

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISIONAward No. 12889  
Docket No. 12829  
95-2-93-2-206

The Second Division consisted of the regular members and in addition Referee James E. Yost when award was rendered.

PARTIES TO DISPUTE: (Joseph Roderiguez, Jr.  
(  
(CSX Transportation, Inc. (former Chesapeake  
( and Ohio Railway Company)

STATEMENT OF CLAIM: "As contained in Notice of Intent Letter filed with the Board under date of October 4, 1993.

- "1. My termination as a long standing employee of CSX Transportation on August 24th, 1992 was justified.
2. Even if, my incarceration was justified in light of my work record, lack of prior discipline of sufficient an the Company's policy of progressive discipline said termination was not the proper remedy."

And as contained in submission filed with the Board:

"That the service rights of Joseph Roderiguez, Jr. were violated when the Carrier assessed discipline of dismissal as a result of an investigation conducted on July 23, 1992."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Petitioner was given due notice that Hearing on this dispute would be held at 10:00 AM on January 11, 1995, at the Board's headquarters, 219 S. Dearborn Street, Room 1364, Chicago, Illinois 60604. He failed to appear at the appointed time. Neither did he contact the Board concerning the hearing. Nevertheless, the Board held the hearing in recess until 12:00 Noon for Petitioner to appear. He failed to appear, and an absentee hearing was held.

In early July, 1992, Carrier became aware the Petitioner had entered a plea of guilty to trafficking in marijuana on June 11, 1992, in Common Pleas Court of Lucas County, Ohio.

On July 7, 1992, Carrier charged Petitioner with "CONDUCT UNBECOMING OF A CSX TRANSPORTATION EMPLOYEE AND IN THAT YOU WERE INDICTED AND ENTERED A PLEA OF GUILTY TO THE OFFENSE OF TRAFFICKING IN MARIJUANA." and scheduled an Investigation for Thursday, July 23, 1992, at 1:00 PM.

Petitioner failed to appear for the Investigation or contact Carrier or his Union Representative and advise why he could not attend and request postponement. Investigation was held in absentia with Petitioner represented by a representative of the Organization.

On the basis of evidence submitted by a Carrier witness, Petitioner was found guilty of the charges and assessed discipline of dismissal from service.

We have reviewed the Investigation transcript and find solid evidence was adduced by Carrier proving the charges against Petitioner. Further, we have searched the record before this Board and find no denial of the charges by the Petitioner. In fact, Petitioner stated in his Notice of Intent letter of October 4, 1993, that his termination as an employee on August 24, 1992 was justified.

Petitioner appears to seek reversal of his dismissal on procedural grounds, none of which this Board finds to have merit.

Petitioner's allegations concerning other employees having been convicted of similar acts as himself and after grieving their discharge have been reinstated were not pursued with any evidence during the handling on the property. Evidence now submitted is new material before this Board and cannot be considered as Circular No. 1 of this Board, issued in 1936, prohibits consideration of new material and evidence not made part of the handling on the property.

The record before the Board reveals Petitioner's assertion that he was subjected to disparate treatment because of his national origin and race by the Carrier and the Organization was investigated by the Ohio Civil Rights Commission with the result that the Commission found:

"Evidence does not substantiate that charging party was terminated because of his ancestry/Mexican-American."

This Board is not impressed with the argument that Carrier failed to give Petitioner a fair and impartial Investigation by reason that the conducting officer would not grant a "continuation" until such time as Petitioner could be present. The Organization Representative present at the Investigation could give no reason why Petitioner was not present, or when he could be present even though he spoke with him the night before.

Under the circumstances of record, we conclude that Carrier's conducting officer did not prejudice Petitioner's contractual rights to a fair and impartial Investigation by proceeding with the Investigation in absentia. Numerous prior Awards of the Board hold that where the charged employee fails to appear at an Investigation, Carrier may proceed without him. One such Award is Second Division Award 8555, wherein the Board held:

"...It is well established that failure of a Claimant to appear at an investigation authorizes the Carrier to proceed without him and that such failure to appear is at the Claimant's own peril."

See also Third Division Awards 13127, 20113 and 24880.

Finally, we note Petitioner's assertion that if discipline was warranted the "Doctrine of progressive discipline" should be adhered to. This Board disagrees. Trafficking in marijuana is not only an illegal activity, but is a third degree felony conviction which is considered a serious offense in the railroad industry, and generally results in dismissal. See, for example, Third Division Award 24728 wherein the Board held:

"This board has generally taken a dim view of cases of employes using or trafficking in drugs. In our recent Award No. 24525, involving a situation quite similar to the one here involved, we held:

'Claimant pled guilty to the court charges.

Pursuant to plea agreement, sentence was suspended. Claimant was fined \$1,000.00 and placed on probation for a period of five years.

The use of drugs, or the dealing in drugs, is considered a serious offense in the railroad industry, usually resulting in dismissal. See Second Division Awards 8205, 8237, Award 8 of Public Law Board No. 1324, and Third Division Awards 24356, 23264, 22530, and 22547.'

See also Second Division Award 8001, and Third Division Awards 23410 and 24608."

Under the circumstances of record, progressive discipline is not appropriate.

A time limit issue was raised by Carrier in its Submission, but we conclude it is not necessary to rule on the issue in view of our findings herein set forth.

Petitioner's service rights were not violated. The Claim will be denied.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Dated at Chicago, Illinois, this 5th day of June 1995.