

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28414
Docket No. SG-28372
90-3-88-3-234

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Norfolk and Western Railway Company (N&W):

Claim on behalf of Mr. C. A. White, Construction Signalman, Western Region-West; assigned hours 7 a.m. to 5 p.m. Mondays through Thursdays; meal period 12 noon to 12:20 p.m.; rest days Fridays, Saturdays, Sundays, and holidays, that:

A. Carrier violated the rules of the Signalmen's Agreement, in particular Rules 701 and 704, when Carrier dismissed Mr. White on December 22, 1987, without just and sufficient cause and on the basis of unproven charges asserted either before or during investigation held on December 4, 1987, in Decatur, Illinois.

B. Carrier should now be required to reinstate Mr. White to his former position with all rights and benefits unimpaired; compensate him for all lost time from May 11, 1987, until he is reinstated; reimburse him for any expenses incurred; pay him for any time used in traveling outside regular working hours because of Carrier's action; and clear his personnel record of any reference to this matter. G.C. file SG-DET-80-1. Carrier file SG-DET-80-1."

FINDINGS:

The Third 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 were given due notice of hearing thereon.

Claimant was notified by letter of May 11, 1987, that he was held out of service and ordered to attend an Investigation to determine responsibility if any for "engaging in conduct unbecoming an employee...in that on April 27, 1987 you were arrested and incarcerated for unlawful delivery of control substance." The Hearing was held, after postponement, on December 4, 1987, and the Claimant was notified thereafter that he had been found guilty and was dismissed from the service of the Carrier.

The Organization argues on property that Claimant was dismissed without just cause. Further, it asserts that Carrier violated the procedural Rules to a fair and impartial Investigation and that the penalty assessed was harsh and excessive. It also notes that the Court recognized the circumstances of the offense and placed Claimant on probation.

The Carrier maintains that Claimant was dismissed as a result of the Investigation "concerning unbecoming conduct (arrested and incarcerated for unlawful delivery of a controlled substance)." It denies any violation of procedural Rules and holds that the evidence submitted during the Investigation proves Claimant was guilty as charged. It also maintains that dismissal is supported by past Awards.

This Board finds that the record consists solely of the transcript and a few letters exchanged on property. All lines of argument raised ex parte before the Board are not properly before us for consideration. Board Awards presented by the Carrier (Third Division Awards 22383, 25892, 21825; Second Division Awards 8205, 8237, 9996) as controlling in this case have been studied and are not on point with the instant circumstances.

In considering the testimony relating to the alleged offense of unbecoming conduct, this record is devoid of the evidence necessary to find Claimant guilty as charged. In October, 1987, the Court made its decision wherein Claimant pleaded guilty to delivering the envelope. Claimant stated in the transcript that his father (with no previous record of illegal activity) asked to borrow his car to deliver an envelope, a package, to a friend. Claimant delivered the envelope which contained a sixteenth of cocaine. The only evidence of record indicates that Claimant pleaded guilty of delivering the envelope and his father engaged in the behavior without Claimant's knowledge. As Claimant was guilty of delivering the envelope, he received extremely limited probation and minor fines from the Court.

The evidence in the transcript contains only the Claimant's own statements and court record of a guilty finding. The Board does not find Claimant admitting to "conduct unbecoming an employee" or to any violation of the Carrier's Rules. Carrier's ex parte arguments relating to Rule 1714 and its sole mention in its February 19, 1988 quote from Third Division Award 25892 is insufficient to establish its controlling disposition in this case.

This Board must conclude that Carrier failed to establish the Rule violation with which it charged Claimant. The Carrier must present the Rule (which is nowhere to be found) and establish the link between Rule and violation by substantive evidence. Rule 1714 was not handled on property and comes too late for our consideration. Claimant's admitted guilt is not linked to a Rule for conduct unbecoming an employee. There is no Rule indicated which would restrict the off duty behavior of the employee from this conduct. There is no evidence of record to demonstrate an adverse effect on Carrier, indicate any public disclosure which created harm, or any link between the employer-employee relationship.

In the instant case the Carrier has failed to cite a Rule violated, presented no probative evidence of how the Rule was violated or any adverse public statements or negative effects. We cannot simply judge this conduct "unbecoming" and consider Carrier's action of dismissal for this behavior as Rule governed. In these circumstances, the only evidence of record is the unrefuted testimony of Claimant which indicates he turned himself in, was a victim of circumstances and except for this instance is a man of good character. We find no prior discipline record with the Carrier.

In the whole of this case, the Board finds that the Carrier has not met its burden of proof. There is insufficient evidence of a Rule violation. The Claim will be sustained to the extent provided by Agreement Rule 704.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of May 1990.