk from the parking place to the front desk of the club and another two and one-half minutes to walk back to where the car was parked. The entire round trip, including the walking time to and from the front desk, took them 16½ minutes. The Manager of Terminal Operations testified that would have left the Claimant a "mere 3 ½ minutes to exercise" if that was her reason for going to the club during her 20 minute meal period.

The Claimant testified that she used a shortcut, and it took her only one minute to walk from where she parked to the club. She stated that she parked at the apartment complex because there had been vandalism in the open parking area near the club. She denied parking where she did so that the Carrier's van could not be seen from the club premises. The Claimant testified that she always notified senior Crew Bus Driver D. Mathes who worked with her whenever she left the premises on her lunch period. She stated that she considered the senior Crew Bus Driver to be her "supervisor." Most of the time, the Claimant testified, she just runs to the club to take a shower. She tries to get back within the 20 minute lunch period, she testified. In her closing statement the Claimant asserted that she did not violate Rule 1.15, prohibiting leaving one's assignment without proper authority, because on every occasion she notified the senior Crew Bus Driver who worked with her that she was going to be absent for a lunch period, and he said that he would cover the business while she was gone. According to the Claimant's testimony, on all occasions other than March 30 she used her private vehicle to go to the club on her lunch period. She denied that she was dishonest.

By letter dated April 27, 2005, Superintendent J. C. Sims notified the Claimant that the charges against her had been proven and she was dismissed from service. On June 20, 2005, the TCU District Chairman appealed the matter to the

Director Labor Relations. By letter dated October 13, 2005, the Director Labor Relations denied the appeal primarily on the basis that ". . . the Claimant admitted to taking the company vehicle without permission."

Upon further reflection, the Director Labor Relations addressed a November 4, 2005 letter to the TCU Allied Services Division President offering the Claimant a leniency reinstatement on a limited basis provided certain conditions were agreed to.

The Claimant rejected the Carrier's November 4, 2005, conditional leniency reinstatement offer and her termination remained in effect. Based on the record before the Board, we conclude that the Claimant would have been wise to have accepted that offer at the time it was made.

The Board reviewed and rejected the procedural arguments raised by the Organization. The Claimant was afforded a fair and impartial Investigation and contrary to the Organization's assertion, the Notice of Investigation was sufficient to adequately apprise her of the charges against her and obviously allowed the Organization to prepare her defense. With regard to the merits, it is significant to note that Administrative Supervisor/Chief Clerk W. S. Hauver, who TCU called to appear as a witness in behalf of the Claimant, did not support the Organization's primary defense that after the Claimant promised not to go to the club during her meal period and promised not to use the Carrier's van for personal use, the two Carrier officers allegedly broke their promise to forgive and forget after allowing her to return to work for the remainder of her shift.

The following colloquy between TCU District Chairman Mojica and Administrative Supervisor/Chief Clerk Hauver appears at Page 64 of the Investigation transcript:

> "Thank you, Wes. Now getting back to that meeting of March 30, with Mr. Farmer and Mr. Crehan, where she admitted fault and promised not to commit the offense again. Just to get the feeling of the actual meeting, did you feel or understand that any charges or as the incident that was brought forth, that she - because she promised not to do it again, that this was an admonishment, it was pretty

much understood that she would return to work and nothing further would be brought against her?

Just that she would return to work."

In Third Division Award 35870 involving a dispute on this Carrier's property, the Board held:

> "As we have said many times, the Board does not sit to weigh evidence and second-guess the Carrier's disciplinary determinations. Instead, our role is limited to reviewing the record developed by the parties during their handling of the matter on the property to ascertain only whether substantial evidence exists in that record to support the Carrier's action. While this record is susceptible to a contrasting interpretation, our review also discloses substantial evidence supporting the Carrier's determination. That evidence permitted the Carrier to conclude that the Claimant was culpable on both charges of misconduct. Given the nature of the falsification charge, dismissal is an appropriate disciplinary penalty notwithstanding long years of service. See, for example, Second Division Awards 8524 and 9432 as well as Third Division Award 31917."

Likewise, in the instant case, substantial evidence supports the Carrier's determination that the Claimant was culpable of misconduct.

That being said, after carefully reviewing the record in this case, including all mitigating circumstances, the likes of which we will not discuss for the sake of brevity, we conclude that the Claimant is to be afforded an additional 30 days following her documented receipt of a copy of this Award to either accept or reject the Carrier's conditional leniency reinstatement offer. Should the Claimant once again reject the Carrier's offer, as outlined in the Director Labor Relations' November 4, 2005 letter, she will remain in dismissed status. However, in the event she now elects to accept the Carrier's conditional leniency reinstatement offer, the Carrier shall take the steps necessary to put the offer into effect.

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 postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of November 2007.