

The Second Division consisted of the regular members and in addition Referee T. Page Sharp when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(
(Metro-North Commuter Railroad Company
(Consolidated Rail Corporation)

Dispute: Claim of Employees:

1. That under the current Agreement the Consolidated Rail Corporation (Conrail) unjustly dismissed Electrician Lindsey L. Mintz from service effective October 29, 1982.
2. That accordingly, the Metro-North Commuter Railroad Company be ordered to restore Electrician Linsey L. Mintz to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to service, at the applicable Electrician's rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the aforementioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole; and expunge his record.

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 were given due notice of hearing thereon.

Claimant, Lindsey L. Mintz, was an Electrician in the employ of Carrier on August 31, 1982, when events on that day led to an investigation into his conduct in which he was charged with:

Unauthorized possession of railroad property (railroad ties) on 8/31/82 at approximately 2:15 p.m. at 138 Spring Valley Street, Beacon, New York.

As a result of the evidence adduced at the investigation, the Investigating Officer found that the charges against Claimant had been proved and, as a result thereof, dismissed Claimant from the service of Carrier.

Acting upon an anonymous tip, Carrier Police proceeded to the house of Claimant and discovered that his yard was terraced with railroad ties. Some of the ties had markings "M" on them and some others had "CR" on them. Testimony established that these markings either referred to Conrail or Metropolitan Region, a division of Conrail. Based on this discovery, the Police waited for Claimant to return home, confronted him with the evidence, and made out a report which led to the charges being brought.

At the investigation a Carrier Policeman, who had been at the house, testified that Claimant had stated that he had purchased the ties from someone. The Policeman stated that he had not been told the name of the seller. Apparently that name had been furnished to the Police Captain who had been at the house but was not at the investigation. Later testimony established that the seller had been an employee of Conrail.

When asked if the ties belonged to the Carrier, the Police witness answered in the affirmative. He said:

"Q. Sgt. Ginard, have these ties been identified as Carrier's property?

A. Yes, they have been."

Claimant presented two witnesses, one a Foreman of the Carrier, who testified that they had been at the residence of Claimant, some one year before, at the time that he purchased the ties from the other employee. The name of the employee, according to these witnesses, was the same as that named by the Claimant.

Thus, several things were undisputed. The Claimant purchased the ties from a fellow employee, identified by numerous witnesses, and this name was furnished the Captain of Police. The ties were removed from the property of Claimant.

Claimant is not charged with theft. As the charge stands he is literally charged with nothing. Possession of Carrier property, even if it was stolen, is not, in itself, a crime. By analogy to law, stolen property cannot be conveyed with clear title and the rightful owner can reclaim his property, but the purchaser is not necessarily guilty of any wrongdoing. The situation is different if the purchaser knowingly purchases stolen property.

Although not carefully articulated, the Board perceives that the discipline meted out is on the grounds that the Claimant knew or should have known that the property was property of the Carrier. Such a finding could justify some degree of discipline. However, there is no proof that Claimant knew that the property was Carrier property. An inference can be made that because some of the ties had the Carrier markings on them Claimant should have known that they were property of Carrier. Such an inference is not justified because of the fact that there was no proof that the ties were property of the Carrier or that Carrier was missing any property that belonged to it. The limited testimony, quoted above, concerning ownership is not only hearsay, it is hearsay without any factual underpinnings. The Police witness was certainly not in a position to testify that there were ties missing from the former year from the inventory of Carrier. The Board takes judicial notice that ties and other railroad property are sold at various times by all Carriers.

The Carrier has not proved its case. It had the name of the person stated to have sold the ties to Claimant, but nowhere is there any evidence that it made any attempt to involve him in the investigation to ascertain if he had legitimately or otherwise acquired these ties. It should have had sufficient knowledge of its own affairs to introduce evidence into the record that established in the proper time frame of missing ties. In short, the Carrier assumed that because Claimant had ties that were allegedly its property, he was guilty of knowingly acquiring this wrongfully appropriated property.

While investigations do not demand the same standard of proof as that necessary in a criminal trial, they demand more proof than was presented here. Given the record of this case, the Board finds that the charges, liberally construed in favor of the Carrier, were not proved.

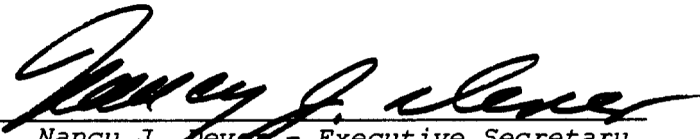
The charges were not proven.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Devos - Executive Secretary

Dated at Chicago, Illinois, this 5th day of June 1985.