PUBLIC LAW BOARD NO. 2908

Case No. 31

Award No. 31

Parties to Dispute: Brotherhood Railway Carmen of the United States & Canada and Norfolk and Western Railway Company

Statement of Claim:

1. That the N&W Railway Company violated the controlling Agreement of September 1, 1949, as subsequently amended, when on November 5, 1981, Upgraded Carman W. N. Massie was given a formal investigation resulting in an unjust dismissal, effective November 23, 1981.

2. That the investigation was improperly arrived at, and represents unjust treatment within the meaning and intent of Rule No. 37 of the controlling Agreement.

3. That because of such violation and unjust action, the N&W Railway Company be ordered to reinstate W. N. Massie to service with seniority rights, vacation rights, and all other benefits which are a condition of employment unimpaired, with compensation for all loss of time, plus 6% annual interest. Reimbursement of all losses sustained, account, loss of coverage under health and welfare and life insurance agreements during the time held out of service.

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 January 29, 1981, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Under date of September 11, 1981, Claimant was notified, in pertinent part:

> "... You are hereby notified to report to the Office of the General Foreman, Second Floor, Motive Power Office Building, Portsmouth, Ohio, at 10:00 AM, Thursday, September 17, 1981, for a formal investigation to determine your responsibility in connection of your conduct unbecoming an employee in that on September 9, 1981, in Scioto County Common Pleas Court, Portsmouth, Ohio, you were found guilty of the charge of possessing a drug abuse instrument.
>
> If you desire to have a representative or representatives and/or witnesses present at this investigation, please arrange for their presence."

The investigation, after repeated postponements at the request of the Organization on Claimant's behalf, was held on November 5, 1981. Under date of November 23, 1981, Claimant was notified, in pertinent part:

> "... As a result of the formal investigation held on November 5, 1981, here at Portsmouth, Ohio, you are hereby dismissed, effective immediately, from all service with the Norfolk and Western Railway Company.
>
> /s/ J. R. Corea, General Foreman"

On April 1, 1977, Carrier caused to be promulgated the following bulletin:

> "BULLETIN
>
> TO ALL MOTIVE POWER DEPARTMENT EMPLOYEES:
>
> Effective with the issuance of this Bulletin, Motive Power Department personnel will be governed by the following:
>
> > 'The conduct of any employee leading to conviction of any felony, or of any misdemeanor involving the unlawful use, possession, transportation or distribution of narcotics or dangerous drugs, or any misdemeanor involving moral turpitude is prohibited.'"

On February 10, 1981, in New Boston, Ohio, Claimant Massie was arrested by the New Boston Police along with two other men. The New Boston Police had received a tip and had staked out a place where the three men in a vehicle had gone to. The arrest and subsequent search disclosed a set of scales, a bulk amount of marijuana totaling 714.28 grams, and a bulk amount of hashish totaling 85.71 grams. Claimant was subsequently indicted by the State Grand Jury and appeared in Court on September 9, 1981, prepared to try the case. The matter was plea bargained and the charges against Claimant were reduced to "...knowingly possess, an instrument, to wit: one Chaus Triple Beam Balance Scale, 2610 gram capacity, to prepare a dangerous drug, other than marijuana, for unlawful use." Claimant, on his entry of a guilty plea, was fined $150 tax Court costs and other statutory Court costs.

As a result of reading that information in the paper, as reported on September 10, 1981, J. E. Fiery, Car Foreman, brought charges against Claimant resulting in the instant claim.

The transcript of the investigation fails to reflect any prejudicial behavior by the Hearing Officer or prejudgment by the Carrier against Claimant. Testimony was brief and concise; Claiment was arrested by the New Boston Police along with three other men, they found a substantial amount of marijuana and hashish in the car together with a scale used in the process of dividing up narcotics for subsequent resale, and Claimant was able to plea bargain his case to a reduced charge of possession of the scale only, a misdemeanor notwithstanding.

Claimant's defense was that he pled guilty to the charge on the advice of his attorney, who, Claimant contends, advised him that his pleading guilty to the reduced charge would help him save his job with

his employer.

Organization made an impassioned plea on Claimant's behalf pointing out that there were three generations of Claimant's family who served honorably, and without incident, with the Carrier for a total of 114 years of service. Organization pointed out that Claimant had undergone a severe emotional stress, resulting in a nervous breakdown, as a result of the breakup of his marriage. Organization contends that Claimant had become dependent upon prescription drugs, but through his own initiative was able to shake his dependency and was prepared to demonstrate his reliability to his employer.

All of those factors might well have been mitigating factors for the Carrier to take into consideration in coming to a determination of what would be an appropriate discipline. Notwithstanding, Carrier chose to dismiss Claimant.

Claimant was convicted of a most serious charge. It involved an issue of moral turpitude, and, were we to substitute our judgment for the Carrier's and reconsider the discipline imposed on the basis of the arguments advanced on Claimant's behalf by his representatives, we would, thus, be substituting our judgment for the Carrier's which is a principle that the divisions and boards have long held repugnant.

Accordingly, we are bound by the facts developed in the record which clearly and succinctly establish that Claimant was convicted of a crime that falls squarely within the parameters of the April 1, 1977 bulletin. We can find no factors in this record that would permit our altering the results arrived at on the property. Therefore, we are impelled to deny this claim.

AWARD: Claim Denied.

R. P. Wojtowicz, Employee Member

S. C. Lyons, Carrier Member

A. Thomas Van Wart, Chairman
and Neutral Member

Dated: Jan. 25, 1985