

AWARD NO. 247
Case No. 281

PUBLIC LAW BOARD NO. 1582

PARTIES) THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

1. That the Carrier's decision to remove Plains Division Trackmen J. D. McQueen, M. A. Frost, F. Hernandez, Jr., C. R. Allen and G. L. Patin and Machine Operator G. O. Smith from service was unjust.

2. That the Carrier now reinstate Claimants J. D. McQueen, M. A. Frost, F. Hernandez, Jr., C. R. Allen, G. L. Patin and G. O. Smith with seniority, vacation, all benefit rights unimpaired and pay for all wage loss as a result of investigation held August 26, 1983 continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial creditable evidence that proved that the Claimants violated the rules enumerated in their decision, and even if Claimants violated the rules enumerated in the decision, permanent removal from service is extreme and harsh discipline under the circumstances.

FINDINGS: This Public Law Board No. 1582 finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

In this dispute the claimants herein, J. D. McQueen, M. A. Frost, F. Hernandez, Jr., C. R. Allen, G. L. Patin and G. O. Smith were notified to attend a formal investigation on August 26, 1983 in Amarillo, Texas.

The six employees were charged with having had in their possession a controlled substance (marijuana) while on duty and on Company property while assigned to Gang 60 and working on the Dumas District of the Plains Division on August 1, 1983 and subsequent dates. They were also charged with furnishing false statements and withholding information in connection therewith.

Pursuant to the investigation the claimants were found in violation of Rules 1, 2, 4, 6 and 14, General Rules for the Guidance of Employees, Form 2626 Standard, and were dismissed from the service of the Carrier.

A Special Agent for the Carrier testified at the investigation that two informants advised him that Gang 60 was regularly using marijuana. He took the statements of the two unidentified witnesses, and those statements were introduced at the investigation.

The Organization objected to these statements being admitted since they were hearsay. Normally that objection would be valid, and in this case is only valid to a certain extent. Standing by itself, those statements would certainly be insufficient to find that the claimants were guilty.

One of the principals charged, Frank Hernandez, Jr., admitted using marijuana and admitted observing the remainder of those charged smoking marijuana while on duty at Marsh, Texas. The statements of the unidentified, confidential informants does not bear a great deal of weight, but the testimony of Frank Hernandez, Jr. justifies substantial credence by the Company.

It is also noted that Foreman F. E. Urioste testified that he held a safety meeting with the trackmen on August 8, 1983 and warned them that if drugs or marijuana were found in their possession, they would be dismissed on the spot.

Foreman Urioste also testified that late in the morning he was listening to claimants Patin and Allen and heard them say that trackman J. D. Kirby had called Patin on the evening of the 15th and told him that the Special Agents were going to check the gangs for drugs the next morning. He testified that claimant Patin called the other trackmen, and they all cleaned out their cars.

Foreman Urioste further testified that claimants Smith, Allen, Frost and Patin were all very mad about this and wanted to know who the "snitch" was. He testified that he heard claimant Allen say: "If I find out who the snitch is, I might burn his house down." He also testified that he did not believe that claimant Allen was serious in making that threat.

Foreman Urioste then testified that he heard through the grapevine that claimants Smith, Patin, Frost and Allen had made threats of bodily injury to the informants. However, that testimony should be stricken from the record and certainly is not being considered by the Board.

The transcript contains 57 pages of testimony, all of which has been carefully studied by the Board. Three employees, Frank Hernandez, Jr., Gilbert San Miguel and Jimmy D. McQueen admitted smoking marijuana on duty. Claimants Smith, Allen, Frost and Patin were all observed by claimant Hernandez smoking marijuana while on duty at Marsh, Texas. That testimony is sufficient for the Carrier to find that claimants were guilty.

It is noted that the representative of the claimants requested that the witnesses be sequestered. Although this request was a little late, it should have been honored by the Carrier. Such a request should be made at the start of an investigation before any testimony

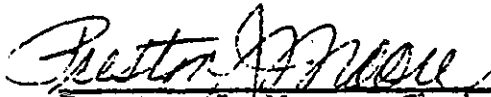
is taken. However, under the circumstances herein there was no harm done by the Carrier's refusal to sequester the witnesses.

The Board again wishes to stress that hearsay testimony, by itself, is insufficient as a general rule on which to base any findings. Certainly the hearsay testimony herein is not sufficient, in itself, to make a finding of guilt. The hearsay testimony is accepted in this instance because of the alleged threats of bodily harm toward the unidentified witnesses and their refusal to step forward because of those threats. At the same time, the testimony is recognized as hearsay testimony and was given little weight or credence.

The decision herein is based upon the testimony of one of the principals involved. The use of a controlled substance while on duty is a serious offense, and the claimants herein had been cautioned and warned by their foreman. That caution and warning is immaterial since it occurred on August 8, 1983, and the prevailing testimony concerns dates prior to that incident. The employees knew, or certainly should have known, that the use of marijuana is a very serious offense which would likely result in discharge.

Under the circumstances there is no justification for setting the discipline aside.

AWARD: Claims denied.


Preston J. Moore, Chairman


Organization Member


Carrier Member

Dated February 6, 1984
at Chicago, Illinois