

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 40

Case No. 40

System Docket No. BMW-269D

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant Justin Macera was without just and sufficient cause, was not based on any clear and probative evidence and was done in an arbitrary and capricious manner, wholly beyond the Scope of the Scheduled Agreement.

(b) Claimant Macera shall be reinstated into Carrier's service with all seniority entitlements and shall be compensated for all lost wages, including overtime benefits which would accrue to him, as provided for in Rule 15 of the Scheduled Agreement.

FINDINGS

The Claimant was subject to an investigative hearing in connection with the following charge:

To determine your responsibility, if any, in that it is alleged that on April 19, 1996 at approximately 1:00 p.m., you utilized Company equipment (dump truck, trailer, and backhoe) to perform non-Company related work at the personal residence of Amtrak Passenger Engineer Larry Macera, while on duty and under pay by the Company.

It is alleged that you attempted to cover up your wrongdoing by saying that the trailer sustained a flat tire enroute to the Rensselaer Facility.

Additionally, it is alleged that the backhoe sustained damage to the hydraulic hose during the performance of this work at the Macera residence, and also became stuck in the landscaping at that location. This necessitated payment of overtime to other employees to repair and free the equipment.

It is further alleged that the performance of this work was premeditated, and that you engaged in deception in order to ensure the availability of yourself and the equipment when you told your foreman that you needed to leave work early to catch a train. As such, you were allowed to leave the work site at 12:00 (noon) in order to return and service the equipment at the M/W Facility.

Following the hearing, the Claimant was dismissed from service on May 9, 1996. A fellow employee was also charged and involved in the investigative hearing; his participation is reviewed in Award No. 41.

The Board cannot accept the Claimant's belated explanation that he simply went to his father's home for lunch and then encountered difficulty in turning the truck around to leave, in the meantime taking the backhoe off the trailer and moving it to the rear of the house. Indeed, the Claimant had prepared a written statement prior to the hearing which stated he had gone to his father's house for lunch, taking the equipment with him. The statement continued:

I asked the operator of the backhoe to dig a hole in the yard for drainage. He agreed and we proceeded to dig. Just before we were finished a hydraulic hose blew.

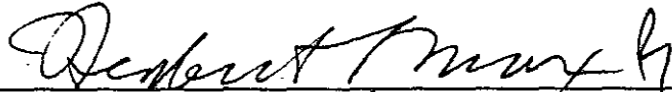
The Organization argues that proof is lacking that work was actually performed with the backhoe. Even if this is the case,

surely the intention to use Company equipment for personal purposes was clear.

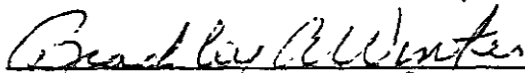
The misuse of Company time and equipment is readily perceived as a most serious offense. There are no mitigating factors involved here, and the Board has no basis to question the Carrier's judgment as to the imposition of the dismissal penalty.

A W A R D

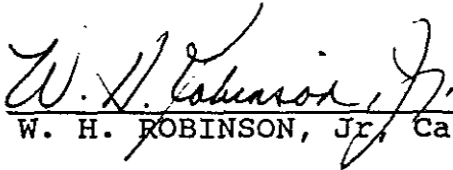
Claim denied.



HERBERT L. MARX, Jr., Chairman and Neutral Member



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: 9-16-96