

10-1-77
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NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21513
Docket Number CL-21667

Robert W. Smedley, Referee

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight **Handlers**,
(**Express** and Station **Employees**

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation
((Former Penn Central Transportation Company)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,
GL-8121, that:

(a) The Carrier violated the **Rules** Agreement, effective February 1, **1968**, particularly Rule 6-A-1, when it assessed discipline of dismissal on J. M. Waters, Clerk, Detroit, Michigan.

(b) Claimant Waters' record be cleared of the charges brought against him on September **30, 1974**.

(c) Claimant Waters be restored to service with seniority and all other rights unimpaired, and be compensated for wage loss sustained in accordance with the provisions of Rule 6-A-1 (h), plus interest at **6 per cent (6%)** per annum, compounded daily. Claimant also to be made whole for any money he was required to spend for medical **and** hospital services, or other benefits which would otherwise have been covered under Traveler's Group Policy GA-23000.

OPINION OF BOARD: Claimant was stopped by Detroit police and found to have **16** new automobile tires in his own private **car**. These came from a boxcar he was charged with checking that night. Claimant says he found the tires on the ground and was in the process of turning them over to carrier. The carrier chose to disbelieve this statement and discharged claimant.

This **Board will** not judge credibility of witnesses or **weigh** conflicting evidence. Nor **will** it disturb management's discretion as to penalty, if the investigation was fair and if the charge was proven by **substantial** evidence.

But we cannot condone bias and prejudice **in conduct** of the investigation. It is obvious from the record that both the hearing and deciding officers had prejudged claimant's guilt. The hearing was a sham. Among other things, claimant's guilt was conclusively inferred from his silence to the police officer after having been informed he had a right to remain silent and what he said would be used against him. **These**

admonitions dictate silence, not talk, regardless of guilt or innocence. The right against self-incrimination is a basic tenet of American law.. We do not adjudge guilt by silence. Claimant did testify at the hearing. He denied intent to steal.

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An accused's protestations of innocent intent cannot belie his conduct to the contrary. Rut given an unfair trial, how can one say a fair trial might not have produced opposite results? **The** highly contentious aspect of the hearing does not influence this Board. Nor do we lay any weight to the result of state **criminal** proceedings respecting the incident. These are immaterial, as is testimony concerning the same.

The reason for discharge stipulated by the carrier is unauthorized possession of the tires. **This** is not theft, the carrier apparently recognizing that proof of intent to convert is lacking. Yet the argument below and on this appeal emphasizes dishonesty. We cannot overstate the seriousness of theft if proven. In this, perhaps above **all** transgressions, the employer has the absolute right to protection. Rut, because of the due process deficiencies noted, and iarcenous **intent** not being shown, the penalty of discharge is too severe.

However, there is substantial evidence of irregular conduct by claimant, namely, having 16 tires in his car. This justifies discipline. Claimant shall be suspended up to the date of this award, a period **in** excess of two years, but then reinstated with **all** rights.

FINDINGS: **The** Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and Rmloyes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the agreement was violated.

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Claim sustained to the **extent** indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, **this 29th day** of April 1977.