

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 56

Carrier File No. 1MWB 91-07-18

Organization File No. S-P-451-W

STATEMENT OF CLAIM

1. The dismissal of Track Laborer A. L. Johnson for alleged absence from duty without proper authority on December 26, 27 and 28, 1990, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.

2. The Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

F I N D I N G S

The Claimant was dismissed from service for his absence without authority in the latter part of December, 1990. There is no doubt the Carrier was aware that the Claimant was incarcerated at the time of the absence. Generally, however, incarceration is not considered an acceptable basis to justify an employee's absence. The resulting penalty of dismissal was supported by the Claimant's disciplinary record which shows a previous dismissal and

leniency reinstatement, as well as disciplinary suspensions, for similar offenses.

There remains a procedural issue. The investigative hearing was originally scheduled in timely fashion for January 9, 1991. On that date the Vice General Chairman sought and obtained a postponement of the hearing. On the same date, the Vice General Chairman wrote to the Manager, Gangs (who had sent the original hearing notice) stating he had advised the hearing officer that the grievant had requested "a thirty day postponement of this investigation until February 9, 1991".

As noted by the Carrier, this is somewhat ambiguous in that 30 days from January 9 would be February 8 and that February 9, 1991 was a Saturday, an unusual day for a hearing. In any event, the Carrier sent a formal notice of postponement, indicating February 8 as the new date. The Claimant signed a copy of this notice, thus indicating his awareness of the February 8 hearing. (The Organization contended it did not receive the postponement notice, although the notice indicates a copy was so directed.)

Neither the Claimant nor a representative appeared for the hearing on February 8. The hearing proceeded in his absence. Following the hearing, the Claimant was dismissed from service.

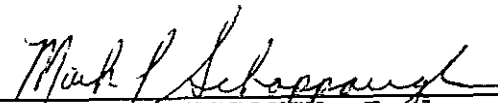
The Organization asks the Board to set aside the results of the hearing based on alleged denial of the Claimant's right to be heard. The Board cannot agree. The Claimant, by acknowledging the postponement letter, was aware of the hearing date, which had been


changed from the original date for his convenience. His failure to appear was at his own risk.

A W A R D

Claim denied.

  
HERBERT L. MARX, Jr, Chairman and Neutral Member

  
MARK J. SCHAPPAUCH, Employee Member

  
D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED:

