

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42072
Docket No. MS-42326
15-3-NRAB-00003-130343**

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

PARTIES TO DISPUTE: (Robin Lambert-Hudson
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(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“I was maliciously and egregiously terminated in June 21, 2012 from Amtrak Riverside Call Center. My medical doctor’s notes were ignored, I was treated extremely unfairly, standard office procedures and protocols were not met and I was treated extremely harsh. Rules were ignored and violated by the Carrier and unethical practices and collusion with the TC Union also.

I also filed grievances with Amtrak Riverside and the National Ethics & Compliance Department long before my unjust termination which I feel added to my unfair Treatment and Wrongful termination. The injustice started from July 2011 and I was not presented before Management until June 2012. I was sick with timely Doctors instructions and Union had permission also took me off the floor and that time was not added back in for my productivity. This has caused me and my family great stress and depravity.

I want my job back and to be made whole for all time lost and seniority status back and malicious participants to be punished.”

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 Petitioner was dismissed from service on June 21, 2012 for violating the Carrier's Special Instructions Governing the Performance of All Riverside Call Center Employees (hereinafter referred to as the "Special Instructions"). The Carrier contends that it met its burden to prove with substantial evidence that the Petitioner was continuously unavailable to take calls at the Riverside Call Center as part of her job responsibilities as a Reservation Sales Agent (RSA). The Carrier contends that the record clearly confirms through the testimony of witnesses and documentary evidence that the Petitioner exceeded the standards of measurement that define how much time an RSA is permitted to be unavailable to take customer calls. The Carrier argues that the Petitioner's extensive disciplinary record – 19 occurrences of discipline – most of which were for the same category of charges – illustrates that progressive discipline had been applied and that leniency had been previously extended.

The Carrier also asserts that several documents and arguments made by the Petitioner were not introduced during the on-property handling of the dispute and, therefore, should be excluded from consideration by the Board.

The Petitioner argues that she followed the acceptable protocols at the Riverside Call Center for those periods when she was away from her work station and, therefore, the calculations used to establish the violations of the Special Instructions are not accurate. The Petitioner maintains that the charges related to dates on which she was called away by her Union Representative should not be considered violations, because the process used was a common occurrence at the Riverside Call Center and that the appropriate Supervisor was notified in advance by the Organization. Therefore, the Petitioner contends that those dates should be excluded from the list of violations. In addition, the Petitioner asserts that she submitted medical documentation in support of her claim that she had a medical condition which confirmed the need for her to be away from her desk for a certain period of time each day. The Petitioner alleges that the Carrier's bias toward her is exemplified when she was charged with violations for the month of November 2011 when she had a daily average of productivity of 97.3% for the month.

The Petitioner also claims that the Carrier engaged in prejudicial and malicious conduct toward her during the disciplinary process. She alleges that the Carrier postponed and cancelled hearing dates without her approval.

In first addressing the Petitioner's allegation of a procedural defect by the Carrier during the on-property Investigation, we find that the contention is unwarranted. There is no evidence in the record that supports the allegation. The postponements were timely and met the applicable notice requirements. Therefore, there is no basis to find that the Petitioner did not receive a fair and impartial Investigation.

In discipline cases, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of its discretion. The record contains substantial evidence that the Petitioner violated the Special Instructions. It is undisputed in the record that the Petitioner was repeatedly unavailable to answer the telephone, which was the primary responsibility of her job function at the Riverside Call Center. The record does not contain reliable evidence to support the Petitioner's affirmative defenses in her attempt to explain the reasons for her time off the phone.

Affirmative defenses must be supported with reliable and credible evidence. The Board has previously held, as stated in Third Division Award 17833, that: "It is a well established principle of the Board that the burden is upon claimants to prove all essential elements of their claim, and that mere assertions are not proof." The proof submitted by the Petitioner regarding her alleged medical condition was both untimely and unreliable. The credibility determinations by the Carrier made with regard to the testimony and medical documents submitted, including the circumstances regarding the Petitioner's request under the Americans with Disabilities Act, cannot be set aside unless there is evidence of bias or prejudice toward the Petitioner. There is no proof in the record of any capricious conduct by the Carrier.

Similarly, there is no reason in the record to overrule the Carrier's credibility determinations regarding the testimony by the Petitioner and the Union Representative pertaining to the allegation that the Supervisor had approved her absence from the work location. It is undisputed in the record that any absence of more than five minutes from a work location by a Riverside Call Center employee requires supervisory approval. There is no evidence of such approval in the record. The testimony by the Union Representative asserting that he obtained such approval is less than credible. When asked for the name of the Supervisor he claimed he could not remember. There is no basis for the Board here

to ignore the Carrier's conclusion that the testimony of the witness was untrustworthy. Further, after numerous disciplinary hearings for similar charges, the Petitioner should have insured that such permission was documented or witnessed before abandoning her post for extensive periods of time, in some cases for more than 20 minutes. In addition, even if the Carrier removed the charges related to the instances on which the Petitioner was away from her desk to meet with her Union Representative, it would only have reduced the total number of violations from 13 to ten.

The Petitioner's extensive disciplinary record contains ample evidence of her previous violations of the Special Instructions in addition to other charges. She has been counseled, reprimanded, and suspended repeatedly for almost every year since 1999. Therefore, there is no basis for the Board here to find the Carrier's discipline excessive or arbitrary. Leniency requests are reserved to the Carrier's discretion. As such, the Board has no basis to modify the Carrier's determination to dismiss the Petitioner.

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 19th day of March 2015.