

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31141
Docket No. MW-31697
95-3-93-3-722

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(St. Louis Southwestern Railway Company

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

- (1) The dismissal of Assistant Track Inspector F. W. Fittinger for alleged violation of Safety and General Rules 1005, 1007 and 1011, by letter dated January 27, 1993, was arbitrary, capricious and based on unproven charges (System File MW-93-5-CB/MWD 93-10 SSW).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be paid for all time lost, with insurance, seniority, vacation and all other benefits due him restored intact and the charge letter dated January 9, 1993 removed from his personal record."

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.

As a result of a police drug raid at Claimants home, he was arrested and charged with:

1. unlawfully, willfully and feloniously possess a narcotic drug, to-wit cocaine:
2. unlawfully, willfully and feloniously sell a controlled substance (methamphetamine);
3. have in his possession or control an hallucinogenic drug... marijuana and
4. have in his possession or control with intent to use drug paraphernalia.

The raid generated an item in the local paper listing Claimant by name and the address of the house raided which was the same address as Claimant's that was on file with the Carrier. There was no mention in the article as to Claimant's place of employment.

Following the raid, the newspaper article and the arrest and incarceration of Claimant pending bond, the Carrier timely served Claimant the following notice of charges:

"You are being withheld from service pending formal investigation scheduled to be held ***January 13, 1993, in connection with your continued failure to protect your employment beginning November 16, 1992. With the allegation that you have been in possession of an illegal substance and that you have subjected the company to criticism or loss of good will by your arrest in a drug raid at your residence by officers of a drug enforcement unit and the Herington, Kansas Police on November 14, 1992. Following your arrest, articles have appeared in local media referring to the arrest of Frank W. Fittinger whose residence is shown to be the*** same as your address of record with this company.

Your actions are a possible violation of Rules 1005, 1007 and 1011 of the Safety and General Rules for All Employees.****"

Following the Investigation, Claimant was dismissed from service.

Among the Rules Carrier alleged Claimant violated were 1005 and 1011.

Rule 1005 reads, in part;

****The illegal use, possession or sale while on or off duty of a drug, narcotics or other substance which affects alertness, coordination, reaction, response or safety, is prohibited."

Rule 1011 reads, in part;

****They must not absent themselves from duty,*** without proper authority.****"

During the Investigation, the following question and answer was recorded as between the presiding Carrier Officer and Claimant:

"Q. Let's go into the alleged violation of Rule 1011, did you absent yourself from the service of the company without proper authority?

A. No

Q. After you were arrested on November 14, how did you excuse yourself from duty with the company?

A. On November 15, an assigned rest day I contacted my sister from jail and in which I told her to call***, my immediate supervisor and tell him what was going on and to contact his immediate Supervisor. Roadmaster***, that I would not be to work on Monday***."

Claimant did not call in to request authority to be off. Instead he instructed his sister to call in for him and explain what happened. We have no testimony from the sister or even a statement that reflects she did call in. Even if she did, being in jail was not accepted by the Carrier as a good and sufficient reason for being absent.

Rule 1011 was violated by Claimant.

Regarding Rule 1005 it is clear that the drugs and drug paraphernalia were found in Claimant's home and because he was indicted for being in possession of cocaine and marijuana and for selling methamphetamine he did violate Rule 1005.

The Organization's consistent theme has been that Carrier never proved Claimant had possession and control of the illegal drugs the police found in his home.

The Carrier, on the other hand, believed the indictments were sufficient evidence, particularly when the drugs were found in Claimant's home. As it developed, the Court also was of the same belief. He was sentenced to three to ten years on the cocaine possession charge, which was reduced to probation, and lesser time on the charge of possession of the other two drugs.

The Court sentence of Claimant occurred after this dispute was advanced off the property. Carrier attached the Court document stating the sentence of Claimant and the Organization vigorously protested its inclusion on the basis of material never handled on the property. Court documents are, however, a matter of public record and, as such, are admissible in proceedings before this Board at any time. Particularly, when said public document merely reinforces Parties' arguments.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.