

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 Foreman 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 "Buddy" gave him the tires.

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.

7 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 thereafter 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 employes 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 Employes involved in this dispute are respectively Carrier and Employes 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  
Executive Secretary

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

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