

PUBLIC LAW BOARD NO. 2035

Parties: Brotherhood of Railway and Airline Clerks
and
Former Penn Central Transportation Company

Statement of Claim: "Claim of System Committee of the Brotherhood (N. H. System Docket 1437) that:

- (a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when, it assessed discipline of dismissal, later reduced to suspension, from May 14, 1974 to October 15, 1974, on Yard Clerk E. Holmberg, Hunt Points Market, Bronx, New York.
- (b) Claimant Holmberg's record be cleared of the charges brought against him on May 16, 1974, and compensated for all wages lost during the period held out of service."

Discussion: The Claimant, and four other Carrier employees, were arrested by the New York City Police, on May 13, 1974, at approximately 11:15 P.M. in the vicinity of Track C-2 in Hunt Points Market. The other employees arrested were a yardmaster and three members of a yard crew.

The basic charges which the Carrier levelled against the Claimant and the four other employees were derived from a report filed by Captain F. J. Dowd of the Carrier's Police Department. Captain Dowd's report stated, inter alia, that the New York City Police Department Officers told him that they had been keeping Hunt Points Market under surveillance for several weeks because consignees at the

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Market had been complaining of shortages in their freight shipments. The New York City Police Officers further stated that on the night in question they had observed a train crew at approximately 11:30 P.M. pull an engine along side a freight car and remove approximately 40 cartons of tomatoes from the freight car and place them on the engine and then proceed to where several private automobiles were parked near the tracks. The Police report further stated that all the crew members, including the Claimant, were apprehended when they started to unload the cartons of tomatoes from the engine to the private automobiles.

All the Carrier employees were arrested that night by the officers of the New York City Police Department and released the next day on their own recognizance. On May 14, 1974, the Claimant was removed from service and directed to attend an investigation which was ultimately held on May 30, 1974. Following the investigation, the Claimant and the other employees were dismissed from service on June 5, 1974. The Organization progressed an appeal, and after the appeal hearing, the Carrier on October 8, 1974, reduced the dismissal to a suspension, but no compensation was granted for time lost.

At the criminal trial held on August 19, 1974, the Claimant and the other employees were acquitted.

The record discloses that the Carrier after claims were filed, on its own motion, granted back pay to the yardmaster from May 14, 1974 to October 1974, with the exception of the days of May 21 to May 30, 1974. Public Law Board No. 1595 in Award No. 3 granted the Engineer back pay from May 14, 1974 to October 17, 1974. Public Law Board No. 1669 in Award No. 8 awarded back pay from September 1, 1974 to October 18, 1974 to the two yardmen.

Carrier's Position

The Carrier stated there was sufficient probative evidence in the record to show that the Claimant was in the yard area at Hunt Points riding the engine when he had no duties to perform which required his presence. The Carrier stated the Claimant was in this area for the purpose of what he was charged with doing. The Carrier noted that the Claimant stated it was his practice to park his car every day at Auction Point. On the night in question, however, he parked his car at another location, namely at a location where the tomatoes were being unloaded from the engine.

The Carrier stated none of the employees involved ever satisfactorily explained why they stopped the engine adjacent to their private automobiles.

The Carrier stated that the fact the Claimant and the other employees were acquitted of the criminal charges is no valid reason for exonerating them from the charges the Carrier filed against them. The degrees of proof required in a criminal proceedings are much stricter than in an employee disciplinary proceeding. This distinction has been recognized by the majority of awards on this subject.

The Carrier also asserts that there is no merit to the several procedural objections interposed by the Organization. A fair analysis of the record of the Claimant's Investigation reveals that the Claimant was permitted to present his defense in full, call his witnesses and examine and cross examine all witnesses produced by the Carrier. The Carrier stressed that the Organization has not shown that the Carrier acted in any arbitrary or capricious manner. On the other hand, the Carrier has shown by the report of Police Captain Dowd that

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the Claimant was involved and had responsibility for the attempted theft. The Carrier stressed that the Claimant was not able to explain satisfactorily why he was on the engine or why he was at the site of the theft. The Carrier states there is substantial evidence to support that the Claimant was guilty as charged.

Organization's Position

The Organization stated that no valid evidence was introduced at the Investigation to prove that the Claimant was guilty as charged. The only evidence introduced at the Investigation was a report by the Carrier's Police Department. Captain Dowd himself saw nothing to incriminate the Claimant and the other employees. All that Captain Dowd knew about the alleged theft was what a New York Police Department Officer told him. However, no New York City Police Department official appeared at the Investigation. There were no eye witnesses present at the Investigation to testify, and be subject to examination and cross examination as to the alleged felonious acts of the Claimant and his fellow employees. The only evidence presented against the Claimant was a written report. The Organization stated the Claimant was denied his right to confront and cross examine his accusers. He was denied basic due process.

The Organization stressed that no evidence was introduced at the Investigation to show how the 40 cartons of tomatoes were removed from the freight car and who removed them. The record at the Investigation showed that vandalism was widespread at Hunt Points.

The Organization stated that the employees gave a valid explanation as to how the tomatoes got on the engine. These

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employees testified that they picked up these cartons of tomatoes along the right of way where they were lying, with the intention of bringing back to the Carrier's Office to have them returned to the consignees. However, the New York City Police Department officers arrested them before they had an opportunity to carry out their program. The Organization asserted it was a standard and normal practice for employees to pick up merchandise lying along the tracks and make it secure for the customers of the Carrier.

The Organization stressed that all other crew members were restored to their job and received compensation for the time lost. The Organization stated that it is only fair that the Claimant should receive the same treatment accorded to all the other employees involved in the same incident.

Findings: The Board, upon the whole record and all the evidence, finds that Employee and Carrier are Employee and Carrier within the Railway Labor Act; that the Board has jurisdiction over the dispute, and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds that the Organization's procedural objections to the Investigation are well founded in that there was no prosecuting witness at the Investigation to testify as to the Claimant's alleged delictual or criminal conduct. No member of the New York City Police Department, who were in fact the prosecuting or accusatory witnesses, appeared at the Investigation, to present the evidence that might have inculpated the Claimant and his fellow.

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employees. The offense for which the Claimant was accused is of such a major nature that they were entitled to confront and cross examine their accusers. The Board finds that a written report by the Carrier's Police Officer, who did not witness any of the key events, is not the equivalent of producing witnesses who were privy to or directly aware of the events that could causally link the affected employees to the incriminating events.

The Board finds that to accuse and find guilty an employee without presenting his accuser, is a denial of basic and fundamental due process, and leaves it with no recourse but to vacate the discipline assessed against the Claimant, and to direct the Carrier to make him whole.

Award: - Claim sustained.

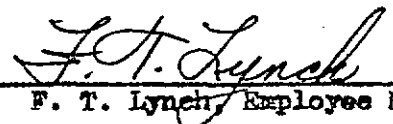
Order: The Carrier is directed to comply with the Award,
on or before May 30, 1980.



Jacob Seidenberg, Chairman and Neutral Member



N. M. Berner, Carrier Member



F. T. Lynch, Employee Member

April 26, 1980