

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 26587
Docket Number MW-26825

John E. Cloney, Referee

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employees**
(The Chesapeake and Ohio Railway Company
(Southern Region)

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

(1) The dismissal of **Trackman** D. W. Clark for 'conduct alleged unbecoming an employee' was arbitrary, capricious, without just and sufficient cause and on the basis of unproven charges (System File **C-D-2626/MG-4926/13-125**).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant, an employee with 6 years service, was arrested on **July 12, 1984**, and charged with having been in **possession** of marijuana on April 28, 1984. Claimant was found guilty on September 6, 1984, appealed and as an apparent result of plea bargaining he pleaded guilty to the charge on October 17, 1984. The Court thereupon deferred further proceedings and placed Claimant on probation on condition that he remain drug free and attend a drug education program. The Court further stated "upon fulfillment of the terms and conditions . . . the Court will discharge the accused and dismiss the proceedings."

On September 12, 1984, Claimant was notified to attend an Investigation because:

"You are charged with conduct allegedly unbecoming an employee in that you were charged with the possession of marijuana on April **28, 1984** and were subsequently convicted . . . on September 6, 1984."

At the Investigation Claimant denied he had possessed marijuana or brought it **into** his house where it had been found. Claimant's wife testified the substance found belonged to her. The transcript of Investigation reflects that Claimant's wife, when asked, "Did you bring into this house any of those substances" answered "No Sir." The General Chairman subsequently contended the transcription was not accurate and that the answer had been "Yes Sir." At the Hearing Claimant noted an appeal of the first Court's decision was pending.

On October 16, 1984, the Manager Engineering wrote Claimant that:

"I . . . find you to be guilty of conduct unbecoming an employee.

The discipline to be assessed is dismissal from the service effective this date."

The Organization contends that under Virginia law the Court's finding on September 6, 1984, was stayed by virtue of the appeal and therefore no guilty finding existed. (In this connection we note documents in the record establish Claimant later "fulfilled the terms and conditions of his probation" and the proceedings against him were dismissed on February 14, 1986.)

The Organization contends that as Claimant's alleged conduct was off duty he cannot be disciplined in the absence of evidence of detrimental impact on Carrier's operations or reputation and that the Investigation was untimely.

Finally, as Claimant has more than six years service with only some references to absences in his record, the Organization views the discipline imposed as excessive.

This Board finds the Investigation was timely, having been conducted within 20 days of Claimant's conviction of September 6, 1984.

Putting aside the question of the effect of the appeal upon a guilty finding we note Carrier's decision was based upon the results of the Investigation which admittedly established the marijuana and drug paraphernalia had been found in Claimant's home. These facts could reasonably be said to constitute substantial evidence to support Carrier's finding of conduct unbecoming an employee.

The conduct involved did occur off the property. However, as we stated in Third Division Award 24535:

"The use of drugs, or the dealing in drugs, is considered a serious offense in the railroad industry, usually resulting in dismissal."

Although this Board certainly does consider the use of drugs as a "extremely serious matter we believe there may be some mitigating circumstances here. Claimant, who pleaded guilty as a result of plea bargaining, entered into and apparently successfully completed a program established by the Court and the charges were ultimately dismissed. Thus while Claimant did have some involvement with marijuana the record as a whole, including his length of service, suggest the extreme discipline of dismissal was excessive.

We shall require that Claimant be reinstated with full seniority, but without compensation for time lost, subject to his successfully passing an appropriate physical examination.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due **notice of** hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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

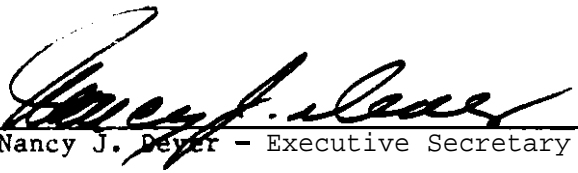
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois this 27th day of October 1987.