

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29774
Docket No. MW-29374
93-3-90-3-293

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(SouthRail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. W. B. Blakley for alleged violation of Rules L and H during March, 1989 and on or about June 15, 1989 was unjust, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File 89-0121-MW).
- (2) The Claimant shall be reinstated with seniority, vacation and all other rights unimpaired, he shall have his record cleared of the charges leveled against him and he shall be compensated for straight time lost from September 16, 1989 up to the date of his reinstatement at the straight time rate of the position he last held."

FINDINGS:

The Third 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 waived right of appearance at hearing thereon.

Claimant entered Carrier's service as a Trackman on February 13, 1989. On August 19, 1989, Carrier was informed by an individual that he had purchased several pieces of equipment, steel and welding rods from Claimant in March and June, 1989. Subsequently, on August 28, 1989, Claimant was removed from service and arrested by civil authorities on a charge of embezzlement. Claimant at the court hearing held on September 28, 1989, pled nolo contendere to the charges as made, was fined and given a 3-month jail sentence which was suspended for a period of one year.

In the meantime, a letter dated September 1, 1989, was sent to Claimant via certified mail - return receipt requested - to his address of record notifying him to appear on September 8, 1989, for a hearing in connection with the following charge:

"...allegedly being dishonest and removing material from railroad property without authority in that you sold a torch and one tank during March, 1989 in the vicinity of carwash at U.S.Highway 82 and Long Street, Starkville, MS, and sold rails and welding rods on or about June 15, 1989 behind Goose Hollow Furniture on Glenn Street on U.S.Highway 82, Starkville, MS to James W. Cannon."

According to the hearing record, notices relative to this piece of registered mail were left by the postal authorities at Claimant's address on September 2, and September 7, 1989. Claimant failed to pick up the piece of certified mail and also failed to appear at the scheduled hearing on September 8, 1989. Prior to the beginning of the hearing, a Carrier officer attempted to contact Claimant by telephone but without success. As a result, the hearing was held in absentia.

Following completion of the hearing, Claimant was notified by letter dated September 15, 1989, and sent to the same address as the hearing notice had been sent to, that he had been found at fault on the charges and was dismissed from Carrier's service.

The appeal from the dismissal has been handled by the Organization in the usual and timely method of handling such matters on the property. Inasmuch as no satisfactory resolution of the matter has been reached during the on-property handling thereof, it has come to this Board for final and binding adjudication.

The Organization has argued that Claimant has been denied his "due process" rights in that he did not receive a notice of precise

charge, he was not present or represented at the hearing, that the Carrier failed to present any credible evidence to support the charges and that the discipline as assessed was unjust, capricious and excessive.

Carrier argued that there is more than substantial evidence to support the charges, that it made every reasonable effort to effect the delivery of the hearing notice, that Claimant's absence from the hearing was his own responsibility and was done at his own peril, and that the assessment of discipline by dismissal was justified in light of the seriousness of the proven offenses.

The Board has carefully examined and reviewed the entire file of this case and, while we do not believe that the record is a "course book" example, it does contain all of the essential items necessary to provide the requisite "due process" rights to the Claimant. The hearing notice was sufficiently precise to put Claimant on notice as to what Carrier intended to investigate. It was issued after the Claimant had been arrested and charged by the civil authorities. It was addressed to Claimant at the same address as his other Company materials, including his pay checks. It was addressed to the same address as the subsequent notice of discipline was sent. The fact that Claimant failed or refused to claim the letter properly addressed to him does not preclude the Carrier from proceeding with the hearing. An employee cannot deliberately avoid receipt of a notice of hearing. Neither can an employee avoid discipline by the simple expedient of either failing to pick up his mail or failing to appear for a hearing.

The Organization has offered the hypothesis that there are several reasons why an individual "may be absent from his usual address - -", yet not one of these several reasons was advanced by the Organization as a reason for Claimant's failure to pick up the properly addressed notice of hearing in this case.

On the basis of the relative convincing force of testimony and evidence in this case, we do not find that this Claimant was denied any due process rights. There is substantial evidence in the record to support the conclusion that, within one month of entering Carrier's service, Claimant began to engage in dishonest acts which deserve dismissal. There is no basis in this record to make any change in the discipline as assessed. The claim advanced by the Organization is, therefore, denied.

A W A R D

Claim denied.

Form 1
Page 4

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: *Catherine Loughrin sb*
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.