

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39525
Docket No. CL-40117
09-3-NRAB-00003-070387
(07-3-387)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Springfield Terminal Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization that:

- (a) Carrier violated the terms of the Clerks General Agreement, Rules 39, 18, 22, 28 and others, when it assessed an actual suspension of two (2) days, when it found Claimant Beth Brow guilty without proving the charges against her, of claiming one half hour of unauthorized overtime on April 17, 2006, and not reporting for duty at the proper time on April 18 and 19, 2006.
- (b) The Carrier shall compensate Claimant Brow two (2) days pay and remove all reference of the charges against her from her personal work 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 were given due notice of hearing thereon.

By notice dated April 28, 2006, the Claimant was directed to attend a formal Investigation on charges that the Claimant allegedly had claimed one-half hour of unauthorized overtime and had failed to report for duty at the proper time. After a postponement, the Hearing was conducted on June 9, 2006. By letter dated July 5, the Claimant was notified that as a result of the Hearing, she had been found guilty as charged, and that she was being issued a two-day actual suspension. The Organization filed a claim on the Claimant's behalf, challenging the Carrier's decision.

The Carrier initially contends that there is no support for the Organization's position that the scenario involved in this case has been a "past practice" in the Claimant's department for years. It asserts that the Claimant had been given authority to work through her lunch break in the past, but this was in connection with incidents where she approached the Carrier and requested permission to make up missed time by working through her lunch break. The Carrier argues that such a scenario did not occur in the present matter.

The Carrier asserts that it has attempted to work with the Claimant on issues such as reporting to work late, leaving early, and going to personal appointments, but she took advantage of the situation and abused the Carrier's flexibility. The Carrier emphasizes that as a result, the Claimant was instructed, in writing, that she and the Carrier would be strictly adhering to the Agreement's requirements. The Carrier points out that the Claimant's assigned on-duty time is 7:30 A.M., and she had no justification for personally choosing to report for duty at 7:45 A.M. on two consecutive days.

The Carrier further emphasizes that the Claimant knew that she was entitled to a 30-minute lunch break, and that this was her own personal time. The Claimant was not required to refrain from exercising her contractual right to this benefit, and she never was asked or ordered to work through her lunch. As for the alleged "past

practice,” which consisted of working through lunch to make up lost time and adjusting her hours accordingly, this is not relevant to the instant case, which involves an entirely different scenario.

The Carrier then contends that there is no procedural ground for disturbing the discipline issued in this case. It points out that, in accordance with established practice, the notice of discipline was hand-delivered to the Claimant at her work station on July 5, 2006, as documented by the Claimant’s signed receipt and eyewitnesses. Moreover, the Claimant actually served the suspension on July 8 and 9, the 29th and 30th days after the June 9 Hearing. The Carrier asserts that, contrary to the Organization’s position, the Claimant was, in fact, notified of the suspension within 30 days of the completion of the June 9 Hearing, and she also served the discipline within this time limit required for notification.

As for the Organization’s arguments regarding the reference to April 7, 2006, in the Hearing notice, the Carrier contends that this was a typographical error. It asserts that this reference should have been to April 17, 2006, as is made clear by the other dates referenced in the notice and by the Claimant’s time sheets. The Carrier argues that there is no merit to this procedural argument, and no basis for asserting that the Hearing was not fair and impartial.

Addressing the Organization’s assertion that the discipline issued was excessive, the Carrier argues that based on the Claimant’s service record, the two-day suspension was reasonable and appropriate under the circumstances.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier violated Rule 39 of the parties’ Agreement, which governs what information must appear in a Notice of Hearing. The Organization asserts that the notice in this matter identified only three witnesses were to be called, yet a significant portion of the transcript records testimony from a witness who was not identified in the notice. Moreover, the Carrier demonstrated its duplicity by identifying this undisclosed witness on the transcript title page as the “Charging Officer,” instead of as a “Witness.” The

Organization argues that on this basis alone, the Board should find that the Claimant's right to Agreement due process and a fair Hearing were impeached. The Organization emphasizes that the Claimant and her representative had no possible way of preparing for the testimony of the previously undisclosed witness.

The Organization then points out that the instant case was the second of three Hearings against the Claimant in a very short period of time. It argues that the Carrier clearly set out to charge the Claimant with innocuous Rule violations with the intent of assessing more discipline as it proceeded. The Organization asserts that the Claimant obviously was found guilty before the Hearing began.

The Organization goes on to maintain that the Carrier failed to prove the charges against the Claimant, and it assessed discipline against her without regard for the facts. The Organization insists that a thorough review of the record demonstrates that the Claimant did not violate the cited Carrier Rules, nor did she violate any Agreement Rules. The Organization argues that it was inappropriate for the Carrier to allege that the Claimant had violated Agreement Rules in the first place. The Organization insists that the cited Agreement Rules do not address employee conduct, but rather set forth the boundaries for establishing work days and workweeks for positions coming under the Agreement.

The Organization contends that the Claimant was innocent of violating the cited General Conduct Rules. The Organization asserts that the Claimant worked through her 30-minute lunch period on April 17, 2006, and she came in 15 minutes after her starting time on the next two work days in order to compensate. The Organization argues that because the Carrier previously had allowed the Claimant to work flexible hours and compensate for extra and lost time, the Claimant correctly considered her actions to be appropriate. The Claimant believed that she was doing what was proper and fair for the Carrier because she covered the telephones when no one else was available to do so.

The Organization emphasizes that if there was a violation of the Agreement, it was committed by the Carrier, which subsequently altered the Claimant's time sheet and reduced her eight hours and 30 minutes of straight time for April 17, 2006, to eight straight time hours, and reduced the Claimant's total hours for that

week from 40 to 39 and one-half. The Organization maintains that the Claimant therefore paid the Claimant less than allowed for in the Agreement. The Organization then points out that the record proves that the Carrier negotiated with the Claimant to change her working hours, and it did so without contacting the Organization, the party responsible for negotiating the Agreement. The Carrier acknowledged that the job bulletin for the Claimant's position lists the work hours as 8:00 A.M. to 5:00 P.M. with a one-hour meal period, but the Carrier changed the working hours because it needed coverage at 7:30 A.M.

The Organization argues that the Carrier created this situation by allowing the Claimant to adjust her hours without abiding by the Agreement Rules, by allowing the Claimant to use flex hours on previous occasions, and by adjusting the starting time and length of the lunch break for the Claimant's position. The Organization then points out that with regard to the e-mail directing the Claimant to notify her supervisor when she was taking lunch each day so that the phone system would be covered, the Claimant's supervisor actually was on vacation during the time period in question and failed to advise the Claimant whom she should contact in his absence to protect the telephone coverage.

The Organization insists that the Claimant did not claim one-half hour of unauthorized overtime for April 17, 2006. The Claimant did not believe she was doing anything wrong in adjusting the hours to show the 40 hours that she actually worked during the week in question. The Organization points out that the Claimant completed two separate time sheets and asked her supervisor which one should be submitted to Payroll.

The Organization maintains that for reasons known only to the Carrier, it is attempting to make mountains out of molehills by charging the Claimant with issues that previously were acceptable to the Carrier. The Organization argues that the Carrier made an unreasonable, arbitrary, and capricious decision when it imposed a two-day actual suspension upon the Claimant.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Board reviewed the procedural arguments raised by the Organization and finds them to be without merit. The Claimant received the benefit of all Agreement due process rights and the Hearing met all requirements of the Rules.

The Board reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating Carrier Rules, as well as sections of the parties' Agreement when she claimed one-half hour of unauthorized overtime for Monday, April 17, and then did not report for duty at the proper time on April 18 and 19, 2006. It is fundamental that the Carrier is the party that sets the start time and directs the employees in their employment. The Claimant has no right to make adjustments to her own start time. In this case, because the Claimant had had so many problems in the past with respect to showing up for work on time, the Carrier ordered her to strictly adhere to the Agreement's requirements. She had no permission to readjust her schedule on her own and, therefore, violated the various Rules.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant was issued a two-day suspension for her wrongdoing. Given the seriousness of the offense, as well as the Claimant's previous disciplinary background, the Board cannot find that the Carrier's action was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD

Claim denied.

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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 2nd day of February 2009.