

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30894
Docket No. MW-31577
95-3-93-3-579

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Eastern Lines)

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

1. The discipline of Track Laborer F. A. Ortiz for alleged '. . . violation of Rules 1005, 1007 and 1013. . . .' was arbitrary, capricious, without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File MW-93-2/MWD 93-3 SPE).
2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to the Carrier's service 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 his being withheld from service beginning October 16, 1992 and the subsequent unjustified dismissal."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

By letter dated October 16, 1992, the Claimant was notified by the Roadmaster, that he was suspended from service pending a formal Investigation to be held on October 21, 1992, at the Office of the District Engineer. The purpose of the hearing was to determine whether the Claimant was responsible for the possession of illegal drugs, subjecting the Carrier to criticism or loss of good will by his actions and whether or not he engaged in any other business which interfered with the performance of Carrier service and without proper Carrier authority.

If guilty of these charges, his actions would constitute a violation of the following rules, which read in part:

"Rule 1005. DRUGS AND ALCOHOL: The illegal use, possession or sale while on or off duty of a drug, narcotic, or other substance which affects alertness, coordination, reaction, response or safety, is prohibited."

"Rule 1007. CONDUCT: Employees must conduct themselves in such a manner that their Company will not be subject to criticism or loss of good will.

Employees will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in a manner which would subject the railroad to criticism. Any act of hostility, misconduct or willful disregard or negligence affecting the interests of the Company is sufficient cause for dismissal and must be reported."

"Rule 1013. UNAUTHORIZED EMPLOYMENT: Employees must not engage in other business which interferes with their performance of service with the Company unless advance written permission is obtained from the proper officer."

The Hearing was postponed and subsequently held on November 10, 1992. The Claimant was suspended from service pending the results of the hearing.

On August 18, 1992, the Claimant contacted his Supervisor to request time off on August 19, 20, 21, 1992. He cited family problems. According to an investigation conducted by a Senior Lieutenant of the Carrier's Police Department in September, 1992, the Claimant purchased a car on August 19, 1992. On that day and the next day, he purchased air shocks and had them installed in the automobile. In his testimony, he indicated individuals who transported drugs frequently outfitted their cars with air shocks to allow heavy loads to be carried without detection.

On August 21, 1992, the Claimant was stopped by a police officer for tailgating and driving with an expired license plate. While the officer was questioning the Claimant he observed that he was very nervous. Becoming suspicious he asked for permission to search the trunk of the car. Permission was granted. When he opened the trunk he discovered over 200 pounds of what appeared to be marijuana, a conclusion subsequently verified by laboratory tests. The Claimant was arrested, booked and eventually indicted by the Grand Jury.

The Carrier charged him with violating the aforementioned rules. Initially he was suspended pending the results of the investigation. On November 19, 1992, he was dismissed. It was not until after the Claimant's dismissal that he pleaded guilty to "possession of Marijuana in the Amount of More than two hundred lbs., but less than two thousand lbs.". This was an aggravated degree felony. He was sentenced to ten years in the State penitentiary and fined \$5000.00. The Judge subsequently placed the Claimant on probation in lieu of jail. The fine was enforced.

Prior to his guilty plea, the Organization had appealed the dismissal to appropriate individuals on the property. On January 13, 1993, the Organization appealed the matter to the Director of Labor Relations. In his denial of the appeal, the Director noted that the Claimant had entered the above outlined guilty plea. When the matter could not be resolved on the property, the Organization appealed the matter to this Board.

The Organization, in support of the Claimant, points out he has over 20 years of unblemished service with the Carrier. Even in this case, the Claimant was not found guilty of any wrong doing at the time the Carrier took action against the Claimant.

Additionally, the Carrier failed to show they were adversely affected by the alleged actions of the Claimant. Nor did the Claimant's arrest adversely affect his work performance. Furthermore, there is no evidence to show the claimant was engaged in other business which interfered with the Carrier's business.

Finally, the Carrier based its dismissal not necessarily on evidence adduced at the hearing, but, on argument and evidence presented subsequently. The Board has consistently held that only the evidence presented at hearing can be considered in actions taken against an employee.

The Carrier argues they are not required to prove the Claimant's guilt by a preponderance of the evidence. It is necessary only to show by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion of guilt." Here, the Carrier's determinations were supported by such "substantial evidence."

The evidence shows that the Claimant was caught with over 200 pounds of marijuana in the trunk of his car. A car the Claimant had recently purchased and outfitted with air shocks. As testimony from Carrier's Lieutenant of Police revealed, it is a common practice for drug traffickers to retrofit their vehicles with air shocks in order to disguise their heavy loads. The Claimant's actions in transporting marijuana gave the Carrier cause to hold him responsible for violating Rule 1005. Since he subsequently pleaded guilty to an illegal act, it was clear he was also in violation of Rule 1007.

Furthermore, the public had access to information the Claimant was guilty of illegal conduct while employed by the Carrier. He was carrying his Southern Pacific photo ID card when booked. In a work environment in which safety is a primary concern, the Carrier cannot afford to retain an employee who is involved in the sale, transport or furtherance of illegal substances in any way.

Finally, the evidence shows the Claimant violated Rule 1013 which prohibits an employee from engaging in a business which interferes with the performance of service to the Carrier's business.

In this case, the evidence against the Claimant was so convincing, the Carrier was justified in dismissing the Claimant prior to his guilty plea.

There are two issues in this case. One involves the rules cited by the Carrier in its charge letter to the Claimant. It has to be determined if the evidence supports a finding that the Claimant violated the cited rules. Secondly, you have the question of whether there is a nexus between an employee's off-duty conduct and his employment. This is an especially difficult decision when illegal substances and arrests are involved. Carriers who learn about such employee conduct are understandably concerned about permitting the continued employment of such an individual, especially in an industry which is as drug sensitive as the railroad industry. An industry where the public has placed great reliance on the efficient and safe transport of people and products. Nevertheless, it has to be determined whether or not the Claimant's actions had an adverse effect on the Carrier.

As discussed below, the Claimant's actions cannot be totally separated from his employment. However, whether the Carrier has shown by sufficient evidence that there was a discernable negative impact on the Carrier is another matter. The Board agrees with Third Division Award 20874, which held:

"Our consideration of this matter and especially study of the authorities cited in Award 20703 leads us to conclude respectfully but firmly that the general rule is misstated therein. The correct standard is that an

employee's off duty misconduct may be the subject of employer discipline where that conduct was found to be related to his employment or was found to have an actual or reasonably foreseeable adverse effect upon the business. The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. In this latter connection mere speculation as to adverse effect upon the business will not suffice. Elkouri & Elkouri, How Arbitration Works, 3rd Ed. B.N.A., Inc. Wash. D.C. 1973 pp. 616-618."

Even though the Claimant identified the Carrier as his employer when arrested and before the Grand Jury, the evidence is insufficient to demonstrate an adverse effect on the Carrier. There is nothing to show that individuals or companies who would utilize the services of the Carrier have been reluctant to do so as a result of the Claimant's arrest. Nor is there evidence that the public, outside the police and the members of the Grand Jury, knew about the incident.

Regardless of the lack of any proven adverse effect on the Carrier, the Claimant was apparently dishonest when he requested time off to take care of family matters. The Board believes the evidence is sufficient to show that he was really taking time off to pick up a load of marijuana. Whether the Claimant was obtaining the marijuana to sell or obtaining it for someone else is immaterial. His activity negatively impacted his performance, if not directly at least indirectly, when he lied about the reason he needed time off. He was scheduled to work. It was only because the Carrier extended him the courtesy of allowing him to take time off for personal reasons, that he was available to obtain the load of marijuana. If an employee engages in the transport of illegal substances when he should be at work, it is interference with work. Unlike the decision in Public Law Board No. 4747, Case 3, where we believed the circumstances were such that there was insufficient evidence the Claimant was actually involved with the sale of drugs, in this case, the Claimant functioned alone and was clearly transporting the drugs. His inability to name the individual to whom he loaned his car created grave doubts as to his credibility.

Furthermore, the Claimant pleaded guilty to the charges. Even though his plea was after the discharge, it was of his own free will and we do not believe the Claimant's Agreement due process rights were violated when the Carrier issued the discipline based on the evidence from the Hearing. They had sufficient evidence to support discipline. Once the Carrier presented a prima facie case, the burden shifted to the Claimant to prove the facts acquired and presented by the Carrier were false.

It appears to this Board, in view of all the circumstances, that the Carrier proved the Claimant was dishonest when he asked for time off for a purpose other than the purpose stated. There was sufficient evidence that the Claimant was guilty of possession of an illegal substance, albeit while off duty. Furthermore, at least indirectly, the Claimant's actions did interfere with his work performance in as much as he would have been working except for asking for time off under false pretenses.

The only question remaining is whether the penalty issued by the Carrier was reasonable in light of the Claimant's twenty year tenure and his unblemished record. It is also noted that this was also the Claimant's first negative encounter with the law. Should the Claimant's 20 years of good service to the Carrier be ignored because of this one incident, albeit the serious act of transporting marijuana. We do not think so, and obviously the Judge who placed the Claimant on probation, had similar reservations regarding the imprisonment of the Claimant. The Board believes the Claimant's record and his tenure should be considered mitigating factors. The Claimant should be allowed to return to work with the Carrier, but without backpay. His reinstatement is subject to his successful completion of the usual reinstatement requirements, i.e. a physical examination, etc.. His continued employment is conditioned upon his maintaining a good employment record. His seniority should be unimpaired. We direct reinstatement not only because the Claimant's unblemished work record and his crime free life style should be considered, but also because the Carrier was not able to show a probable adverse effect from the Claimant's actions.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of May 1995.

LABOR MEMBER'S
CONCURRING OPINION AND DISSENT
TO
AWARD 30894, DOCKET MW-31577
(Referee Zamperini)

The Majority correctly found that the Claimant could not be disciplined by the Carrier for his off-duty conduct. Therefore, a partial concurrence is appropriate. Dissent is required, however, because the reasoning of the Majority in denying backpay, converting the period of dismissal to a lengthy suspension, is erroneous.

First, there were three charges against the Claimant at the investigation: (1) responsibility for the possession of illegal drugs; (2) subjecting the Carrier to criticism or loss of good will and (3) engaging in business which interfered with the performance of company service without proper Carrier authority. The Majority found, correctly, that the Claimant could not be held responsible by the Carrier on these charges. Furthermore, the Board has repeatedly held that an employe may not be charged with one violation, then found guilty of another and have discipline imposed on that basis. See, for instance, Third Division Awards 16610 and 16740. In addition, the Majority should have recalled that this Board serves as an appellate body and has no jurisdiction to investigate and decide charges the Carrier either did not make or for which it did not find the charged employe responsible.

The reason given by the Majority for upholding any measure of discipline against the Claimant at all is that he was dishonest

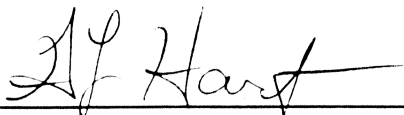
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when he asked for time off. Assuming, arguendo, that any such dishonesty had been proven, it must be noted here that no such charge was made against the Claimant nor was the Claimant found by the Carrier to be responsible for any dishonest conduct. Therefore, the Majority erred in upholding the imposition of discipline on that basis.

The Majority compounded its initial error when it ordered that the Claimant's reinstatement be without backpay. Reinstating the Claimant without backpay in this case is essentially the same as imposing a suspension without pay for 32 months. Discipline in this industry generally ranges from a letter of reprimand for relatively minor infractions up to a 120 day suspension where serious or repeated violations are proven. The imposition of a 32 month suspension where the Claimant obtained permission from his supervisor to be absent but may have failed to inform his supervisor of the exact reason therefor is clearly excessive.

For the foregoing reasons, I dissent from the decision that the Claimant be denied backpay upon reinstatement.

Respectfully submitted,



G. L. Hart
Labor Member