

PUBLIC LAW BOARD NO. 3460

Award No. 40
Case No. 40

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 Section Laborer K. M. Ellesson October 6, 1980, was without just and sufficient cause and wholly disproportionate to the alleged offense.
- (2) Section Laborer K. M. Ellesson be returned to service with seniority unimpaired and paid for all time lost, including straight time pay, over-time and holiday pay."

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, a laborer, was charged with being absent without authority on September 5 and 8, 1980. Following an investigation held on September 18, 1980, claimant was found guilty of the charges and dismissed from Carrier's service. The record indicates and claimant admits that on September 5, 1980, he was in the Pillsbury Forest and was sick. He called in that morning (either at 8:15 or 10:30 A.M. but following the normal starting time of the shift) to report that fact. This was on a Friday. On the following Monday he did not report or call in and claimed that he had been lost in the Forest while bear hunting and was unable to come to work.

Petitioner alleges initially that the hearing was flawed and that claimant was denied a fair and impartial investigation. This allegation was based on so-called hearsay testimony at the hearing and the fact that the hearing officer did not wait for a witness to appear on behalf of claimant. Examination of the

record does not support this allegation by petitioner. The hearing was not flawed in any respect as the record indicates. Further, claimant had nine days' notice in which to secure witnesses and, after arriving at the hearing late himself, indicated that he had not had time to pick up his witness. Carrier refused to wait more than the 1½ hours *it* had waited initially on that morning and no request for a postponement of the hearing was made. Thus, the procedural arguments are not supported by the record. Additionally, petitioner claims that the punishment in this instance, dismissal, was unwarranted since it did not fit the alleged crime.

Carrier argues that not only was the hearing conducted in a fair and impartial manner but the ultimate decision of dismissal was fully warranted. Carrier notes that by claimant's own testimony he was absent without authority on the two days in question for the reasons which he indicated. Carrier points out neither excuse rendered or given by claimant for the absences on the days in question, either the illness or being lost while hunting, is mitigating and sufficient to overcome the clear and admitted violation of the rules. Even if one were to believe claimant's story of the reason for his absence, it would not be persuasive from Carrier's point of view. The hearing officer, in fact, rejected the excuses offered. As an example of the implausibility of the account, had claimant indeed been ill on the first of the two absences, he could have called in prior to the beginning of the shift. It is clear that he did not do so since he was out hunting that day, as Carrier views it. With respect to the penalty, Carrier also believes that the penalty was appropriate, particularly in view of the fact that claimant had been suspended on three occasions during the year preceding the incident involved in this matter.

As the Board views it, there is no doubt that the hearing was conducted in a fair and impartial manner. Furthermore, the evidence adduced at the hearing fully supports Carrier's conclusion that claimant was guilty. The penalty of dismissal under the circumstances, particularly in view of the prior violations for the identical offense, is entirely appropriate. It cannot be said to be capricious or an abuse of discretion. 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 13, 1986