

Award No. 10
Case No. 10

Public Law Board No. 2203

PARTIES
TO
DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Consolidated Rail Corporation

STATEMENT
OF
CLAIM:

- (a) The Carrier violated the Rules Agreement effective December 16, 1945, as amended, particularly Rules 5-A-1 and 5-E-1, when it assessed discipline of dismissal on M. W. Repairman R. A. Laase, August 25, 1977.
- (b) Claimant Laase's record be cleared of the charge brought against him on July 18, 1977.
- (c) Claimant Laase be restored to service with seniority and all other rights unimpaired and be compensated for wage loss sustained in accordance with the provision of Rule 6-A-1(d), with benefits restored.

FINDINGS:

Claimant was dismissed from Carrier's service on the ground that evidence presented at a hearing

held on August 3, 1977 substantiates the following charge against him:

"Conduct unbecoming an employee in that on October 13, 1976, at 1:00 p.m. you sold Marijuana while on Company property, (and at the time you were on duty and under pay) an act in violation of Section 2935.03 (A) (1) (E) (1) of the Ohio Revised Code for which you were subsequently indicted by a Stark County Grand Jury and arrested."

The hearing had been originally scheduled for February 8, 1977, but had been postponed to August 3 of that year at Petitioner's request. He had been held out of service since November 24, 1976, after he had been arrested by local police and indicted by the Stark County Grand Jury for selling marijuana at the time and place indicated above in violation of the Ohio Revised Code.

In Carrier's view the hearing it conducted on August 3, 1977 "clearly established claimant's guilt."

There are a number of difficulties with Carrier's position. No testimony was offered at the August 3rd hearing by any witness that he had actually observed the alleged sale. Nor were sufficient facts presented at the hearing to establish by circumstantial evidence that the sale had taken place. The

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Conrail police sergeant who was called as a witness merely testified that a County narcotics agent, John C. Miller, "informed me" that he had purchased Marijuana from claimant, and that on the basis of Mr. Miller's testimony an indictment against claimant was returned by the Grand Jury for making the sale and thus violating the Ohio Revised Code Section 2935.03.

A notarized document signed by Mr. Miller was introduced in evidence at the August 3rd hearing. It stated that on October 13, 1976 at 1:00 p.m. claimant sold Mr. Miller 26.7 grams of Marijuana in the parking lot of the shop where claimant was employed. No opportunity was afforded claimant or his representative to cross-examine Mr. Miller.

We agree with Carrier that criminal court rules of evidence do not necessarily apply to discipline hearings conducted under the terms of a collective bargaining agreement. As Third Division Award 19929 points out, "a carrier's right to discipline an employee is unrelated to the actions of criminal or civil courts."

No matter how informal discipline proceedings maybe, however, such extreme discipline as dismissal must be supported by substantial evidence. Mr. Miller's affidavit, without any corroborating evidence or opportunity to cross-examine him, does not provide a sufficient basis for dismissal although it may be considered on the question of remedy. Nor does

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claimant's arrest and indictment lend weight to the dismissal decision since the Court ruled, when the criminal case against claimant was heard, that he was "Not Guilty of Trafficking." The police sergeant's hearsay testimony is of absolutely no value in establishing guilt on claimant's part.

In the light of these considerations, it cannot be validly held that a proper basis exists for dismissal, the extreme penalty in the employer-employee relationship. Conjecture, strong suspicion or, in the absence of conviction, an employee's arrest and indictment are not to be equated with proof of guilt.

There may be situations where it would not be inappropriate to base the dismissal of an employee on the written statement of a witness who cannot be produced at a discipline hearing. Insufficient facts have been presented in this case to warrant such highly exceptional treatment.

Upon weighing all these considerations including the language of Rules 5-A-1, 5-C-1, 5-D-1, 5-E-1 and 6-A-1 and the entire record, it is our conclusion that claimant should be offered immediate reinstatement to Carrier's employ with seniority and other rights unimpaired but without back pay. While the agent's statement will not be used to support the dismissal decision, it has been taken into consideration by this Referee in fashioning a remedy and concluding that in the context of the Carrier-employee relationship, claimant was not blameless.

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AWARD: Claim sustained to the extent indicated, supra,
in the last paragraph of Findings.

Adopted at Philadelphia, Pa., *July 10* 1979.

ORDER: Carrier is hereby ordered to put the above Award
into effect on or before August 10 1979.

Harold M. Weston

Harold M. Weston, Chairman

M. M. Lerner

Carrier Member

John J. [illegible]

Employee Member