

PUBLIC LAW BOARD NO. 3460

Award No. 46
Case No. 46

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employes
and
Burlington Northern Railroad Company

STATEMENT
OF CLAIM

- "1. The dismissal of B & B Carpenter R. A. Browning for alleged 'violation of Rule 700 and 700(B) of the Burlington Northern Rules of the Maintenance of Way Department' was without just and sufficient cause and on the basis of unproven charges.
2. Claimant shall be reinstated with seniority and all other benefits and rights unimpaired, his record cleared of the charge leveled against him and he should be compensated for all wage loss suffered."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant had been in Carrier's service for over six years and was employed as a B & B carpenter. On Monday, September 15, 1980, at approximately 7:15 A.M., while at work, claimant stopped at a location of a derailment from the prior week involving automobiles which had been heavily damaged in that accident. He climbed up onto a gondola to look at the damaged cars. At that time two other employees, Mr. Leach and Mr. McCullah, drove by. The two other employees asked claimant what was in the gondola and he told them that there were some loose tires in the bottom of the gondola. Leach asked claimant if there were any 13" tires in the gondola and, when claimant said there may well be, he asked him for them and claimant took two such tires mounted on wheels and threw them down to Leach. Leach placed them in McCullah's jeep and they departed. Two days later, Carrier's Security Representative questioned the three men, including claimant, about the incident and all three signed statements admitting their part in the transaction. All three were

subsequently charged with theft and summoned to an investigation. The investigation was held on September 25, 1980, and all three employees were terminated.

Petitioner argues that the transcript does not indicate any intention by claimant of engaging in misconduct or an act of theft when he mounted the gondola car on the morning in question. According to Petitioner, claimant was merely climbing on the car to look around at the damaged automobiles. Furthermore, it is argued that claimant was not the instigator or any theft whatever. Furthermore, he did not believe he was involved in any wrongdoing when he tossed the tires down to Mr. Leach. The fact that claimant later reported the incident to his foreman further supports his position that he had no intention of stealing or engaging in any type of misconduct on the morning in question. Petitioner concludes that there is no evidence whatever to show that claimant was aware or wilfully participated in an alleged theft. Thus, according to the Organization, Carrier has not met its burden of proof.

Carrier argues initially that the dispute in this instance was not submitted to the Board herein until some four years following the date of the appeal in April of 1981. Carrier insists that the delay of over four years in pursuing the claim is unreasonable and the Doctrine of Laches is applicable and the claim should be dismissed. Furthermore, on the merits Carrier argues that the undisputed evidence indicates that claimant removed tires from a gondola and gave them to another employee and watched him place the tires in the third employee's personal vehicle and depart. This was clearly a dishonest act and claimant knew that the employees were not authorized to take property which was in the care of the railroad. It is obvious, according to Carrier, that claimant knew he was participating in the theft of tires.

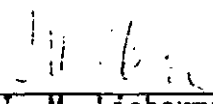
The other two employees involved in this matter have been reinstated on a leniency basis in December of 1981. Claimant was offered reinstatement on the same basis as that offered to the other employees. Although claimant did not reject the offer, he indicated that he was not interested in being reinstated prior to December 22, 1981, when his school semester would end.

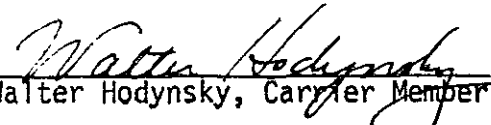
The issue of the unreasonable delay raised by Carrier is an important one which this Board has considered in the past. While not condoning such unwarranted delays,

the Board believes that this particular dispute is best resolved on the merits. The evidence is clear, as the Board views it, that claimant was involved in a dishonest transaction. The fact that tires were removed by him from the gondola car and given to another employee is sufficient to warrant Carrier's conclusion of dishonesty and theft. Therefore, under any circumstance, the discipline was appropriate and justifiable. With respect to leniency, that matter is solely within the discretion of Carrier and not boards such as this. Based on the fact that claimant was accorded full due process in the investigation and was found appropriately to be guilty of a dishonest act, participation in a theft, the discipline cannot be disturbed by the Board. The claim must be denied.

AWARD

Claim denied.


I. M. Lieberman, Neutral-Chairman


Walter Hodynsky, Carrier Member


F. H. Funk, Employee Member

St. Paul, Minnesota
July 3/, 1986