

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21540
Docket Number MW-21612

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: { (Brotherhood of Maintenance of Way **Employes**
{ Consolidated Rail Corporation
{ (**Former** Penn Central)

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

(1) **The** dismissal of Track Foreman C. L. Trangone **was** without just and sufficient cause (System Docket 309/Northeastern Corridor Region - New Jersey Division Case 6/75).

(2) Track For- C. L. **Trangone** be reinstated with seniority, **vacation** and all other rights unimpaired; the charges against him be stricken from his record and he be compensated for the assigned working hours lost.

OPINION OF BOARD: On November 8, 1974, Claimant was notified to attend a trial concerning **alleged** unauthorized possession - and removal of - tires which were part of a railroad **shipment, as** well as unauthorized presence and discrediting conduct. The charges all **stemmed** from the same basic events.

Subsequent to investigation, **Claimant** was dismissed from service.

Claimant testified, at the investigation, that **upon entering** the yard in the **early** morning hours - to see a friend - his automobile headlights shone upon two tires which were partially hidden in weeds. **He** retrieved them and placed same in the trunk of his vehicle. When the **Foreman** "refused to take **them** because he didn't **want** anything to do with them", the **Claimant** decided to transport them to the Railroad Police. **However**, he was intercepted by said police while **enroute** to deliver the tires.

However, Claimant told a different story to the Carrier's police shortly after apprehension, stating that "Ruddy" gave him the tires.

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Carrier's Special Investigators testified that they observed two (2) individuals actually steal the tires in question. After an interval of time, they were joined by Claimant and the tires were placed into the trunk of his car.

6 **Claimant** was tried in Criminal Court on a charge of possession of stolen property, and was **found** not guilty.

8 **Claimant's** attorney attended the hearing as an **observer**. After he had interjected himself into the proceedings on a number of occasions - by providing answers to questions addressed to the **Claimant** - he was requested to leave. When he refused, he was escorted **from** the premises. **Claimant** then decided to **accompany** his attorney, and there-
9 after **Claimant's** representatives **also** left the proceedings. The hearing was concluded without Claimant or his representatives being present. Certainly, **this** type of circumstance causes us to consider the record in detail to assure that none of **Claimant's** rights were **compromised**. We cannot conclude that the exclusion of **Counsel** was inappropriate **under** the circumstances **and/or** under the rules of the Agreement. Thereafter, the **Claimant** **voluntarily** absented himself. To continue the **investigation** under those **circumstances** was not prejudicial. **Simply** stated, an **employee** may not thwart the orderly procedures of the Agreement by **voluntarily** absenting himself **from** the trial, and then assert a rights violation.

8 The disposition of **criminal** charges to **Claimant's** benefit does not dispose of the dispute. Different degrees of proof are required in the two **separate** forums, and different considerations are pertinent. **But** here, we question that the charges were **actually** identical. The **criminal** trial was on a charge of possession of stolen property, whereas the charges here **included, among** other things, an allegation of removal of tires which were **part** of a railroad shipment. Claimant conceded that he was **aware** of that fact on the night in question.

9 Even if numerous conflicts were to be resolved to **Claimant's** benefit, the evidence indicates that he embarked **upon** a course of conduct of highly questionable propriety. But, Carrier's resolution of credibility conflicts (which we are not inclined to disturb) shows that Claimant was guilty of the first two charges. We find substantive evidence of record to substantiate the finding of **guilt**.

10 There remains the question of whether the discipline of permanent discharge was appropriate to the offense **committed**. Claimant had 43 years of service at the time of the incident, and we find nothing of record which suggests that there had been any prior disciplinary action against **him**. Unquestionably, long service is not a defense to **an offense**. Moreover, certain Awards have held that years of service **alone** should not constitute mitigation. **But, there are** other items to be considered here.

Although there are four (4) charged offenses, in reality they **all contemplate** the **same** events.

The record shows that other **employees actually removed** the tires from the automobile in question and at a later **time** Claimant **came** into possession of them. The record does not show, with any degree of clarity, if **Claimant** was involved in a pre-arranged scheme, or if his actions were spontaneous. 12

We do not **condone** Claimant's action, as demonstrated by the record. We do feel however, that under this **particular** record, the discipline was excessive. We **will** restore Claimant to **service** with retention of seniority and other benefits, but without **payment** for compensation lost while he was out of service. 13

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 Employees** 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 discipline was excessive.

A W A R D

Claim sustained to the extent stated in the Opinion of **Board**, above.

ATTEST: A. W. Pauls NATIONAL RAILROAD ADJUSTMENT BOARD
Executive Secretary By Order of Third Division

Dated at Chicago, Illinois, this 19th day of May 1977.