

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21228  
Docket Number CL-21389

Walter c. Wallace, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers. Express and Station **Employees**

PARTIES TO DISPUTE: (

(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood, GL-7941, that:

1. Carrier violated **the Agreement** between the parties when on October 18, 1974, they arbitrarily and capriciously dismissed Clerk L. I. Mackey.
- 2.. The Carrier's action was unjust, **unreasonable** and **an** abuse of Carrier's discretion. The discipline **was** assessed even after the charges were shown to be completely unsubstantiated.
3. Carrier shall now reinstate L. I. **Mackey** with all rights and privileges unimpaired and **pay him** for all **time** lost, including time spent attending the hearing.
4. In addition to the **money amounts** claimed herein, Carrier shall pay claimant an additional **amount** of eighteen (18) percent interest compounded **daily**.

OPINION OF BOARD: The claimant, Lee I. Mackey, was employed by the Norfolk and Western Railway Company as an extra agent-telegrapher on November 13, 1967 and was assigned as an extra clerk on the extra board at **Gambrinus**, Ohio.

On the night of August 14, 1974, the home in which claimant was residing in **Massillon**, Ohio, was entered and searched by Perry Township police officers, along with a unit of the Stark County Metro Squad. Several items were found in the house, including one box of pills, **two** pipes, two small bottles of brown liquid matter, one box of vials and one bag of pills. Additionally, claimant admitted to the investigating police officers that he was the owner of a jacket in which a container of green-brown vegetable matter, which was later proven to be marijuana, was found.

Following the search of the house, claimant (along with other individuals found in the house) was arrested and transported to the Perry Township Police **Department** where the claimant in this case was charged with possession of barbiturate and possession of hallucinogen.

On August 23, 1974, **following** proceedings in the **Massillon** Municipal Court, claimant was convicted for "possession of barbiturate" **and** "possession of hallucinogen". As **a** result of this conviction, claimant was originally sentenced to serve a total of 360 days in jail; however, the sentence was reduced and claimant did serve five (5) **days** in jail from August 23, 1974 to 9:00 a.m., August 28, 1974, at which time he was released.

On August 23, 1974, at **12:23** a.m., **claimant** marked off from duty on the extra board and remained marked off until **12:50** p.m., August 28, 1974.

On August 29, 1974, **claimant** was given the following notification to attend a hearing scheduled for September 3, 1974, which read in part:

'You are hereby charged with engaging in unlawful activity which resulted in your arrest on August **15**, 1974 and conviction on August 23, 1974 for possession **of an hallucinogen** and barbiturate in violation of Operation Bulletin 150 and rendering you unavailable for **service** on August 23, 24, 25, 26, 27, 1974.'

Thereafter, at the request of representatives of the **claimant** two postponements were granted and the hearing was eventually held on October 9, 1974. In connection with one of the postponements the claimant pointed out that his lawyer thought it better that he **not** show up at the hearing and gave him a letter providing his statement on the matter. **Accordingly**, a postponement was granted to permit Mr. **Traynor**, claimant's representative, to familiarize himself with the case. The lawyer's letter was introduced into the record **after the** hearing and was dated September 3, 1974.

Subsequent to the hearing and on October 18, 1974 claimant was notified by letter **from Trainmaster** R. E. Reed that his responsibility for the charges had developed in the hearing and he **was** dismissed from the service of the carrier. On October 21, 1974 Local Chairman **Traynor** wrote to the carrier appealing the decision on various grounds and requested reinstatement for **claimant**. The appeal was processed through the appropriate levels and became the basis for the claim before this Board to the effect that carrier violated the agreement between the parties when they arbitrarily and capriciously dismissed claimant. It is also **claimed** that carrier's actions were unjust, **unreasonable** and an abuse of carrier's discretion and the "discipline was assessed even after the charges were shown to be completely unsubstantiated."

A number of issues emerged including the following: that claimant was not **apprised** of the specific charges against him; there was no opportunity to face his accusers and cross examine them; the hearing was unfair for various **reasons**. In addition, certain other issues were raised: that the Operations Bulletin No. 150 was an improper basis for charges against the claimant; that claimant was not **unavailable** for **service** within the meaning of the charges: and that **claimant's** plea of 'no contest' was not **an** admission of guilt.

We have carefully considered all of these matters and **we** have made a thorough review of the record. Each contention will be discussed:

With respect to claimant's claim that there **was** insufficient specificity in the charges the phrase "unlawful activity" is questioned. Rule 27 requires that the charge be specific but that does not mean more than **that it** should provide sufficient notice to permit the accused to prepare his defense. There is no requirement that the notice must satisfy the technical **requirements** of a criminal complaint. Here the "unlawful activity" in the charge **was** linked to claimant's arrest and conviction on August 23, 1974 for the possession of **the drugs** in violation of the cited rule. We believe this constitutes sufficient specificity to satisfy **Rule 27**. The fact that the arrest date was misstated does not change our view; claimant was neither misled nor prejudiced by this error.

We believe the argument is far-fetched that claimant's right to face his accusers **and** cross examine them was violated here. It questions the proof of claimant's arrest, **conviction** and sentencing by the Massillon Municipal Court through the testimony of **Mr. Carr**, a detective employed by carrier. Admittedly, **Mr. Carr** had not been present during the search of claimant's house, nor **when** he was arrested, nor **when** he was triad **and** sentenced. Clearly, **Mr. Carr** had no first hand knowledge of these events. His testimony was provided for the **purpose** of verifying certain **documents** which **attempted** to establish the facts of the arrest, conviction and sentencing of **claimant**. Much **was** made of the "**hearsay**" aspect of this proof. We believe this argument **misses** the point. There was no contested issue here and claimant could not be prejudiced by the admission of evidence in support of **uncontested** facts. As **an** attachment to the December 11, 1974 letter from Vice Chairman Walker, a letter from claimant's **attorney** dated September 3, 1974 (mentioned previously) verifies in every essential way the information introduced through the testimony of **Mr. Carr**. That letter, using different **terms**, admits the facts of the arrest, conviction and sentencing of claimant for the aforementioned misdemeanor. **Viewed** in this light, we conclude this argument is without merit.

In support of the claim that the hearing officer was not impartial certain illustrations from hearing testimony were **offered indicating** the officer had prior knowledge **concerning facts** related to his arrest and the investigation. According to claimant it follows that the presiding officer prejudged the case because he had such prior knowledge. We disagree. This conclusion does not follow from the premise and we do not agree there was prejudgment here. See Award 20859, Third Division.

Certain allegations were made to the effect claimant was denied "due process". We **are not** inclined to agree. Unless such rights are **provided** for in the agreement between the parties they are like ghosts in the **law**, hardly a basis for enforcement. There is no **basis** for such claims in this agreement. See Awards 18106, 16602.

The fact the hearing officer **was also** the charging officer is not a defect that undermines the essential fairness of the hearing. There is no prohibition of this in the agreement and the Third Division awards have not viewed this as a basis for unfairness. **See** Awards 21017, 20859 and 20828.

**During** the hearing the authority of the hearing officer was challenged on the grounds he admitted he was not empowered to interpret **Rule 27** which deals with discipline and investigations. If this question, asked at the outset, had the purpose of determining whether the presiding officer was empowered to rule on appropriate questions in the conduct of the hearing, there was ample proof of this in the way he conducted this difficult hearing, regardless of his negative answer. If the question was intended for a different purpose, such as to inquire whether the presiding officer had authority to give advisory opinions or provide rule interpretations in the abstract, the negative answer was proper, **We** conclude this objection lacks merit on either basis.

Coming to other questions, we consider the claim that Operations Bulletin No. 150 is **an improper** basis for charges against claimant. The record indicates this rule **was** promulgated unilaterally by the carrier and is not based upon an **agreement between** the carrier and the representative of the **employees**. We believe an objection on this basis is unfounded because such rules are **well established** in the railroad industry. Reasonable rules, not **inconsistent** with the agreement and not applied in an arbitrary, capricious manner **are** binding upon the **employees** covered. Here we have no basis for holding that **Operations** Bulletin No. 150 runs afoul of these **requirements**. To the extent there was **objection that** the bulletin was not properly disseminated or that claimant **was** ignorant of the bulletin, we **are** of the view there was substantial evidence in the record that the bulletin was disseminated properly. It follows that claimant is chargeable with knowledge of its contents whether or not he **saw** it.

The **argument** is also made that claimant had "**asked** to be marked off the extra board which is **permissible** under the agreement". Presumably, it is claimant's view that it is not a matter of concern to the carrier that claimant spent this time in **jail**. We do not see **it this** way. Being in jail, as the consequence of conviction of a crime, is not a proper way for a railroad **employee** to protect his assignment. See Third Division **Awards** 20307, 19847, 12993.

lastly, we **come** to claimant's explanation, included in the attorney's letter of September 3, 1974, that claimant's plea of "**no contest**" was not an admission of guilt under Ohio law. Assuming this is true it does not undermine the carrier's decision here. Under Operations Bulletin No. 150 the offense is **complete** when an **employee** is convicted of any misdemeanor for possession of **narcotics** or dangerous drugs. The fact **claimant** never **admitted** the offense is irrelevant.

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We conclude that all these objections lack merit. Claimant had a full **and** impartial hearing. The evidence in support of the charges against him **was** substantial and credible. The conclusion reached that he engaged in unlawful activity which resulted in his arrest and conviction in violation of the Operations Bulletin No. 150, is warranted. We have no basis to assert that his **dismissal was** an inappropriate punishment, and under the circumstances we do not find it to be arbitrary, **capricious** or unreasonable.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived **oral** hearing;

**That** the Carrier and the **Employees** involved in this dispute are **respectively** Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;.

That this Division of the Adjustment **Board** has jurisdiction over the dispute involved herein; and

That the Agreement was **not** violated.

A W A R D

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1976.