Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 3033
Docket No. 3003

Referee Robert M. O'Brien

PARTIES TO DISPUTE: **American Railway Supervisors Association**

Penn Central Transportation Company

STATEMENT OF CLAIM: It is the claim and request of the **Petitioning Organization** that:

1. Respondent Carrier violated Rule 17 (e) of the Agreement when, under date of June 29, 1972, following investigation, Mr. John Ramirez, Jr., was dismissed in all capacities from the service of the Carrier.

2. Carrier shall be required to restore Mr. John Ramirez, Jr., to his position of Track Supervisor, with all his seniority, vacation rights, health and welfare benefits unimpaired and pay Mr. Ramirez the salary denied to him by the violative and unwarranted action of the Carrier.

OPINION OF THE BOARD: Following a Hearing held June 20, 1972, claimant, a track Supervisor, was dismissed from service with Carrier. The Association has raised several objections to the Hearing which we must respond to. Initially, they contend that Carrier's Auditors, Messrs. Walsh and George, held a Hearing with claimant on April 26, 1972 which violated Rule 17 (e) of the Agreement since the Hearing was conducted without an Association representative present. Without deciding whether that conference was a Hearing as that term is used in Rule 17 (e), the record clearly reveals that claimant knowingly and voluntarily waived any right to representation by executing a written statement to this effect on April 26, 1972. He cannot now be heard to object to such lack of representation.

Next, the Association maintains that claimant was not given proper notice of the Hearing since said notice failed to contain specific information such as dates, times, individuals involved, amount of money allegedly involved etc. We find no merit to this contention. Claimant was charged with the improper disposition of company property (railroad ties) in that he requested and accepted monies from individuals who removed the ties and claimant did not report or remit the monies to Carrier on several occasions during the period January 1, 1971 to May 9, 1972. Such notice adequately apprised claimant of the charge being preferred against him with sufficient particularity to enable him to prepare a defense thereto. Furthermore, in light of the interview he had with the Auditors on April 26, 1972, it is highly unlikely that he was surprised by any evidence adduced at the subsequent Hearing June 20, 1972.

The Association further alleges that Carrier violated the time limits of Rule 17 (e) by failing to hold the Hearing within the 15 day limit. Rule 17 (e), however, requires that the Hearing shall be held within 15 days from the date the occurrence or offence becomes fully known to the proper official. It was not until May 9, 1972 that General Manager Smith was notified by the Auditors of the results of their investigation. And when he scheduled a Hearing thereon for May 17, 1972, though said Hearing was postponed by mutual agreement of the parties, the 15 day time limits were complied with.

Finally, the Association protests that Carrier allowed the introduction of hearsay evidence at the Hearing. We agree with the Association in this regard. The statements of Mr. and Mrs. Owens as well as that of Mr. Scofield should have been excluded since they were not present at the Hearing thereby depriving claimant of the opportunity to cross-examine them. In ascertaining whether there was substantive evidence adduced at the Hearing to uphold the charge, this Board will give no weight at all to these statements.

A careful examination of the Hearing transcript reveals that Carrier has proved the charge against claimant by substantive evidence of probative value. Mr. Vander Laan testified that he purchased scrap railroad ties from claimant, i. e. approximately 14 loads, and paid him $50 per load. He stated that on March 31, 1971, the first time he purchased the ties he gave claimant a $30 check, but when claimant protested , he subsequently paid him in cash. Mr. Cooley, an employee of Vander Laan, corroborated this and testified that he saw Vander Laan pay claimant for ties at least a half dozen times. Claimant denied that he ever sold Carrier's ties to Vander Laan or anyone else, and denied even meeting Mr. Cooley. He did admit receiving the $30 check from Vander Laan and contends it was a gift, though he could not offer an explanation why the gift was given him when he hardly knew Vander Laan.

Though the evidence of Vander Laan and Cooley was controverted by that of claimant, we believe it was sufficient to uphold Carrier's findings. It is not our responsibility to weigh the credibility of witnesses. Rather we must examine the evidence to determine whether it was sufficient to uphold the charge against claimant. In the claim before us that standard has certainly been met. The evidence reveals that contrary to Carrier's Rules, claimant, on several occasions, disposed of Company material for personal gain. Dishonesty of employees, especially those in a supervisory capacity, constitutes a serious offense warranting in our opinion, discipline of dismissal.

FINDINGS:

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

The Carrier and the employe 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.

The parties to said dispute waived right of appearance at hearing, but were

granted privilege of appearing before the Division with Referee setting as a member thereof, to present oral argument.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
BY ORDER OF THE FOURTH DIVISION

By Stacey J. Daney
Assistant Executive Secretary

Dated at Chicago, Illinois this 6th Day of February 1974.