

PUBLIC LAW BOARD NO. 2960

AWARD NO. 2

CASE NO. 2

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

(1) The dismissal of Foreman J. M. Hernandez was without just and sufficient cause, arbitrary, unreasonable and wholly disproportionate to the alleged charge. (Carrier's File D-11-8-514)

(2) Foreman J. M. Hernandez shall be reinstated with seniority and all other rights unimpaired, compensated for all wage loss suffered and shall have his record cleared of the charge leveled against him.

OPINION OF BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the employees and the Carrier involved in this dispute are respectively employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

At the time of dismissal, Claimant was employed as a Track Foreman and had twenty years seniority. On October 12, 1979, the Claimant was directed to attend a formal investigation on the following charge:

"To determine your responsibility for unauthorized use of company material, tools and truck when you were observed doing work on an industry track at Bay View, Wisconsin, at approximately 3:00 p.m. on Saturday, October 6, 1979."

As a result of the investigation, the Claimant was dismissed.

In reviewing the evidence, there is no doubt the Claimant was guilty as charged. The evidence includes an admission by the Claimant that he and others used the Company truck, tools and materials to perform track work on a privately owned industry track and that they were directly compensated by the industry.

The real question in this case is whether permanent discharge is appropriate. It is obvious that the charge is serious particularly the portion relating to misappropriation of Company material. It has often been stated that discharge is appropriate for serious charges of this nature. However, there are a couple of mitigating circumstances that tend to make the Board believe a penalty short of discharge would be appropriate. First of all, the Claimant has a significant amount of seniority, some twenty years. Secondly, and most importantly, the Organization has shown that the use of Company truck and tools for this type of work was not clearly prohibited by past practice. Several employee witnesses testified that they had been permitted to do this type of work using Company truck and tools. Some of the witnesses further testified they had done this type of work in conjunction with Company supervisors. There was no refutation of this testimony in the record. Because this practice was not clearly prohibited by practice the Claimant cannot be entirely faulted for his behavior in respect to the use of the Company truck and tools.


While the Claimant's guilt is partially mitigated, it still remains that he misappropriated Company property and some form of punishment for this dishonesty alone is appropriate. Under the facts and circumstances of this case, a reinstatement of the Claimant without backpay and with trackman seniority rights only would be an appropriate penalty. Because of the nature of supervisory positions and the trust and integrity they require, the Board firmly believes the Carrier in this case should have the discretion to make this sensitive determination as to whether the Claimant's foreman seniority rights should be reinstated. If the Carrier does determine it is appropriate to reinstate the Claimant's foreman rights the Claimant should seriously consider that under the circumstances continued employment in such a position requires exemplary behavior.

AWARD

The Claimant is to be reinstated with his trackman seniority rights unimpaired and with no pay for time lost within 30 days.



Gil Vernon, Chairman


H. G. Harper, Employee Member
J. P. Crawford, Carrier Member

Date: Oct 26, 1981