

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26390
Docket Number **MW-26599**

Edwin H. **Benn**, Referee

(**Brotherhood** of Maintenance of Way **Employes**

PARTIES TO DISPUTE: (

(The Chesapeake and Ohio Railway Company
(Southern Region)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that;

1. **Trackman** D. W. Martin was improperly withheld from service commencing March 30, 1984 (System File C-TC-2350/MG-4703).

2. The dismissal of **Trackman** D. W. Martin was arbitrary, without just and sufficient cause and on the basis of unproven charges (System File C-D-2358/MG-4738).

3. The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered as a result of either (1) and/or (2) above."

OPINION OF BOARD: Claimant was a **Trackman** on the Clifton Forge Seniority District. The parties reached a settlement concerning Claimant's dismissal providing, in part, for reinstatement conditioned upon Claimant's satisfactorily passing a physical examination. Claimant took the physical examination on March 29, 1984. Thereafter, Claimant was advised that before he would be permitted to return to work further blood tests were **necessary**. Ultimately, Claimant was marked unqualified by the Carrier's Chief Medical Officer because after taking the March 29, 1984, physical examination, the Carrier contended that Claimant failed to provide certain information in a timely fashion.

During the period Claimant was being withheld from service pending the operation of the terms of the settlement, Claimant and another employee were arrested at Claimant's home and criminally charged with misdemeanors for off duty conduct. Claimant was then charged by the Carrier with conduct unbecoming an employee resulting from the arrest.

we note, consistent with the Carrier's position, that because Claimant was in a furloughed, inactive, or withheld from service status does not completely insulate him from disciplinary action. See Third Division Awards 26203, 25892, 24782, 23410, 23284; Public Law Board No. 1324, Award No. 8. Similarly, and contrary to the Organization's position, the fact that the specific criminal charge against Claimant cited by the Carrier as the basis for the discipline may have been ultimately dismissed cannot, in this case, be considered as a bar to disciplinary action since acquittal by a court does not automatically preclude the Carrier from imposing discipline. See Third Division Award 20781 and Awards cited therein; Public Law Board No. 1827, Award No. 1. **Here**, the record indicates that Claimant ultimately was found guilty, albeit of a lesser although related criminal allegation than that with which he was originally charged.

Nevertheless, upon our review of the entire record, we are of the opinion that the penalty of discharge under the circumstances was excessive. Therefore, we shall restore the status quo that existed at the time of the disciplinary action which gave rise to this Claim. Claimant shall be returned to service without loss of seniority, but without compensation for time lost conditioned upon his taking and successfully completing physical examination. On the basis of this record, we find that reinstatement shall be on a last chance basis.

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 Employee 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

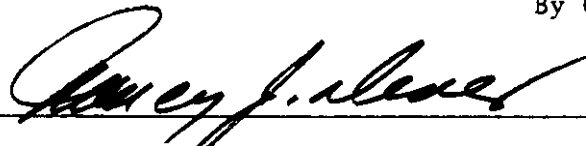
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest : _____


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1987.