

PUBLIC LAW BOARD NO. 2960

AWARD NO. 16
CASE NO. 28

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. The dismissal of Foreman Isadore Lopez was without just and sufficient cause, unwarranted and excessive (Carrier's File D-11-8-527)
2. Foreman Isadore Lopez shall be allowed the remedy prescribed in Rule 19(d).

OPINION OF THE BOARD:

On March 17, 1980, the Claimant was directed to attend an investigation scheduled for March 21, 1980, on the following charge:

"To determine your responsibility in connection with the sale of Chicago & North Western Transportation Company property at West Allis, Wisconsin on Saturday, March 15, 1980."

Subsequent to the investigation, the record reveals the Claimant was discharged.

The investigation transcript reveals that on March 15, 1980, one of the Carrier's special agents was attending a rummage sale at the State fair park in West Allis, Wisconsin. For sale on one of the tables at the rummage sale were several items that the agent believed to be Carrier's property. The agent purchased two switch locks, one C&NW switch key and a telephone. Mr. Lopez was not present

and the items were purchased from his daughter who was attending to the table. The agent then called his supervisor. The inspector, along with another railroad official, then went to the sale. He too testified he observed items for sale on the table he believed to be the Carrier's property. The inspector then asked Mr. Lopez to report to his office at approximately 6:00 p.m. that evening to discuss the matter and to bring with him anything else that belonged to the Company. Mr. Lopez reported at 6:00 p.m. and brought with him some old signal locks, some old lamp parts, old order books and a 1971 telephone book. The Claimant then consented to have his car, locker and home searched. During the search, the only items of significance found were six old railroad signs at his home. The inspector acknowledged the Claimant was cooperative during this investigation.

The locks and keys were stamped "C&NW" and were the kind and type used by the Carrier. The telephone was positively identified as one once removed from the railroad police office when new equipment was installed.

The Carrier argues in their submission that there is no question that the Claimant stole Carrier property. Under the circumstances, the Carrier contends that dismissal was warranted. At the hearing, the Carrier suggested Claimant was involved in systematic selling of Carrier's property.

The Organization argued at the hearing that there was no evidence of a systematic selling of the Carrier's property and that we concern ourselves only with the items discussed at the investigation. In regard to the new switch lock found at the Claimant's table, they

point to the Claimant's testimony that he keeps such items along with a spike maul in his car for time that he is called out for emergency work. The Claimant contends that the new switch lock was erroneously removed from his car by his daughter. In regard to the other items, the Organization directs us to the testimony of the Claimant wherein he claims to have purchased the other items from other railroad employees or found them in scrap piles as in the case of the telephone. The Organization contends that the items were of no value and that dismissal for selling scrap material is excessive and in this regard directed our attention to Award No. 2 of Public Law Board 1844.

In reviewing the evidence, we find the Claimant guilty of selling Company property. The remaining issue in this case is the appropriateness of the discipline. In considering the issue, we find the facts are similar to those in Award No. 2 Public Law Board 1844 and find its rationale persuasive. We find that the Claimant in the instant case should be reinstated with seniority rights unimpaired but without backpay. The Board must conclude on the basis of all the evidence that the items in question were of no value except for the new switch lock. The Carrier did not refute the Claimant's contention that his daughter removed it by mistake and further the record establishes that the Claimant had a plausible explanation for having it in his car. Of the other items, the Claimant testified he either bought them from other railroad employees or

found them in scrap piles. The Carrier never effectively refuted this. In this regard we find that the record does not establish that the Claimant knowingly or intentionally sold anything other than abandoned material. In this respect this case is distinguished from Award No. 9 and Award No. 14 of this Board. In Award 2 of Public Law Board 1844, similar finding as made in this case was grounds to overturn dismissal in favor of reinstatement without backpay. We also find mitigating to some degree the Claimant's long seniority. We agree with the following statement made in Award No. 2 of Public Law Board 1844:

"We should not be understood, nor do we perceive the authority we cite, as condoning conversion and resale of company property, whatever its condition or status. Claimant is culpable of a serious dereliction of duty which will not go unpunished. But we are cognizant of the generally recognized labor relations principle, to which this Carrier adheres, that discipline should be remedial rather than punitive and progressive rather than terminal if conditions and circumstances permit. In our considered judgment the penalty of outright dismissal is inappropriately severe given the nature and circumstances of the offense and Claimant's long-standing and apparently satisfactory work record."

It is the Board's desire that the Claimant be made aware of the seriousness of his offense. While we find the circumstances in this case to be mitigating, it would not be found to be so if the Claimant were found to be involved in such conduct a second time.

AWARD

Claim sustained to the extent indicated in the Opinion.



Gil Vernon, Chairman



J. Q. Crawford, Carrier Member



H. G. Harper, Employee Member

Date:

Feb 5 1982