

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44782
Docket No. CL-45415
22-3-NRAB-00003-190216**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

(Transportation Communication Union/IAM

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

- “1. Carrier violated the Agreement when it improperly dismissed Appellant, (Kaneisha Solomon) from employment as a result of formal hearing held on November 7, 2017; and**
- 2. Appellant shall now be reinstated to service, compensated for all lost wages, overtime and holiday pay, including any other compensation Appellant may have earned during the time Appellant is held out of service; Appellant’s record will be cleared of the charges made in the matter, and all rights, privileges and seniority shall be restored unimpaired; and**
- 3. Appellant shall now be reimbursed for any amounts paid by Claimant for medical, surgical or dental expenses for Appellant and her dependents to the extent that such payments would be payable by the current insurance carriers covering Appellant’s fellow employees in the craft; Appellant shall also be reimbursed for all premium payments Appellant may have had to make in the purchase of substitute health, dental and life insurance; this and the above claims shall be considered as on-going and therefore shall continue until such time as this dispute is settled.”**

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 held the position of Customer Service Representative at the Alexandria Amtrak Passenger Rail Station in Alexandria, Virginia. On July 26, 2017, a retired Amtrak Employee and his wife arrived at the station and wanted to obtain a train ticket using his Employee Rail Pass Privileges for train travel that day. Because of certain restrictions, the privileges were not available that day and they had to purchase the ticket. The wife expressed frustration at having to pay for the ticket, but she paid the \$143.20 owed for the ticket and waited in the station lobby for her train.

The Claimant realized that she could get a better price for the wife utilizing another policy. She retrieved the ticket, cancelled it and upgraded the ticket to Business Class, which allowed the wife to attain a full refund of her money. The Claimant testified that she placed the \$143.20 cash refund into an envelope and gave the envelope and the new tickets to the Retiree while his wife was in the bathroom.

According to the evidentiary record, the wife contacted the Carrier's customer service to inquire whether she was due a refund September 14, 2017. She informed the Station Manager that she had not received a refund and wrote a statement confirming this. On October 17, 2017, the Claimant was given notice of an investigation in connection with the following charges:

The purpose of this investigation will be to develop the facts and determine your responsibility, if any, in connection with the following specification(s) and charges:

Charge One: Alleged Violation of the Amtrak's Standards of Excellence specifically the part entitled "Attending to Duties" which reads in pertinent part,

"Amtrak's success depends on using all available resources in the most efficient and productive way possible. As an Amtrak

employee and, therefore, the company's most important resource, you have an obligation to perform. Your duties properly and in accordance with the standards set for your particular job."

Charge Two: Alleged violation of the "Trust and Honesty" standard in Amtrak's Standards of Excellence, which read in pertinent part:

"Because honesty is so important to trust and our ability to work together as a team, Amtrak has no tolerance for employees who are dishonest. Specifically, none of us has the right to use of take for our personal gain any funds, property of services belonging to the company, our coworkers or our customers. Remember that taking anything that is not yours, no matter how small the value is stealing and, therefore dishonest."

Charge Three: Alleged violation of Amtrak's Departmental Policy and Procedures specifically the part entitled "Reservation, Ticketing, Passenger Service and Station Policies", Station Accounting Procedures sub heading Handling Station Documents which reads in pertinent part:

"It is mandatory that the first and last name of the person applying for a refund, and the type of ID (not ID serial number) presented, be typed or written onto the Refund Transaction Record. It is not acceptable to omit any portion of this information additionally; the signature of the person must appear on the Refund Record document after the document has been produced."

Specification One: On July 26, 2017, it is alleged that while working as an Amtrak ticket agent, you sold an Amtrak retired employee's spouse a train ticket from Alexandria, Virginia to Spartanburg, South Carolina for a cash sum of \$143.20. The Arrow system showed that a cash refund was issued in the amount of \$143.20 on the same day of travel; the retired employee's spouse never received the refund.

After a formal investigation on November 7, 2017, the Claimant was found guilty of all charges and was dismissed from the Carrier's service.

In a letter dated December 1, 2017, the Organization appealed the Carrier's discipline. The Carrier denied the appeal in a letter dated April 25, 2018. Additional information was obtained during the appeal process. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Carrier contends that it has presented substantial evidence of the Claimant's rule violations. The Carrier contends that the facts adduced at the investigation establish that the Claimant stole money from a customer and failed to comply with the Carrier's policy in the handling of a refund. The Carrier contends that the purported evidence offered in opposition was not credible. The Carrier contends that the Hearing Officer's credibility determination should not be disturbed by this Board. The Hearing Officer credited the wife's testimony and determined that the Claimant was culpable of rule violations.

The Carrier contends that the Claimant was provided a fair and impartial hearing. The Carrier contends that its first knowledge of the Claimant's violation occurred when the retiree's wife alleged that she had not been given her refund. Thereafter, an investigation was conducted, and the Claimant was charged within the time limits of the Agreement. The Carrier contends that the Organization raised this version of its time limits argument for the first time in its submission to the Board, preventing it from providing a full response. The Carrier points out that the only timeliness argument raised in the on-property handling was that the timeline began to run in July when the ticket was issued, and that the Carrier showed that it had no knowledge of the incident until the customer complained. The Carrier further contends that even if the Organization's argument that the Carrier's first knowledge was in September is accepted, the delay was no more than a few days and the Organization has not shown that the Claimant was prejudiced in any way by this minor delay. Finally, the Carrier contends that the Organization made this objection at the hearing but abandoned it during the appellate process.

The Carrier contends that dismissal is the appropriate remedy, as the misappropriation of funds is a dischargeable offense in nearly every industry. This is especially true when the theft is from a customer. Furthermore, the Claimant's disciplinary record justified her discharge.

The Organization contends that the Claimant was denied a fair and impartial hearing as she was charged more than thirty calendar days after the Carrier had knowledge of the alleged violations. Article VI(1)(d) provides:

...A letter of intent to impose discipline shall not be issued to an employee for any offense of which the corporation has had actual knowledge thirty (30) calendar days or more, except where a civil action or criminal proceeding results from the offense, in which event the letter of intent to impose discipline may be made within thirty (30) days of the final judgement.

The Organization contended that the alleged offense took place on July 26, 2017, and the Carrier placed in the record that it had actual knowledge of the incident on September 14, 2017, but waited until October 17, 2017, to issue its Notice of Formal Investigation. Thus, the Organization contends that the Carrier waited 33 calendar days before issuing a Charge Letter, in violation of the parties' Agreement.

The Organization contends that the Hearing Officer was not fair and impartial when she failed to give appropriate weight to the Claimant's and her coworker's testimony. The Organization contends that the primary witness' testimony was not credible as she could not recall material facts from the day of the incident.

The Organization contends that the Carrier has failed to meet its heightened burden of proof. The Organization contends that the Carrier failed to prove that the Claimant was dishonest or that she intended to deceive the Carrier. The Organization contends that the Carrier refused to investigate evidence that would have exonerated the Claimant.

The Organization contends that even if discipline was warranted, the penalty of dismissal is excessive. The Organization contends that the excessive penalty was the result of the Carrier prejudgment of the Claimant in advance of the charges.

The Organization raised several procedural objections, including that the charges were untimely. In response to the Organization's objection at the Investigation hearing, the Carrier placed into the record that its first knowledge of the alleged violation occurred on September 14, 2017, when the wife contacted the customer call center to say that she had never received her refund. The Carrier notified the Claimant of the investigation in a letter dated October 17, 2017.

The Carrier acknowledged that the charges were filed more than 30 days after the Carrier's actual knowledge but argues that the Organization raised this issue for the first time in its submission to this Board. But the Organization objected at the Investigation hearing that the charges were untimely. While it initially asserted that the

Carrier's first knowledge occurred in July when the ticket was sold, the Carrier responded on the record that it had documents showing that it was first contacted on September 14, which was then described as "the date of knowledge." the Organization acknowledged that September 14 was the date of first knowledge in its submission to this Board. From the outset, the timeliness of the charges was discussed. The Carrier had ample opportunity to respond to the Organization's assertion that the charges were untimely after the Carrier introduced the September 14 date into the record.

The Carrier also argued that the charges were only a few days late and that the Organization has failed to show how the minor delay prejudiced the Claimant, citing Board precedent. However, the precedent cited by the Carrier addressed a post-hearing delay, which is materially different than a pre-hearing delay, which prejudices the underlying Investigation. *See, e.g.,* Third Division Award 37054. Boards in this Division have consistently held that time limits negotiated by the parties must be respected. For example, Award 720 of SBA 973, which involved these parties and interpreted this same Agreement, states, "We are required to enforce the Agreement and not to ignore or rewrite the Agreement by way of Awards."

The importance of time limits, especially with respect to those which apply prior to an Investigation, has been consistently recognized.

Every Division of this Board has attempted, through its decisions to be meticulously accurate and consistent in applying time limits as written in the Schedule Agreement. The parties in this industry are fully aware of the Board's position on adherence to time limits and the majority of claims have no time limit problems.

Third Division Award 23553. *See also,* Third Division Award 18354, "Therefore, Carrier not having served the charge on the Claimant within the contractually prescribed time limitation, the investigation proceedings which are the subject matter of this dispute are void *ab initio*." Whether the charges are one day late or several days late, the parties' Agreement states unequivocally that the charges may not go forward. Numerous Boards have held that time limits must be strictly construed and even one day late is noncompliant. *See, e.g.,* Award 3 of Public Law Board 2960.

Additionally, Boards have rejected arguments that a claimant must show prejudice from the delay, instead agreeing that it is the obligation of the Board to follow the agreements as written.

That is a bargained for right of an employee subject to discipline. In the instant case the employee being subject to discipline lay claim to that right at the outset of the hearing. While holding the parties to the time limits set out in their agreements may from time to time work an injustice for either a carrier or claimant, we must apply the agreements as written and not by case law create exceptions which have not been agreed on by the parties.

The Carrier failed to serve charges on the Claimant within 30 days of actual knowledge of the offense, making the investigation *void ab initio*. Accordingly, this case must be sustained on the basis of the failure to adhere to the contractual time limits. The merits of the claim will not be reached.

In accord with precedent on this property, the Claimant is to be reimbursed the difference in wages and benefits which would normally have been paid less any interim earnings, including unemployment compensation; her seniority and all other rights to be unimpaired.

AWARD

Claim sustained.

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 6th day of September 2022.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 44782 – Docket 45415

(Referee Kathryn VanDagens)

Amtrak dissents because the Majority's decision is based on an argument that was not articulated by the Organization until its submission before this Board. Although the Organization raised a timeliness argument during the investigatory hearing, the theory advanced before this Board was never raised on-property and the Organization abandoned any time limit argument during the appeal process.

During the investigatory hearing, the Organization argued Amtrak violated time limits because charges were issued more than 30 days from the July 26, 2017 incident. Amtrak managers testified that they had no knowledge of the incident until the customer complained and the September 14, 2017 date of that complaint became part of the record. At that point, the Organization did not take issue with charges being filed more than 30 days from September 14, 2017. We do not know the reason the Organization did not take issue in this respect - perhaps conversations between the Charging Officer and Local Union Representatives led to said delay in charges being authorized. The Board should have concluded the Organization did not carry the original objection on appeal due to never taking any issue with the matter. Finally, there is no indication in the record that the Organization ever objected to Amtrak's affirmative statement and contention that the charges were timely.

The record does show that the Organization vigorously appealed the discipline assessed. It attempted to present additional witnesses after the investigatory hearing and had numerous communications with Amtrak Labor Relations officials. Even assuming the Organization initially simply forgot to take issue with the timeliness matter, it is clear from a review of the record the Organization had additional opportunities to further explain any objections related to time limits and it simply did not. Amtrak relied on the Organization's apparent abandonment of the argument. As stated by Arbitrator Wallin in *Public Law Board No. 6189, Award No. 65*, "[w]hile no lengthy restatement of a procedural objection must be made at every appeal stage, there must be some . . . indication that the objection has not been abandoned." Here, there was no such indication or even a hint the Organization believed the charge date was improper based on the assertion of September 14 first knowledge date.

By allowing the time limit issue to be raised nearly five years later, under a different theory, this Board placed the Carrier at a disadvantage in responding to the issue and went against precedent on this matter. The parties did not have the proper opportunity to discuss the time

limit issue. This award will be cited by any party wishing to raise meritless procedural objections early in the process in the hopes that a more skilled advocate will be able to articulate a better argument in front of this Board. This award must be given no precedential value based on the facts outlined above.

For these reasons, the Carrier respectfully dissents.

Angela Heverling

**Angela Heverling
Carrier Member**

Kristin C. Beckner

**Kristin C. Beckner
Carrier Member**