

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2406

NATIONAL RAILROAD CORPORATION (AMTRAK)
-and-
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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* Case No. 53
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* Award No. 53
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Public Law Board No. 2406 was established pursuant to the provisions of Section 3, Second (Public Law 89-456) of the Railway Labor Act and the applicable rules of the National Mediation Board.

The parties, the National Railroad Passenger Corporation (AMTRAK, hereinafter the Carrier) and the Brotherhood of Maintenance of Way Employes (hereinafter the Organization), are duly constituted carrier and labor organization representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

After hearing and upon the record, this Board finds that it has jurisdiction to resolve the following claim:

"The Carrier violated the effective agreement dated May 19, 1976, on June 29, 1981 by unfairly, improperly, and without just cause dismissing Claimant Carl Smith from service.

Claimant Smith shall be reinstated to service, the discipline removed from his record, compensated for all wages lost, and returned with seniority and benefits unimpaired."

Background Facts

Mr. Carl Smith, hereinafter the Claimant, entered the Carrier's service on July 15, 1976. At the time that the incidents arose which gave rise to the Claimant's dismissal he was working as an Engineer Work Equipment "B" on the Carrier's New York Division.

On April 16, 1981 a notice of investigation was sent to the Claimant which stated that he had allegedly violated a Carrier Rule of Conduct regarding dishonesty in that he had allegedly been responsible for charging numerous personal toll calls between the dates of December 16, 1980 through January 13, 1981 to Carrier phone numbers.

The investigation scheduled for April 30, 1981 was postponed on several occasions and was finally conducted on June 18, 1981. The trial was conducted in absentia. There is no evidence in the record to establish that the Claimant did not receive the original notice of investigation or the subsequent rescheduling notices.

As a result of the investigation, the Carrier determined that the Claimant was guilty of the offenses charged and dismissed him from service effective June 19, 1981. The discipline was appealed and is now before this Board.

Position of the Carrier

The Carrier contends that it relied upon substantial and probative evidence which establishes that thirty-four telephone calls were made from the Claimant's personal telephone and improperly charged to different Carrier telephone numbers in the Carrier's Pennsylvania Station facility. The Carrier contends that documentary as well as testimonial evidence supports its position.

The Carrier also contends that the charges were timely filed against the Claimant as it was not until the telephone bills were received on April 13, 1981 that the Carrier was in a position to bring charges against the Claimant. The Carrier also argues that the Organization's contention that the charges were not timely filed was, itself, not timely presented on the property. Thus, the Carrier contends that the procedural objection by the Organization should be dismissed.

Finally, the Carrier contends that the penalty of dismissal is commensurate with the seriousness of the offense of dishonesty. The Carrier also points out that the Claimant's prior disciplinary record has an indication that the Claimant has been previously suspended for insubordination. In light of the seriousness of the offense and the Claimant's prior disciplinary record, the Carrier contends that his claim should be denied.

Position of the Organization

Initially, the Organization contends that the Carrier violated the procedural requirements in the agreement that charges must be preferred within fifteen days of the offense. The Organization contends that the last telephone call which the Claimant is being charged with improperly having debited to the Carrier's phone numbers occurred on January 13, 1981 and the Carrier did not charge the Claimant with such offense until April 13, 1981. Therefore, the Organization contends that the charges were not timely filed and the claim should be sustained on this basis.

Secondly, the Organization contends that the Carrier improperly introduced into the record the Claimant's prior disciplinary record. Specifically, the Organization argues that there were elements on the Claimant's prior disciplinary record which had been expunged but that those facts were not reflected in the documentation presented to the reviewing officers.

Thirdly, the Organization contends that the Carrier's entire case is built on circumstantial evidence. The Organization argues that there is no hard proof to establish that the Claimant was responsible for the charging of phone calls to Carrier phone numbers in the Pennsylvania Station facility. The Organization argues that there is no showing

that the Claimant made the telephone calls in question and that there is no verification that the Claimant was responsible for any of the alleged improper conduct.

Accordingly, the Organization requests that the Claimant be restored to service and be made whole for all pay and benefits as well as lost seniority.

Findings and Opinion

At the outset we note that the Claimant has not contended and has not proven that he was not given proper and adequate notice to attend the investigation regarding the charges. That investigation was conducted in the presence of the Claimant's Organization representative. At the investigation the Carrier presented substantial evidence to establish that numerous telephone calls, made from the Claimant's home telephone number, were charged to Carrier offices in the Pennsylvania Station facility. The Carrier also presented evidence at the investigation that one of the phone numbers charged to the Carrier's lines was traced to a Ms. Aretha White in Trenton, New Jersey and that when Ms. White was contacted she acknowledged that she knew the Claimant. Although the Organization has submitted an affidavit from Ms. White denying that she knew the Claimant, the

Carrier was justified in relying upon the verification performed by its Chief Operator establishing that Ms. White, in fact, did know the Claimant. While this Board recognizes that much of the evidence against the Claimant is of a circumstantial nature, in the realm of labor arbitration it is not necessary that proof of a charged offense reach the level of "beyond a reasonable doubt" or that all proof be of a non-circumstantial quality. In a case of the type before this Board, it would be ridiculous to require the Carrier to develop "eye witness" evidence. It is not reasonable to expect that the Carrier could hear or observe the Claimant improperly charging telephone calls except in the most unusual of circumstances. The Carrier relied upon appropriate documented evidence and the evidence establishes a clear nexus to the Claimant. Accordingly, we find that the Carrier has met its burden of proving that the Claimant violated a Carrier Rule regarding dishonesty.

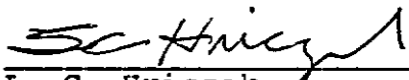
The Board also finds that the Carrier acted within the prescribed time limits of the agreement when it charged the Claimant on April 13, 1981. As this Board has previously ruled, charges are to be preferred within the time limits of the agreement subsequent to the time that the Carrier has reasonable notice of an alleged infraction. The Carrier has met the test here and this Board will not sustain the claim

on procedural grounds.

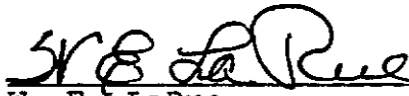
Finally, we do not find that the Carrier improperly relied upon the Claimant's prior disciplinary record which included an offense which had been previously expunged. The Carrier had the right to dismiss the Claimant from service for the instant offense. Dishonesty is a sufficiently serious offense to merit dismissal in its own right. In any event, the Claimant's prior disciplinary record was less than perfect and the Carrier has not been shown to have acted arbitrarily or in an overly severe manner when it dismissed the Claimant from service.

Accordingly, the claim will be denied.

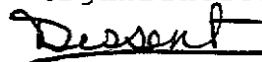
AWARD: The claim is denied.



L. C. Hriczak,
Carrier Member



W. E. LaRue,
Organization Member



Dessant



Richard R. Kasher,
Chairman and Neutral Member

August 3, 1985
Philadelphia, PA