Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7955
Docket No. 7757
2-L&N-SM-'79

The Second Division consisted of the regular members and in addition Referee Abraham Weiss when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
(Louisville and Nashville Railroad Company

Dispute: Claim of Employes:

1. That the Louisville and Nashville Railroad Company violated the controlling agreement, particularly Rule 34, and Article V(a) of Carrier's Proposal No. 7, when they unjustly dismissed Sheet Metal Workers J. L. Bradley and M. E. Baugus from service beginning November 19, 1976.

2. That accordingly, the Louisville and Nashville Railroad Company be ordered to compensate Sheet Metal Workers J. L. Bradley and M. E. Bangus beginning November 19, 1976, as follows:

    a) Restore them to service with all seniority rights unimpaired.

    b) Compensate them for all time held out of service;

    c) Make them whole for all vacation rights;

    d) Pay hospital association dues or insurance for all time out of service;

    e) Pay the premiums for Group Life Insurance for all time out of service;

    f) Pay them for all holidays;

    g) Pay them for all sick pay;

    h) Pay them for all insurance premiums;

    i) Pay them for all jury duty lost.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 Claimants were cited for investigation and dismissed after being found guilty of the following charges:

> "You are charged with absenting yourself from your assigned duties for an undetermined period of time, November 18, 1976.
>
> You are charged with unauthorized entry into Union Station, Nashville, Tennessee, November 18, 1976.
>
> You are further charged with the unauthorized removal of five marble slabs from Union Station, Nashville, Tennessee, November 18, 1976."

On November 20, 1976, both Claimants were notified by letter from J. B. Sellers, Superintendent, of their dismissal from the Company's service, effective that day. Both letters were delivered that day to the Claimants, one at about 2:30 p.m.; the other at 6:40 p.m.

The parties requested a hearing, which was held at the offices of the National Railroad Adjustment Board on February 27, 1979, with Division Members and the Referee in attendance.

The events which gave rise to the aforesaid charges may be summarized as follows:

Shortly after the start of their shift on the day of the incident, Claimants were sent to the Union Station at Nashville, Tennessee to make repairs to the AMTRAK watering facilities, using Mr. Bradley's truck to transport themselves and tools.

In response to a call from Lead Ticker Clerk Woodward that he had heard unusual noises in Union Station, which had been locked up, General Inspector Special Services O'Brien arrived at Union Station at about 1:40 p.m. and found Claimants standing at the rear of the truck, the waiting room window propped up by a 3-4 foot length of pipe, and inside the truck, 5 pieces of marble slab which had been pulled loose from the Union Station walls.

Claimants' testimony was that after completing the repairs they had been assigned to make and loading a water pump onto the truck, they noticed one window open approximately 2-3 inches. They entered the ticket office to get a key to enter the Station in order "to check out and examine some old radiators that could be used in the outside pit at Radnor", their regular work site. Claimants stated that there had been discussions prior to this date between them and their foreman on the need for more heat at Radnor; hency, their check of radiators to supply that need.

Claimants testified they found no one at the ticket office and since the window in question was already partially open, they raised it further so as to inspect the radiator right under the window. In doing so, they also observed 5 pieces of marble just inside the window, concluded that someone intended to remove the marble, and decided to put the marble in the truck to turn it in to a proper Carrier authority. It was at that point that Inspector O'Brien approached them and discovered the marble inside the truck.

Both Claimants denied entering Union Station. Neither Claimant received permission to open the window or to remove the marble.

Both at the hearing and in the progress of this case on the property, the Organization raised a number of procedural issues, which we shall address first.

1. The Organization argues that the claim is allowable as presented because the Carrier failed to decline the claim within 60 days of its initial filing. The Carrier retorts that that the claim was never received.

The record shows that on December 20, 1976, the date Claimants' dismissal was effective, the Organization's General Chairman wrote to Master Mechanic Harris, the Hearing Officer at the formal investigation, protesting the "way this Investigation was handled. It was not a fair and impartial investigation for the following reasons: ...". The letter requested "that these men be given another investigation or they be returned to work with pay for all time lost". Master Mechanic Harris replied by letter dated January 25, 1977, in which he declined "the request made in your letter of January 20, 1976".

On December 30, 1976, the Organization's Local Chairman wrote to Superintendent Sellers. The text of that letter was an exact duplicate of the General Chairman's letter of December 20 to Master Mechanic Harris. On March 14, 1977, the Local Chairman wrote to Superintendent Sellers that he had received no answer to his December 30 letter and that under the Agreement, claims or grievances not disallowed within 60 days are to be allowed as presented. He then stated:

> "I did not receive an answer to my claim concerning Mr. Bradley or Mr. Baugus therefore I would appreciate it if these men were put back to work at onece with all pay for time lost."

On March 16, 1977 Superintendent Sellers replied that he did not receive the Local Chairman's December 30, 1976 letter and, therefore, was not in violation of the time limitations.

We thus have a situation in which the Organization's General Chairman wrote to the Master Mechanic 10 days prior to an identical letter addressed to the Superintendent by the Local Chairman. In a letter dated June 27,

1977 to Carrier's Chief Mechanical Officer, the General Chairman described his December 20, 1976 letter as "not an appeal to the hearing but a protest to the way it was handled and to state my views that it was not a fair and impartial investigation...".

The Organization's raising of alleged procedural irregularities in turn engender further questions, which will be touched on briefly. At the first step of the grievance procedure, the participants are the Local Chairman and the Master Mechanic. But the December 20, 1976 letter was addressed by the Organization's General Chairman to the Master Mechanic. The December 30, 1976 letter, on the other hand was addressed by the Local Chairman to Superintendent, rather than to the Master Mechanic. Thus, the Organization's progressing of the dispute appears not to comply with the prescribed steps of the grievance procedure.

The Organization further maintains that the General Chairman's December 20 letter was not a claim but a protest, and that the Local Chairman's December 30 letter constituted a claim to which Carrier did not respond within 60 days, and, therefore, the claim should be allowed. Given that the Local Chairman's December 30 letter is a verbatim copy of the General Chairman's December 20 letter, we find it difficult to distinguish between them, i.e., to characterize the later letter as a "claim" and the earlier one as a "protest".

The Local Chairman's "claim" was made before Carrier's January 25, 1977 reply to the General Chairman's December 20 letter to the Master Mechanic, management's representative at the first step of the grievance procedure. Under the rules, appeals to the next step in the grievance procedure may not be taken before the grievance, claim, or protest has been declined at the prior step, within the prescribed time limit.

With respect to the charge that the claim should be allowed because a declination was not given within the prescribed time limit, and Carrier's assertion that it never received the Local Chairman's December 30 letter, this Board has been faced in the past with claims by one or the other party that claims or replies were never received by the party for whom intended. In similar cases the Board has held that the burden is on the charging party to show that the claim (or reply) was sent (and received). In the instant case, we have an assertion that the December 30 letter to Superintendent Sellers was sent, but no rpoof. We are guided by the Board's opinion in Third Division (Supplemental) Award 11505 (Dorsey) which states:

> "... If the addressee denies receipt of the letter then the addressor has the burden or proving that the letter was _in fact_ received. Petitioner herein has adduced no proof, _in the_ record, to prove _de facto_ receipt of the letter by the Carrier.
>
> The perils attendant to entrusting performance of an act to an agent are borne by the principal." (Emphasis in original)

In short, claims are filed when received by the Carrier.

2. The Organization argues that the charge was not precise nor was a rule violation cited. A review of the charges, quoted verbatim supra, reveals that they were sufficient to allow the claimants to prepare a defense. Claimants were apprised of the precise charges against them with copy being furnished their Local Chairman.

The Board has also decided that it is not necessary that a specific rule be set out in the notice of charges and investigation. See Third Division Awards 18903 (Ritter), 11170 (Coburn) and 11443 (Dolnick).

3. The Organization also alleges that the hearing was not fairly and impartially conducted in that, for example, no employee witnesses were called; the Organization's objections were never recorded; the Hearing Officer denied it the right to use a tape recorder; and the Hearing Officer allowed Carrier witnesses to read their testimony.

The transcript of the investigation, included in the record before us, shows the signatures of both Claimants, the Local Chairman and the General Chairman.

Both Claimants answered in the affirmative to the question: "Was the investigation conducted in a satisfactory manner to you?"

The record also contains a letter dated January 25, 1977 by the Hearing Officer, Master Mechanic Harris to the General Chairman, which addresses itself, in part, to the calling of witnesses in the Claimants' behalf:

> "At 7:00 a.m., December 2, 1976, Local Chairman Garland gave me a list of people he wanted for witnesses in behalf of Messrs. Bradley and Baugus. Each of these witnesses was working on the first shift on this date. Local Chairman Garland stated to me that he was 99% sure he would not call these witnesses to testify. I contacted each of these witnesses and told each one to stay ready to testify if they were called to do so by the accused, that I would notify them to come to the Division Office Building to testify in behalf of Messrs. Bradley and Baugus.
>
> After all the company witnesses had testified at the investigation, I made this information known to the accused and the committee. At this time I asked the accused if they were ready for their witnesses to testify and you, at this time, asked for a 30-minute recess. Messrs. Bradley and Baugus stated that they did not want a recess and would like to make their statements at that time. At this time I told Messrs. Bradley and Baugus and the committee that if they wanted the witnesses after Messrs Bradley and Baugus made

"their statements to let it be known and I would call the witnesses at that time. After Messrs. Bradley and Baugus made their statements, neither of these men nor the committee asked for these witnesses."

The Board has held many times that objections as to the fairness of a hearing must be made at the hearing, else they are waived. The record does not reflect that this objection was registered at the hearing, therefore, it is waived and cannot be heard by this Board.

We find that the Claimants were accorded a fair and impartial investigation and that they so indicated at the hearing. Accordingly, we find no prejudicial error adversely affecting Claimants' rights under the Agreement.

Reduced to its essentials, the Claimants' defense was that they placed the marble slabs in their truck because of their belief that someone would take them and they intended to turn over the marble to an appropriate Carrier official in order to protect the Carrier's property.

But the defense falls in light of Inspector O'Brien's statement at the investigation, reporting on his conversation with one of the claimants: "I asked him what he was going to do with these marble slabs and he said that he had planned to use them for his personal use".

The Hearing Officer did not find Claimants' account credible. It is not the function of this Board to assess credibility or to resolve conflicts in testimony. To do so is the Hearing Officer's role. The Board's proper function in discipline is to determine if there was substantial evidence to uphold the Hearing Officer's decision; i.e., was there enough evidence, if believed, to support the finding. There was no reason for the claimants to have the marble slabs. If their intention was to protect the marble from theft, they could have secured the window and reported the matter to appropriate authorities. As we have stated before, unexplained possession of Carrier's property is sufficient evidence to prove wrongdoing.

The offense charged was not trivial but serious, for which dismissal has often been upheld by this Board.

The hearing and investigation record in this case support a finding that the Claimants were guilty of the charges filed. The discipline imposed was commensurate with the seriousness of the offense and was not excessive. The Organization has offered no evidence of probative value to disprove the testimony of Carrier's witnesses, including an admission by one of the claimants to Inspector O'Brien that he intended to use the marble for his own use. That admission was not renounced or challenged when the Claimant testified in his own behalf.

The Board will not interfere with a decision where there was sufficient or substantial evidence. We are without authority to upset that decision.

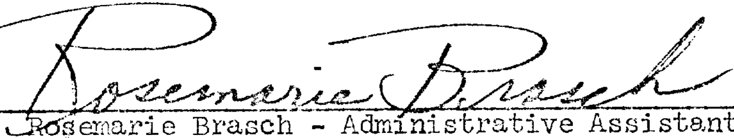
Accordingly, we will deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board



By ________________________________
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of June, 1979.