

**PUBLIC LAW BOARD NO. 6493**

**PARTIES TO THE DISPUTE:**

DELAWARE & HUDSON RAILWAY COMPANY, INC.

- and -

BROTHERHOOD OF MAINTENANCE  
OF WAY EMPLOYEES

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

1. The dismissal of Machine Operator Robert J. Penzone for his alleged theft of less than one (1) gallon of gasoline was without just and sufficient cause, excessive and undue punishment (Carrier's File 8-00272).
2. Machine Operator Robert J. Penzone shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

Public Law Board 6493 upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Board has jurisdiction over the dispute involved herein.

Parties to said dispute exercised the right to appearance at hearing thereon.

**OPINION OF BOARD:**

Trackmen and Track Foremen employed by the Delaware & Hudson Railway Company, Inc. ("Carrier") are subject to the terms of the Collective Bargaining Agreement between Carrier and the Brotherhood of Maintenance of Way Employees ("Organization"). Mr. Robert J. Penzone ("Claimant") was employed by Carrier for some 26 years and was working as a Machine Operator

at the time of his termination on April 19, 2002, for alleged theft of approximately one (1) gallon of gasoline from Carrier on the evening of March 25, 2002.

Claimant conceded at the formal investigation held on April 2, 2002 that he had helped himself to a gallon of Carrier's gasoline before going home on March 25; after working overtime that night to clear snow during a heavy storm. The undisputed record shows that Claimant had already completed his normal work day on March 25, 2002, but then responded to Carrier's call to come back in to help with snow clearance and removal. His testimony concerning taking the gallon of gasoline is set forth at Transcript pages 47-48, as follows:

Q. What time did you complete your assignment on March 25, 2002? A. March 25', that would be Monday? Yeah. It was somewhere in the neighborhood of approximately 11:30, maybe a little bit before, somewhere around that time.

Q. What was your reason for taking the gasoline, Mr. Penzone?

A. Well, as I explained to Mr. Reynolds, I had worked late that night. I didn't know how much snow, I had heard stories from other employees that there was up to a foot of snow in some of their homes in Pennsylvania. I wasn't aware how much there was. I was tired, I just wanted to get home and I figured I knew I didn't have any gasoline, just took a gallon of gas to clean off my sidewalks when I got home.

Q. When you departed the Binghamton terminal on March 25, 2002, en route to your residence, did you have any stops?

A. Yeah. On my way home, after I got on Interstate 81, I realized that I didn't have any gas in my car. So, I stopped at a gas station and filled it up and continued on home.

Q. These gas stations on 81 are 24/7 operation?

A. I know of two. I don't know about the rest of them, because I don't normally - - you know, there may be. I'm not disputing that.

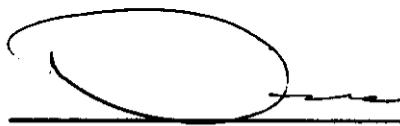
Claimant, an employee with 26 years of exemplary and unblemished service put his livelihood and reputation at risk by this one act of poor judgement. Although ably represented before the Board by the Organization, he personally appeared at the hearing, accepted responsibility for his actions and expressed remorse. His breach of Carrier's trust cannot be condoned and an appropriate

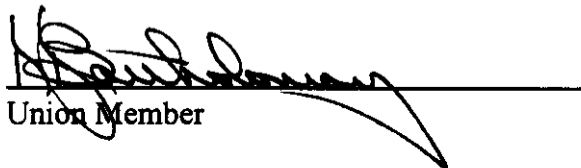
measure of discipline was warranted. Based on the unique facts and circumstances of this record, on a non-prejudicial and non-referable basis, the Board modifies the discharge to a suspension without pay for time held out of service. Carrier shall offer Claimant an opportunity to return to service as a productive employee, with seniority unimpaired but without back pay or benefits, subject to his passing normally required return to work medical and rule examinations.

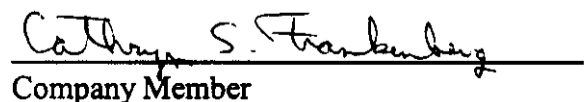
**AWARD**

Claim sustained in part and denied in part, as follows:

- 1) The discipline of dismissal is modified to a suspension without pay for time held out of service.
- 2) Carrier shall allow Claimant an opportunity to demonstrate that he can be a responsible and reliable employee, by offering him a return to service with seniority unimpaired but without back pay or benefits for time held out of service, conditioned upon his passing normally required return to work medical and rule examinations.
- 3) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.
- 4) Jurisdiction is retained for the sole purpose of resolving any disputes which may arise between the Parties regarding the meaning, application or implementation of this Award.

  
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Dana Edward Eischen, Chairman

  
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Union Member

  
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Cathryn S. Frankenberg  
Company Member