

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

PARTIES TO DISPUTE: (Sheet Metal Workers International Association
(CSX Transportation, Inc.
(Formerly Baltimore & Ohio Railroad Company)

STATEMENT OF CLAIM:

1. That under the current agreement, Sheet Metal Worker John M. McKenzie was unjustly discharged from service on February 14, 1989.

2. That accordingly, the Carrier be required to reinstate the aforementioned employee to service with all rights unimpaired, including seniority, vacation, health and welfare benefits, life insurance and that he be made whole for all time lost.

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The Claimant was employed by the Carrier at Cumberland, Maryland. On January 5, 1989, the Claimant was arrested and charged with one count each of distribution and possession of marijuana. Under date of January 9, 1989, the Claimant was notified to attend an Investigation on January 31, 1989, charged as follows:

"You are charged with conduct unbecoming an employee of CSXT Corporation as the result of your being arrested January 5, 1989, and charged with one count each of distribution and possession of marijuana."

The Claimant was notified under date of February 14, 1989, as follows:

"It has been found that you being arrested January 5, 1989, and charged with one count each of distribution and possession of marijuana is conduct unbecoming an employee of CSX Transportation Corporation. Discipline administered is dismissal from service of CSX Transportation Corporation."

On or about June 30, 1989, the Claimant pleaded guilty to possession of marijuana. On August 21, 1989, the Claimant was sentenced for two years of which all but six months was suspended.

The Organization's main thrust in this case is as follows:

"For the Carrier to take the position that by being arrested the claimant was in violation of the conduct unbecoming rule, is the same as saying a person is guilty of a crime simply because he is arrested. If that were the case we would have no need for the court system in this country, and certainly no need to hold that one is presumed innocent until proven guilty.

* * * *

The whole point here is that no matter what resulted from the state action against the Claimant, the Carrier had no cause for the charges and action it took at the time prior to Claimant's day in State Court."

We basically agree with the Organization's argument as set forth above. Under the United States court system an individual is presumed innocent until proven guilty. We cannot agree with the Carrier's position that simply because an individual is arrested he is guilty of conduct unbecoming an employee. There have been too many documented cases of individuals being falsely arrested because of mistaken identity or individuals being freed after being arrested because of insufficient evidence to prove they were guilty of the charges against them, to accept Carrier's argument. For example, recently a star basketball player was arrested and jailed for alleged robbery. It was subsequently conclusively proven that it had been a case of mistaken identity and he was freed.

The Carrier has cited numerous Awards in support of its position. In our review of the Awards we found that, except for Third Division Award 23284, the Investigations were held after the individuals were convicted or the individual was caught selling drugs on company property. In Third Division Award 23284 an individual, who was charged with conduct unbecoming an employee because of having been arrested, was discharged before being convicted. The Board in Award 23284 upheld the discharge stating: "Based upon the entire record, there is no basis for the Board to interfere in the discipline imposed," however, the Board made no mention of the propriety of the Carrier

using the arrest of an employee solely as a basis for finding such employee guilty of: "conduct unbecoming an employee." We have no way of knowing if the Organization raised the same argument in Award 23284 as raised in this case. It appears this important issue simply was not addressed. For this reason we are not giving any weight to this Award.

The Carrier in its Submission states:

"This is an issue on which the Carrier is placed 'between a rock and a hard place.' If the decision is made to proceed with a disciplinary hearing before an incident is fully adjudicated in court, the contention is made that the employee has been prejudged or treated unfairly, punished before his case is fully heard in the legal system. If, on the other hand, the Carrier elects to wait until the employee's legal remedies are exhausted and his conviction or acquittal firmly established, the timeliness of the charge and investigation are subject to challenge! The Carrier submits that this is a decision that must be made on a case-by-case basis, considering the nature of the crime, the availability of information, and the potential for harm to the legal or contractual rights of the claimant. In the instant case, there has been no showing that the claimant's rights were impaired by not waiting until the conviction and sentencing were concluded. The Carrier properly found the claimant at fault as was later confirmed by both (1) a June 20, 1989 newspaper article in the Cumberland Times Union wherein the claimant was ordered held without bond after he pleaded guilty to distribution of marijuana (Carrier's Exhibit 'J') and (2) the sentencing report which stated the claimant was sentenced on August 21, 1989, following a plea of guilty to the charge of distribution of marijuana for two years of which all but six months was suspended, and the state was to dismiss the companion charge of possession."

The Carrier contends in the instant case there has been no showing that the Claimant's rights were impaired by not waiting until the conviction and sentencing were concluded. The Carrier further contends it properly found the Claimant at fault because it was later confirmed by the fact the Claimant pleaded guilty and was sentenced to time in jail. In other words its action

in discharging the Claimant prior to the court case was vindicated by the final outcome. While this may be true in this case, the Carrier has not indicated what it would have done if the reverse had been true, i.e., the Claimant had been found innocent of the charges for which he was arrested. Would it have voluntarily rectified its error of discharging an employee found innocent of any wrongdoing and returned the employee to service with full seniority and lost wages or would it have forced the Organization to take the case to a Board for final adjudication? Certainly we would not uphold a discharge under the latter circumstances.

We are not unmindful of the critical and serious issues in this case, i.e., a Claimant's individual rights and reputation vs. a Carrier's concern about its reputation and being required to allow, what it considers to be an undesirable employee to remain on its property. This Board is of the opinion that if a carrier has an employee that has been arrested by civil authorities and it does not desire to have such employee on the property it should suspend him pending the outcome of the civil case. Many municipalities follow this procedure with their employees, including policemen. While the Organization may object to such procedure, certainly less harm is done to the Claimant's individual rights and reputation than to presume just because he is arrested he is guilty of the charges and "jump-the-gun" and dismiss him. See Second Division Award 9120, where a hearing involving an employee charged with "conduct unbecoming an employee and unsatisfactory service" was recessed to await the outcome of the Claimant's civil case in county court.

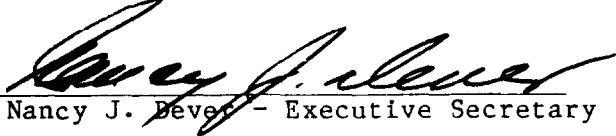
In conclusion we will not interfere with the discipline assessed in this case for the following reasons:

1. At no time either prior to or during the Investigation did the Claimant request a postponement.
2. At no time during the Investigation did the Claimant contend that he was innocent of the charges brought against him by civil authorities.
3. The Claimant eventually pleaded guilty to part of the charges and was sentenced to a term in jail.
4. If our suggested manner of handling this type of case had been followed in the instant case the final outcome, i.e., discharge, would have been the same.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of January 1991.

