

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44549
Docket No. SG-45693
22-3-NRAB-00003-190683**

The Third Division consisted of the regular members and in addition Referee Keith D. Greenberg when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

“Claim on behalf of K.S. Morris, for reinstatement to his former position with all seniority and benefits unimpaired, compensation for all time lost, including overtime, and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 57, when it issued the harsh and excessive discipline of dismissal to the Claimant, without providing him a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on July 19, 2018. Carrier's File No. BRS-SD-1265D. General Chairman's File No. AEGC20181023. BRS File Case No. 16058-NRPC(S). NMB Code No. 173.”

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 were given due notice of hearing thereon.

The Claimant, Karl Morris, had been employed by the Carrier as a Signal Maintainer at the time of his dismissal. On or about April 19, 2017, the Claimant was arrested for the illegal manufacture and sale of steroids.

The Carrier's Drug and Alcohol Free Workplace Program, identified with P/I Number 7.3.3, states at Section 5.4:

"As a condition of employment, an employee must notify his or her supervisor as soon as possible, but no later than 48 hours after any criminal drug or alcohol statute arrest, conviction, or off-property activity. Amtrak will conduct a case-by-case assessment with regard to any employment action following a drug or alcohol-related arrest. Those with a qualifying arrest will be required to report to Amtrak's internal Employee Assistance Program (EAP) for initial evaluation."

The record reflects that, on or about April 21, 2017, the Claimant had contacted his immediate supervisor, Ronald Stillwagon, and had notified Mr. Stillwagon about his arrest. The record further reflects that Mr. Stillwagon believed that he had subsequently contacted his own supervisor, Robert Schwarz, an Assistant Division Engineer, to notify Mr. Stillwagon about the Claimant's arrest, although Mr. Schwarz denied having been so informed. Rocco Carpinona, a Supervisor for the Carrier, testified that Mr. Stillwagon had mentioned Stillwagon's call to Mr. Schwarz in a conversation with Mr. Carpinona. Lester De Lago, Deputy Division Engineer, also denied having been notified of the criminal charges against the Claimant and the Claimant's indictment. Overall, the Carrier's Engineering Department asserted that it had first learned of the Claimant's arrest and indictment on February 20, 2018. The record does not reflect any documentation reflecting that the Carrier's managers learned of those facts at an earlier date.

The Claimant was taken out of service on March 1, 2018.

The Claimant subsequently pleaded guilty to the criminal charge of "Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver." The Claimant did not deny that he engaged in wrongdoing.

On March 13, 2018, the Carrier issued the Claimant a Notice of Investigation, which stated in relevant part that:

This notice is issued in connection with the alleged incident(s) outlined below, and you are hereby directed to appear for a formal investigation, as indicated.

....

Charge(s):

- 1) Failure to notify the Carrier of a drug or alcohol arrest, in violation of:

“Standards of Excellence” pertaining to the sections entitled, Trust and Honesty, Professional And Personal Conduct (Teamwork) and Attending To Duties, which read in pertinent parts:

Trust and Honesty: “Every productive employment relationship requires that the employee and his/her employer trust one another. When you become part of our company we place trust in you. In turn you must conduct yourself honestly and in a way that reflects credit upon Amtrak.”

Professional And Personal Conduct: “*Teamwork* - ... Part of teamwork is properly performing your duties. Another part is following instructions. Therefore, you must comply with all company and departmental policies, procedures and rules as well as all instructions, directions and orders from supervisors and managers.”

Attending to Duties: “ ... As an Amtrak employee and, therefore, the company's most important resource, you have an obligation to perform your duties properly and in accordance with the standards set for your particular job. This requires that you remain alert to your duties at all times ... ”

Drug and Alcohol Free Workplace Program 7.3.3, Section 5.4:
“As a condition of employment, an employee must notify his or her supervisor as soon as possible, but no later than 48 hours after

any criminal drug or alcohol statute arrest, conviction, or off-property activity ...”

Specification(s):

On Tuesday February 20, 2018 it was discovered by Amtrak Engineering Department that Signal Maintainer Karl Morris was arrested and indicted for manufacturing and distributing controlled substances on April 19, 2017. Mr. Morris self-surrendered to a Bucks County detective and, as a result of his arrest, is currently scheduled for trial. As of this date, Mr. Morris has failed to report any of these drug related charges to his Supervisor or anyone in his chain of command.

- 2) Engaging in the distribution of, possession with intent to distribute or importation of a controlled substance, in violation of:

Standards of Excellence, Value: Integrity: “We will comply with the spirit and letter of laws, practice high ethical standards of conduct, be socially and environmentally responsible and strive to earn and maintain the trust and respect of our employees and the public.”

Standards of Excellence, Professional and Personal Conduct (Conduct): “On the Amtrak team, there is no place for activities or behaviors that compromise the safety, satisfaction and well-being of our customers, the public or our fellow employees ... ”

Specification(s):

On Tuesday February 20, 2018 it was discovered by Amtrak Engineering Department that Signal Maintainer Karl Morris engaged in the Manufacture, Delivery or Possession with the Intent to Manufacture or Deliver a controlled substance. . . .”

After several postponements of the on-property investigation, such investigation was held on July 19, 2018. Following the on-property investigation, the Hearing Officer issued a Decision, dated July 30, 2018, which stated in relevant part that:

“On July 19, 2018, the undersigned Hearing Officer conducted an investigation into the above quoted charges. You also appeared as well as your Union Representatives Mr. Ingersoll and Mr. Haveman. The following findings are based on evidence and testimony presented at the investigation and the hearing record as a whole.

At all times in question in this case the above cited Amtrak Policies were in effect and applicable to you.

At the hearing the carrier established through witness testimony and documentation that you were arrested for manufacturing and distributing a controlled substance (steroids). The carrier also submitted the sworn to Police Criminal Complaint and accompanying sworn to Affidavit which contained a detail of the evidence against you in the criminal proceeding. In addition, it was established that the media has been involved with the criminal matter.

You did not deny being arrested for the foregoing. Rather, your defense was that you notified your then supervisor, Mr. Stillwagon, of this arrest within 24 hours and in accordance with Amtrak’s policy. As support you submitted an email from Mr. Stillwagon which indicated as much. In addition, you called Mr. Stillwagon as a witness and he testified that you had so informed him. The carrier’s witness, Mr. DeLago also stated that Mr. Stillwagon was your supervisor at the time of the arrest.

Based on the foregoing, I find that the carrier established by substantial evidence that you violated the above policies as stated in Charge 2 but the carrier did not establish by substantial evidence that you violated the above policies as stated in Charge 1. Thus, based on the testimony and the hearing record as a whole, I find that the charges were proven in part and not proven in part.”

By letter dated August 1, 2018, the Claimant was notified of his dismissal, effective immediately. An appeal of the Claimant’s dismissal was denied by the Carrier.

The Carrier argues that it had just cause to dismiss the Claimant for breaching the Standards of Excellence, which require, among other things, compliance with laws and high ethical conduct. The Claimant has admitted to engaging in manufacturing

and distributing illegal drugs, an inherently deceitful crime that justifies his dismissal. See Public Law Board No. 6199, Case 18 (upholding dismissal of employee for arrest and conviction for distribution of marijuana); Public Law Board No. 6345, Case No. 3 (upholding dismissal of employee for off-duty manufacturing of methamphetamines, as well as for conviction for such manufacturing); Third Division Award No. 31141 (upholding dismissal of employee based on absences due to incarceration as well as for indictment and subsequent conviction for the use, possession, and sale of cocaine and marijuana). The Carrier contends that the Claimant cannot be trusted; that, if returned to work, his actions could create the perception that the Carrier tolerates such illicit behavior by its employees, including by those in safety-sensitive roles; and that the Claimant compromised the workplace when he engaged in criminal conduct with a fellow Carrier employee.

The Carrier contends that the Organization's procedural arguments should be rejected. Specifically, the Board should not find that the Carrier violated Rule 57(d) of the Agreement by not conducting an investigation within 30 days of April 21, 2017, when the Claimant notified Mr. Stillwagon of his arrest. Rule 57, Discipline and Appeals, of the Parties' Agreement states in relevant part that:

“(d) An employee who is accused of an offense and who is directed to report for a trial therefor, shall be given reasonable advance notice in writing of the exact offense for which he is to be tried and the time and place of the trial. The trial shall be scheduled to begin within thirty (30) calendar days of his supervisor's first knowledge of the employee's involvement and may be postponed for a valid reason for a reasonable period of time at the request of the Company, for the employee or the employee's union representative. A copy of this notice shall be furnished the Local Chairman.”

The Carrier maintains that, while the Claimant may well have notified Mr. Stillwagon, an ARASA-represented supervisor, of his arrest, the Carrier's Engineering Department did not become aware of the Claimant's arrest until February 20, 2018, when the Chief Engineer was notified that the Claimant been arrested on charges of manufacturing and distributing illegal substances and was scheduled for trial. The record raises serious questions as to whether Mr. Stillwagon ever notified his own supervisor, Mr. Schwarz, about the Claimant's arrest. The Carrier posits that, even if Mr. Schwarz had heard rumors of the Claimant's arrest, it would have been unfair to both the Claimant and the Carrier for the Carrier to have acted on the basis of rumor alone. See Public Law Board No. 7602, Award No. 3

(finding that carrier did not have objective knowledge of employee's felony conviction until investigation by railroad police had been completed). The Carrier asserts that, while the Hearing Officer properly found that the Claimant did not fail to report his arrest, the Carrier should not be penalized when a low-level supervisor fails to timely report important information up their supervisory chain. Cf. NRAB Third Division, Award No. 37628 (finding that Rule 57 limits were not triggered by employee's admission of misconduct to supervisor, but were triggered by conclusion of investigation by Office of Inspector General). The Carrier further contends that, even if the procedural deficiencies alleged by the Organization were shown to have occurred, there was no demonstrated prejudice to the Claimant from such violations. Boards have long held that when an employee alleges procedural errors, they have the burden to prove such errors were prejudicial to their rights. See Public Law Board No. 718, Award No. 6 ("The Board further finds that there were no procedural defects in this case which were prejudicial to the claimants.").

Finally, the Carrier asserts that, even if the Board were to rule that the Claimant should not have been disciplined, the Claim here is excessive, and the remedy should be limited to payment for time lost less any compensation that the Claimant actually earned or should have earned if he properly mitigated his damages while held out of service.

The Organization contends that the Carrier failed to abide by the requirements of Rule 57(d) when it issued the Claimant harsh and excessive discipline without having conducted a fair and impartial investigation and without meeting its burden of proof. The Organization asserts that the Carrier failed to timely hold the investigation into the Claimant's alleged misconduct, in violation of Rule 57(d), and excessively delayed the investigation for four months after the Claimant was taken out of service on March 1, 2018. Because the Carrier failed to comply with the time limits of Rule 57, it forfeited its right to take disciplinary action against the Claimant for the misconduct alleged here. See Third Division Award No. 18352 (finding disciplinary action void ab initio based on carrier's failure to observe time limits in collective bargaining agreement); Third Division Award No. 41798 (sustaining claim when carrier was shown to have failed to meet contractual time limits for initiating disciplinary action). The Organization alleges that the Carrier failed to establish that the Claimant's off-duty behavior damaged the Carrier's public reputation, its property, the safety of its employees, or the safety or well-being of its customers. The Organization further asserts that there was no evidence of any nexus between the Claimant's off-duty conduct and his employment with the Carrier; at most, the Carrier has speculated as to the potential negative effect of the Claimant's behavior

without demonstrating any actual harm or prejudice. See Public Law Board No. 5352, Award No. 6 (“[I]n order to justify discipline or discharge [for off-duty conduct], the misconduct must affect the employer's business, the employee's ability [to] satisfactorily to perform his job, or the willingness of other employees to work with him. In each case of discipline or discharge for off-duty conduct, the facts must be scrutinized to determine if the conduct has in fact affected the business or the employment relationship.”); see also First Division Award No. 26782.

After careful consideration of the entire record, the Board concludes that the Carrier demonstrated just cause for the Claimant’s dismissal. The record is clear as to the Claimant’s arrest and indictment for manufacturing and distributing controlled substances; although he initially denied the charges against him, he subsequently pleaded guilty to the charge of “Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver.” The Claimant was, therefore, shown to have been guilty of the charge sustained by the Hearing Officer.

The Board is unpersuaded by the Organization’s procedural objections here. The record evidence in this case appears insufficient to support a conclusion that management was aware of the Claimant’s arrest and indictment prior to February 20, 2018 or that the investigation in this matter was unduly delayed in violation of Rule 57(d) when rescheduled once with the consent of the Organization and for a second time based on the illness of the Charging Officer.

With respect to the question of penalty, the Board is persuaded that the Carrier demonstrated just cause for the Claimant’s dismissal. The Board notes that, in situations involving off-duty misconduct by an employee, the Carrier is typically required demonstrate a nexus between the off-duty misconduct and the interests of the Carrier in order to justify disciplinary action for such off-duty conduct. Such interests negatively affected by an employee’s off-duty conduct may include harm to the Carrier’s business interests or reputation; an inability by the employee to report for work or satisfactorily perform their job; causing other employees to reasonably fear the employee or to refuse to work with the employee; or otherwise rendering the employee unfit to deal with the Carrier’s customers or to enter the customers’ places of business. See First Division Award No. 26782; Public Law Board No. 5352, Award No. 6.

After a thorough review of relevant awards, the Board concludes, however, that the overwhelming weight of precedent in this industry reflects that an employee’s proven involvement in the illegal trafficking of controlled substances, even if off-duty,

has long provided just cause for dismissal. See Third Division Award No. 24728 (upholding dismissal of employee for off-duty sale of marijuana, cocaine, and other controlled substances following guilty plea to offenses relating to same and noting, “This Board has generally taken a dim view of cases of employees using or trafficking in drugs ‘The use of drugs, or the dealing in drugs, is considered a serious offense in the railroad industry, usually resulting in dismissal.’” (internal citations omitted)); Public Law Board No. 3763, Award No. 18 (upholding dismissal of employee for off-duty sale of cocaine following guilty plea and noting that “[i]t is commonly known that the railroad industry has come under very close scrutiny with respect to the problems of drug abuse among employees. . . . There is no question as to the justification of the Carrier for taking an adamant stand against drug abuse, let alone against having an acknowledged transporter of drugs on its property.”). See also, for example, Public Law Board No. 6392, Case No. 52; Public Law Board No. 6199, Case No. 18; Public Law Board 5107, Award No. 74; Public Law Board No. 4897, Award No. 45; Public Law Board No. 5290, Case No. 1; Second Division Award No. 8001; and Second Division Award No. 9355.

As noted in Public Law Board No. 6392, Case No. 52, “There is ample Board precedent which holds that serious criminal activity on the part of an employee constitutes grounds for dismissal, because the Carrier is not obligated to retain employees whose conduct demonstrates a lack of trustworthiness. That is particularly so in the railroad industry, given the safety-sensitive nature of the jobs, the drug-free requirements placed on the industry by law and the legitimate expectations of the public.” See also Public Law Board 5107, Award No. 74 (“The charge of trafficking in drugs is considered much more egregious than that involving the use of drugs for which special rules may be applicable for rehabilitation. Proven drug trafficking is a heinous offense and commands the most severe discipline at Carrier's disposal.”).

No basis was shown on this record to mitigate the Carrier’s decision to dismiss the Claimant.

For all of these reasons, the Board finds that just cause was demonstrated for the Claimant’s dismissal.

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 8th day of October 2021.