

PUBLIC LAW BOARD NO. 3460

Award No. 37
Case No. 37

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
Burlington Northern Railway Company

STATEMENT
OF CLAIM

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Grinder Operator J. J. Aguilera was without just and sufficient cause and wholly disproportionate to the alleged offense.
- (2) Claimant Aguilera be returned to service, paid for all straight time and overtime that he could have worked had he not been dismissed from service, and his record be cleared."

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 was dismissed by Carrier for placing two rolls of copper cable in a Carrier-leased truck and leaving Carrier's property with it. Following an investigation, claimant was dismissed from service on December 29, 1980, having been found guilty of removing the two rolls of copper, placing it in a Company truck and leaving the property without authority and subsequently failing to give a factual report regarding the use of this cable.

Carrier maintains that the transcript of the investigation clearly indicates that claimant was guilty of the charges. He was seen loading the cable into the truck which was driven by an ex-foreman named Flores. Foreman Flores had been dismissed the day before for padding a time roll. The truck was a leased truck and was later stopped by Carrier's special agents outside of Carrier's

property and with the two rolls of copper in it. Carrier asserts that claimant admitted that it was his idea to put the copper into the truck and that he had received permission from Flores after asking whether he could do it. Furthermore, claimant insisted that the copper was to be used in some of his welding activity when, indeed, that was not the case, as the Carrier views it. Carrier's evidence indicates that the copper had never been used and could not be used by a welder.

Petitioner argues that claimant was not aware of the fact that Foreman Flores had been dismissed the day before. Furthermore, Flores had authorized the claimant to put the cable into the truck and, hence, he did nothing wrong, according to petitioner. Petitioner insists that only Flores knew that his intentions were not reputable. Thus, from the standpoint of evidence, petitioner argues that there was no proof whatever that claimant was aware that the copper was to be stolen and had no intention to do so himself. Furthermore, it is argued that since the copper was in a Company truck, which was Company property, it was never removed from the Company and, therefore, there was no theft.

A careful evaluation of the evidence adduced at the investigation reveals a substantial quantum of evidence in support of Carrier's conclusion. From claimant's own testimony it is apparent that it was his idea to put the copper in the truck in the first instance. Following that notion, he received permission or authorization from Foreman Flores. Even more important, it is apparent from the evidence that there was no use in terms of past history for the copper in the welding operation. It had never been used before. Even assuming, arguendo, that claimant was unaware that Foreman Flores had been dismissed the night before, there is substantial evidence to indicate that he had no proper authority to take the copper and place it in the truck and leave Carrier's premises in the truck with that copper. Those facts are clear and incontrovertible. From the evidence as a whole, therefore, it is the Board's conclusion that claimant was guilty of the charges and the dismissal penalty was appropriate under the circumstances. The claim must be denied.

AWARD

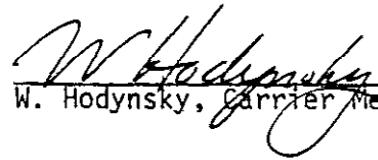
Claim denied.



I. M. Lieberman, Neutral-Chairman



F. H. Funk, Employee Member



W. Hodynsky, Carrier Member

St. Paul, Minnesota

March 5, 1986