

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 2406

Brotherhood of Maintenance of
Way Employees

-and-

National Railroad Passenger
Corporation (Amtrak)

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Case Nos. 6, 7 & 8
Award Nos. 6, 7 & 8

Public Law Board No. 2406 was established pursuant to the provisions of Section 3, Second of the Railway Labor Act and the applicable rules of the National Mediation Board.

The Brotherhood of Maintenance of Way Employees and the National Railroad Passenger Corp. (AMTRAK) (hereinafter the Organization and the Carrier respectively) are duly constituted labor organization and carrier representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

On October 8, 1979, a hearing was held in the Carrier's offices in Philadelphia, Pennsylvania at which the below-stated claim was addressed:

STATEMENT OF CLAIM (s):

"(a) The Carrier violated the Rules Agreement effective May 19, 1976, as amended, particularly Rules 68, 69, 71, 74 and 64 when it assessed discipline of dismissal on (Claimant) on June 28, 1978.

(b) Claimant's record be cleared of the charge brought against him on June 9, 1978.

(c) Claimant 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 64."

We have combined the three claims captioned above in view of the fact that the three employees were dismissed as the result of the same incident which occurred on June 6, 1978. We have reviewed the trial records of all three Claimants and find that the facts involved in all cases are identical. Therefore, if the Carrier's assessment of guilt is sustained by this Board, the only different treatment for the individual Claimants, might be based upon their previous records if we determine the propriety of the extent of discipline imposed.

Each of the Claimants received a letter dated June 7, 1978 in which he was advised that he was being taken out of service, effective 2:30 p.m. that day, in connection with his having been arrested by the Carrier's Police for unauthorized removal of Company property at approximately 6:45 p.m. on Tuesday June 6, 1978 in the vicinity of 33rd Street and the Zoo. The Claimants were each charged with trespassing on Carrier property after working hours without proper permission and with the theft and unauthorized removal of Company property. All three Claimants attended investigations, were found guilty, and were dismissed. The Organization appealed the cases independently through the appropriate steps in the grievance procedure terminating with the Organization's submission of the cases to this Board.

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In reviewing the records before us we find that the facts relevant to determining these cases are identical. During the late afternoon and early evening of June 6, 1978 the Claimants were observed on Carrier premises engaged in removing rail ties from the Carrier's property and loading them on a U-Haul truck. One of the three Claimants was also observed using a claw bar for the purpose of removing spikes from the ties on one track in order that these ties might be lifted, dragged, and loaded onto the U-Haul vehicle. The evidence indicates that the track from which the ties were being removed was a track that was no longer in use. The evidence also indicates that Police surveillance of this activity continued for approximately 2 1/2 hours and culminated in the arrest of the three Claimants. When arrested, the Claimants had removed and loaded in excess of 45 ties from the Carrier's property and were in the process of leaving the Carrier's property in their private vehicles. At the time that the Claimants were arrested none of them was on duty.

The Carrier argues in each of the cases that the trial record conclusively shows that each of the Claimants was guilty of the offense with which charged; that the discipline imposed was commensurate with the offense; that the Carrier's action in disciplining the Claimant(s) was not arbitrary, capricious or unreasonable; and, there is no basis for this Board to make any change in the discipline imposed.

The Organization argues, on behalf of each of the Claimants, individually, that the charges brought were deficient under the requirements of Rule 71 (a); that the charges were not proven

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in total; that the Carrier assessed discipline on assumed intent, not accomplished fact; and, that the discipline of dismissal was arbitrary, capricious and, at the very least, excessive in view of the Claimant'(s) previous histories.

The evidence in the records before us is overwhelming in establishing that each of the Claimants was on Carrier property at a time when they had no right to be there. Additionally, none of the Claimants had received permission from any supervisory employee of the Carrier to be at the location where they were.

Throughout the course of the trial transcripts the Claimants have raised a number of arguments in support of their claim that they should not have been found guilty for trespass and theft. It has been argued that they wanted permission to remove old ties but did not have the proper opportunity to obtain this permission. We find that such a posture by the Claimants puts their case in a worse light than the physical facts themselves. That is, the Claimants recognized the necessity to obtain permission before taking the ties which they admit were going to be used for their own use.

It is also contended in the Claimants' behalf, that had they truly intended to take property from the Carrier, they would have taken new ties which were arguably in the work location from which they were removing the old ties. We do not find that argument convincing. There are too many speculative reasons concerning why these Claimants chose one group of ties to remove as opposed

to another. We are struck by the fact, that even with permission to remove ties, there is no indication that such permission had been previously granted to any employee or members of the public where the removal would have involved dismantling of a track, albeit the track was out of service.

The Organization argues that Rule 71 (a), which provides that an employee who is accused of an offense and who is directed to report for a trial therefore, shall within fifteen (15) days of the date of the alleged offense, be given notice of the exact charge on which he is to be tried and the time and place of trial, was violated since a third charge "being arrested by AMTRAK Police" was added to the two charges which appeared in the notice of trial, ie. (1) trespassing and theft and (2) unauthorized removal of Company property. We find that the two charges in the notice of trial were the charges upon which the Carrier based its findings of guilt. Thus, although the Organization is technically correct, the Claimants were given sufficient and proper notice consistent with the Rules pertaining to the major offences with which they were charged. The records developed for each Claimant were concerned with the charges of (a) trespassing and (b) theft and unauthorized of removal of Company property.

Finally, there is some reference throughout the trial transcript and the submissions that a fourth individual, allegedly an individual who had given the Claimants permission, directly or indirectly, to engage in the charged activity, was present

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and/or observed by the Police during the incident. There is no evidence of substance upon which we can rely to support this presumption. It is too speculative to consider, and had the Claimants been given permission by a fourth individual we would assume that some tangible evidence of that nature would have been presented at the various stages of the appeal process.

We find overwhelming and substantial evidence to support the Carrier's charges of trespass and theft. In fact, all three Claimants admit that they were on the property improperly and that they intended to remove property which they knew at the time of its removal belonged to the Carrier. There is no question that the actions and the intent of the Claimants was consistent with the charges brought against them. We do not find that the Claimants' guilt is at all mitigated because of the alleged nominal value (some of the ties were said to be in splintered condition) of the property taken. The guilt of the Claimants was proven beyond reasonable doubt and we find no basis for disturbing the Carrier's judgement or the extent of the discipline imposed in any of these cases.

AWARD: Claims denied.

Richard R. Kasher
Richard R. Kasher,
Chairman and Neutral Member

William E. LaRue
William E. LaRue,
Organization Member
P.L. Board No. 2406

S. H. Heltzinger
S. H. Heltzinger,
Carrier Member
P.L. Board No. 2406

Date: 12/28/79

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