

PUBLIC LAW BOARD NO. 1838

Award No. 78

Case No. 78

Carrier File MW-CR-81-56

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Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement Former employes, J. A. Tabb, Apt. 41-Hill Avenue, Bluefield,
of WV 24701, and G. L. Reed, Box 8, Princeton, WV 24740, was
Claim dismissed account of allegedly having marijuana in their
possession on railroad property on November 3, 1981.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 1, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant Reed began service with Carrier, on August 6, 1979, and Claimant Tabb began service with Carrier, on June 18, 1979, and were on duty and under pay on November 3, 1981, when they were dismissed from all service of the Carrier for violation of Rule G.

Rule G, in pertinent part, reads;

"The use of alcoholic beverages, intoxicants or narcotics by employees subject to duty, or their possession or use while on duty or on company property is prohibited."

Pursuant to the mandates of Rule 33 - Discipline and Grievance, Claimants requested, and were granted, a hearing which was held on May 14, 1982. As a result thereof Claimants dismissal from all service was reaffirmed.

Organization advances the appeal on the grounds, amongst others, that Carrier failed to establish by sufficient credible evidence proof of possession of the marijuana which gave rise to Claimants' dismissal. Additionally, Organization avers that Carrier founded its conclusion that Claimants were in possession of alleged marijuana by relying upon laboratory tests and analysis by the local police authorities which were never made part of the record.

The record of Claimants' investigation reflected that on November 3, 1981 R-5 Rail Gang Supervisor Greenfield returned to the Courtland area and noticed that the gang's fuel truck was beside the bunk cars; Supervisor Greenfield testified that he was aware that some machines were getting low on fuel and sought to locate the driver. He walked into the camp cars, smelled what he believed to be marijuana, observed a tray on the camp car table at which Claimant Tabb was seated, partially covered with papers. Supervisor Greenfield moved the papers and observed a tray containing pieces of a tobacco-like substance, stems, seeds and what he believed to be marijuana cigarette butts. Greenfield then instructed the employees present in the car to remain there and sent for assistance. Supervisor Greenfield testified that although he was not an expert, he had previously smelled and observed marijuana on a number of other occasions; Greenfield was sure in his own mind that the substance in question was, in fact, marijuana.

Claimant Reed was not present at this confrontation. However, as a result of what was observed, local police were sent for, search warrants were obtained, and a search of the camp car was made. As a result thereof additional marijuana was found in several different locations in the car, including a toilet kit marked with Claimant Reed's name, and

which he subsequently identified as his, which contained a quantity of a substance which was subsequently identified as marijuana. As a result thereof, Claimant Reed was additionally charged with violation of Rule G. Claimants Reed and Tabb were subsequently charged and convicted by the civilian authorities for possession of marijuana.

After the civilian authority arrived Claimant Tabb was confronted by Special Agent Daley; Claimant stated "...I tell all of you one thing to solve the problem of who the tray belongs to, I take the responsibility for the tray and the contents...". Subsequently, after the discovery of marijuana stashed throughout the car, Claimant rescinded his statement. At the investigation Claimant denied that the marijuana was his, explaining that he offered to take the responsibility because it was such a small amount of stems and seeds, and so much commotion was being made about it, he thought it would be the easiest way to resolve the incident, believing that nothing of consequence would occur as a result thereof.

Claimant Reed denied any knowledge of the marijuana, testifying that when he used the shave kit he did not notice it there, stating that he did not use marijuana, did not know if anybody else used it, and was not aware of any marijuana in the camp car. Both Claimant Reed and Claimant Tabb testified, as did virtually all of the witnesses, the camp cars were open and virtually unattended throughout the day and that anybody could have come aboard and planted the marijuana in the places that they found. Both denied knowledge of, possession of or responsibility for the marijuana.

Notwithstanding the conflict in testimony, Carrier had a right to rely upon the credibility of its witnesses and the proofs that were

presented. There is no factual dispute that the material found was, in fact, marijuana. The pivotal issue was whether or not Claimants were in violation of Rule G by their alleged possession of, or use of narcotics while on company property.

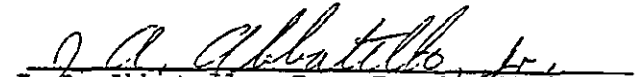
The Board finds that there was sufficient credible evidence to support Carrier's conclusion, notwithstanding Claimant's denial thereof, that Claimants were in possession of a narcotic substance on company property. While supposition could lead one to agree that someone could have planted the marijuana in Claimant Reeds travel kit, no motive for such act was ever asserted or shown. The Hearing was not a court of law; Carrier, in these circumstances, had the right to draw from the facts shown. The permissible inference that all the items in Claimant Reed's travel kit belonged to him. Carrier also had the right to rely on Claimant Tabb's contemporaneous admission, notwithstanding his subsequent recantation; but even disallowing his statement, Claimant Tabb put himself in a compromising situation and failed to provide any credible explanation therefor.

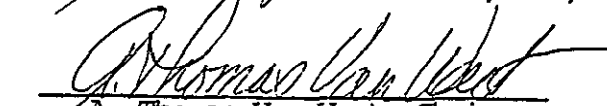
Claimants were ably and aggressively represented throughout the hearing and subjected Carrier's witnesses to thorough cross-examination. Claimants were afforded the opportunity to testify on their own behalf and call such witnesses as they deemed appropriate in support of their defense, which they did.

Carrier's conclusions was based upon more than mere speculation and was supported by sufficient credible testimony. The discipline was neither arbitrary, capricious nor excessive in the circumstances. For the reasons set forth above we must conclude that the claim be denied.

AWARD: Claim denied.


Bryce Hall, Employee Member


J. A. Abbateillo, Jr., Carrier Member


A. Thomas Van Wart, Chairman
and Neutral Member

Issued at Salem, New Jersey, March 26, 1984.