Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12197
Docket No. 11979-T
91-2-90-2-80

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Sheet Metal Workers International Association
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(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. The Chicago and North Western Transportation Company violated the provisions of the current and controlling agreement, when they failed to answer a properly submitted time claim, within the time limits.

2. The Chicago and Northwestern Transportation Company violated the provisions of the current and controlling agreement when on or about January 3, 1989 they began assigning other than Sheet Metal Workers the work of building, assembling, erecting and installing lighter than 10 gauge sheet metal lockers.

3. That accordingly, the Chicago and Northwestern Transportation Company be required to compensate Water Service Engineering Department Sheet Metal Workers J. Dennison, J. Valle, C. Blanco, and R. Waters in the amount of nine-hundred and twelve (912) hours at the pro rata rate, equally divided between them.

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 employes 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 waived right of appearance at hearing thereon.

As Third Party in Interest, the Brotherhood of Maintenance of Way Employes was advised of the pendency of this dispute and filed a Submission with the Division.

On February 23, 1989 the Local Chairman of the Organization filed a claim with the Carrier on grounds that provisions of the Agreement had been violated when the Carrier assigned other than members of the craft to build, assemble, erect and install light gauge sheet metal lockers. The non-Agreement employees doing this were allegedly some of the Carrier's Proviso Diesel Ramp employees. On May 16, 1989 a second letter was sent by the Organization to the same Carrier supervisor in the ADM-Engineering Department in West Chicago with allegation that the Carrier had missed the time-lines for denying the original claim. Request was made for payment of the claim. On June 12, 1989 the Carrier's Manager of Personnel and Records responded to the Organization with information that the Carrier was "unable to fin(d) a record of (the original claim) in any of (its) offices." The letter also stated that before the West Chicago office had been closed and records moved to the Chicago office a "complete search was made for the February 23, 1989 letter" and it was not found. The June 12th letter also stated that:

> "On a one-time non-referable basis, I am willing to allow you to send a copy of the February 23, 1989 letter so that a search can be made as to the validity of the claim and on both our parts a new 60 day limit for response can be allowed."

This proposal was rejected by the Organization on July 5, 1989 on grounds that Article V of the Agreement had been violated when the Carrier missed the 60 days time lines in answering the original claim. On August 29, 1989 the Manager of Labor Relations then denied the claim by stating simply that: "I have reviewed the facts in this case and I find that your claim does not have merit." After additional appeal further declination by the Carrier was issued in which the Carrier stated the following:

> "A review of the file shows that there is a time limit violation in evidence. The initial appeal of this claim was not received by the former Eastern Division within the time limit prescribed in the schedule rules and agreements."

The Board must rule on the time-limits issue prior to addressing the merits of the instant claim.

As moving party the Organization must meet the test of substantial evidence. The latter has been defined, for arbitral purposes in this industry, as:

> "as relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229)."

First of all, the record contains a detailed exchange of correspondence between the Claimants and the General Chairman of the Organization under date of February 6, 1989 outlining, with supporting materials, allegations that the rule infractions had started on January 3, 1989. The pertinence of these

materials in the record is not disputed by the Carrier. It was shortly thereafter, on February 23, 1989, that the Organization states that it first filed claim on the alleged infractions. The original claim letter, in the record, details both the circumstances and the Rules at bar. In view of internal evidence it is reasonable to conclude that a claim would have been filed when the Organization states that it, in fact, did so. The Carrier's letter of June 12, 1989 states that a move of all files had been made, at an unspecified date, but certainly between February 23, 1989 and the date of this letter, from West Chicago to Chicago and that the original claim could not be found. This letter then requests that a "copy" of (the original letter) be re-sent (so that) the "validity of the claim" could be determined. Why would the Carrier request a "copy" of a document if it doubted the latter's existence? Further, the Carrier argues that the Organization ought to have sent the original claim by registered letter, which it had not, as it had done all subsequent correspondence on this case. This latter is not factually true. The Organization cites a piece of correspondence to the Carrier under date of September 6, 1989 requesting a conference on the claim which was also sent by regular surface mail. Such is never factually disputed by the Carrier. Nor is there evidence of record that the parties ever had a past practice of forwarding claims, appeals, or declinations to each other by registered mail.

The record as a whole shows considerable confusion on the part of the Carrier with respect to the time-limits' issue in this case. Its initial reaction is request of a "copy" of claim it states it cannot find because of a physical move of its files; its next declination is vague and is without any rationale as the Organization correctly underlines; its December 8, 1989 declination, cited in the foregoing, contains obtuse logic at best; its understanding of the facts relative to how all correspondence was forwarded is faulty; and lastly the Carrier's own file on this case which it submitted to this Board contains, inexplicably, only the one June 12, 1989 first letter of response to the allegation of the time-lines' violation. The rest of the Carrier's file accompanying its Submission to this Board is devoted to cites of arbitral precedent. Evidence of record is more persuasive that the position of the Organization, rather than that of the Carrier, is more correct in this case. The Board must rule accordingly. On basis of such conclusion the Board need not address the merits of the claim.

It is unclear from the record exactly how long it took the non-craft employees to do the work at bar. Arguments by the Carrier about the exact amount of time needed to do the work, according to its calculations, gets mixed in during the exchanges on property with alleged offers and counter-offers of settlement. Settlement offers are not properly used by this Board in framing conclusions (Third Division Award 25107; Fourth Division Award 3298, Public Law Board 3840, Award 14) but in this case they provide insight, albeit somewhat vague, about the amount of work actually in question. On basis of information of record, the Board rules that reasonable compromise on relief shall be one third of the hours cited in the original claim. The four (4) Claimants shall each be compensated, at pro rata rate, one fourth of three hundred and four (304) hours, or seventy-six (76) hours each.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of December 1991.

CARRIER MEMBERS' DISSENT
TO
AWARD 12197, DOCKET 11979-T
(Referee Suntrup)

The major fault in this decision is that the Carrier is held responsible for not responding to an asserted claim that it never received.

The Majority indicates that the Local Chairman submitted a claim dated February 23, 1989; that there was a detailed exchange of correspondence between the Claimants and their representative dated February 6, 1989 concerning this alleged infraction which apparently was made part of the initial claim; and that, "in view of internal evidence it is reasonable, to conclude that a claim would have been filed..." But the leap in logic from the possibility of "would have" to the factual "a claim was filed" travel us, at best, into the land of the incredulous and illogical.

None of this meets the test of substantial evidence that the Majority notes at page 2 is required of the Organization, as the moving party, that a February 23, 1989 claim was in fact submitted to the Carrier, to which it did not timely respond.

On the property, in response to the first piece of correspondence from the Organization, Carrier advised it had NO record of the alleged February 23, 1989 claim in any of its offices; that subsequent to receipt of the Organization's May 16, 1989 letter, a complete search was made at the West Chicago offices and there was no record of such a claim being received; NO EVIDENCE WAS EVER SUBMITTED PROVING THAT THE FEBRUARY 23, 1989 CLAIM WAS

FILED. In Third Division Award 28204, the responsibility of proof was stated:

> "...the sender of the appeals letter has the burden of proving that the letter was conveyed within the applicable time limitations. In Second Division Award 10157, which addressed an analogous situation...the Division ruled that the sender of the letter, of necessity, was responsible for proving that communication was sent within the required time limits."

See also Third Division Awards 27886, 23416, 20763; Second Division Award 7591.

In addition, Carrier noted that much of the Organization's correspondence had been sent certified mail. While such an observation was not meant that the Organization was required to use certified mail, but that it was unusual that most of the correspondence sent by the Organization did use certified mail. Further, such use would have provided evidence that the February 23, 1989 alleged claim was, in fact, mailed.

There is nothing in this record that supports the Majority's erroneous finding that Carrier failed to respond to a claim that it did not receive. The Majority seems to imply that Carrier's request for a "copy" of the claim is somehow an admission of its improper handling. Since the Carrier never received the initial claim, what should it have asked for from the Organization? If, in fact, such a claim had been placed in the U.S. Mail and was swallowed up in the labyrinth of the U.S. Postal system, what would have remained but the Organization's copy, which was made part of the Organization's Submission for the first time in this matter.

Until receipt of the Organization's submission, Carrier had not seen the alleged February 23, 1989 claim. It was not a part of the on-property record. Carrier's offer to address the merits of this matter in view of the Organization's failure to file a timely claim - their May 16, 1989 letter was not timely filed. The offer was rejected and the Carrier properly noted that the Organization's May 16, 1989 claim was not timely filed. Such a position is not obtuse given the state of the Organization's claim handling.

While this claim has been adjudicated on the basis of an erroneous premise, it must be noted that the Organization claimed the assembly of lockers as their "claim" but thereafter expanded their "claim" to shelving and assembling storage bins. Both the Carrier and the Third Party, BMWE, noted that the assembly of shelving had been done "for decades" by many other crafts. If the initial claim involved locker assembly, but the subsequent handling involved shelving, then there is a legitimate question as to what was sustained in this dispute?

Finally, while it was the Organization that sought a settlement, the Carrier pointed out, on the property, that:

> "Further, the Engineering Department takes great exception to the number of hours claimed for the alleged work. They advise that the shelving units at the location are 73" X 36" X 18". They advised that there are 78 shelving units. Based on the 912 hours claim, this would mean that it would take one man 11.7 hours to build one unit. They have informed that one of these units could be completed by one man working 2.5 hours or 195 hours for all 78 units. There is nothing in this record to substantiate the amount of hours claimed as being factual....I have been informed that two men who did work on these shelves were a Mr. Rocha and Mr.

Tinsley. It also appears that both of these men are Sheetmetal Workers. Therefore, even if the claim were valid, which it is not, the hours that these men worked on this project would have to be deducted from the amount claimed." (Emphasis added)

Thus, the disposition made in this matter is neither "a reasonable compromise" nor supportable by the actual record.

We Dissent.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost