Award No. 5
Case No. 5

PUBLIC LAW BOARD NO. 4111

PARTIES: United Transportation Union (C&T)

and

Union Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of former North Platte, Nebraska Brakeman K. E. Vreeland for reinstatement to service with vacation and seniority rights unimpaired and pay for all time lost as a result of February 2, 1984 investigation."

FINDINGS: The Board, upon the whole record and all the evidence, finds that:

The Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended. The Board has jurisdiction over the dispute and the parties involved herein. The parties to said dispute were given due notice of hearing.

The Claimant, Kirk E. Vreeland, a Brakeman, was fired and out of service between November 27, 1981 and December 5, 1982 at which time, he was reinstated. On August 22, 1983, the Claimant was arrested in North Platte, Nebraska, for the alleged violation of Federal laws relating to possession and delivery of

controlled substances. News of his arrest was noted in the North Platte Telegraph, a local newspaper.

On January 12, 1984, Mr. Vreeland entered a plea of guilty with respect to two of the eight counts with which he had been charged (Count I and Count IV of the indictment). Count I charged that from on or about the first day of January 1981 to on or about the 16th day of June 1983, the Claimant, and others, did wilfully and knowingly combine, conspire, confederate and agree to distribute and possess, with intent to distribute, cocaine, marijuana and other controlled substances. Count IV charged that on or about the 20th day of November of 1982, the Claimant knowingly and intentionally did unlawfully distribute 2 ounces, more or less, of cocaine, a controlled substance. On March 6, 1984, the Claimant was sentenced to serve 8 years in the Federal penitentiary on both counts which sentences were to be served concurrently, followed by 5 years of parole. On December 1, 1986, he was released from prison and will be on parole for a period of 10 years.

By memo dated January 31, 1984, the Claimant was given notice of an investigative hearing scheduled for February 2, 1984:

> "...to develop the facts and determine responsibility on alleged charges that on January 12, 1984, in United States District Court, Omaha, Nebraska, he pled guilty to one count of conspiracy to distribute and possess, with intent to distribute cocaine,

marijuana and controlled substance and one count of unlawful distribution of 2 oz. (more or less) of cocaine suggesting conduct unbecoming to an employee of the Union Pacific Railroad, indicating violation of General Notice, General Rules B, E; and Operating Rule 700.

This investigation and hearing will be conducted in conformity with Rule 84 of the Agreement effective May 1, 1983, between the Company and the United Transportation Union (C) and (T)... ."

As a result of this hearing, it was determined that the Claimant had engaged in the alleged conduct and had violated General Rule B and E and Operating Rule 700 as hereafter set forth, and he was dismissed:

GENERAL RULE:

"B. Employes must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, they must apply to proper authority of the railroad for an explanation."

"E. Employes must render every assistance in their power in carrying out the rules and special instructions, and must report any violation thereof to the proper officer."

OPERATING RULE:

"700. Employes will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations."

Claimant was notified of his dismissal by letter dated February 2, 1984. The Organization appealed this decision to the Carrier through the appropriate steps of the grievance procedure, but at each step, the appeal was denied by the Carrier.

"RULE 84. DISCIPLINE PROCEDURE states inter alia:

(a) Investigations. No employe will be disciplined or dismissed without a fair hearing. Suspension in proper cases pending hearing will not be considered a violation of this principle. Hearings will be held as promptly as possible and within five days from the date charges are preferred and decision rendered within ten days of completion thereof.

"At a reasonable time prior to the hearing, the employe will be advised of the charge against him. An employe may be represented by an employe of his choice or his duly elected Union representative, and the accused and his representative shall be permitted to hear the testimony of and interrogate all witnesses.

"A copy of the transcript of the investigation will be furnished to the interested Local Chairman upon his request in cases where discipline has been assessed.

"An employe failing to appear at a hearing, after having been properly notified in writing, and who makes no effort to secure a postponement, will automatically terminate his services and seniority rights.

"b) Appeals. (1) Appeal from the decision must be filed with the Superintendent in writing within thirty days from date thereof. Final decision of Superintendent on appeal consideration must be made within thirty days from date of appeal. If it is found the employe has been unjustly suspended or dismissed from the service

such employe shall be reinstated with seniority rights unimpaired and compensated for wage loss, if any, resulting from such suspension or dismissal." (emphasis added)

Preliminarily, the Organization urged that the Carrier was aware of the Claimant's guilty plea from the time he entered it on January 12, 1984. Nonetheless, an investigative hearing was not held until February 2, 1984. Accordingly, it is the position of the Organization that an investigative hearing was not held as promptly as possible as required by Rule 84, and as a result, the discipline must be set aside.

Despite the assertions of the Organization, it is unclear from the record as to when the Carrier became aware that the Claimant had entered a guilty plea on January 12, 1984. It is true that the notice of hearing dated January 31, 1984 refers to the guilty plea that was entered on January 12, 1984, but this does not establish when the Carrier became aware that the plea had, in fact, been entered. Even assuming arguendo that the Carrier was aware that the plea had been entered on January 12, 1984, the Board does not find this to be a violation of Rule 84 which requires hearings to be held as promptly as possible and within 5 days of the date charges are preferred. In Award No. 1 of Public Law Board No. 3757, this Referee held that it was not unreasonable or inappropriate for the Carrier to await the outcome of criminal proceedings before initiating any action.

In that case, there was a 7-month hiatus between the Claimant's arrest and the Notice of Hearing. In the instant case, there was only a period of 19 days between the entry of a plea of guilty and the January 31, 1984 Notice of Hearing. There is no evidence that the Claimant's position was in any way prejudiced, and the Board is persuaded that the Carrier acted in a responsible manner insofar as the scheduling of a hearing is concerned. In addition, the Board also notes that at the outset of the hearing, the Claimant was asked by the hearing officer whether the Notice of Hearing was received within the time frame required by the Agreement. Mr. Vreeland responded that it was.

In seeking to set aside the discharge, the Organization raises the following defenses:

1. Because of the Claimant's prior termination by the Carrier, he was unemployed by them between November 27, 1981 and December 5, 1982. Since the conduct to which he pled guilty occurred during this time frame, he was not employed by the Carrier when he violated the law, and, therefore, any disciplinary action which might be applicable to individuals who are employed do not apply to the Claimant.

2. Even if the Claimant were, in fact, an employee,

his off-duty conduct, not involving the Company premises, would not subject him to discipline by the Carrier and is beyond the scope of General Rules B and E and Operating Rule 700 since these Rules apply solely to conduct on Company time or Company premises.

3. Assuming General Rules B and E and/or Operating Rule 700 are found to apply to the Complainant, there is no substantial evidence that the Claimant violated these Rules, and, therefore, he should not be subject to discipline for his conduct.

With respect to the Claimant's first defense, namely, that he was not employed when the criminal conduct occurred, the Board cannot agree. While it is true that Count IV involves conduct which occurred on November 20, 1982 (the Claimant was not re-employed until December 5, 1982), the criminal conduct encompassed by Count I involves a much broader time frame (January 1, 1981 to June 16, 1983). Furthermore, the nature of the charge to which the Claimant pled guilty is conspiracy. As a co-conspirator, the Claimant was responsible in the eyes of the law for each and every criminal act committed by all of the co-conspirators. The conspiracy was initiated on or about January 1, 1981 which was well prior to Mr. Vreeland's termination on November 27, 1981 and continued until June 16, 1983 which was over a month after Mr. Vreeland had been reinstated to his job on

December 5, 1982. Although the Claimant indicated that his own drug dealings were confined to the time period when he was laid off by the Carrier (November 27, 1981 to December 5, 1982), or inactively employed as he put it, the fact remains that he pled guilty to involvement in a conspiracy which extended from January 1, 1981 to June 16, 1983. In light of his guilty plea to this charge, the Board is inescapably drawn to the conclusion that the Claimant was involved in a criminal course of conduct relating to the possession and distribution of drugs during a time when he was actively employed by the Carrier. As a result, the Board is not persuaded that the Claimant can insulate himself from any adverse consequences on the basis that this conduct did not occur during a period of employment.

The second defense raised by the Organization focuses on the nature of the Claimant's conduct. There is no assertion by the Carrier that the Claimant's involvement with the law took place on Company premises or while the Claimant was assigned to duty. It is, therefore, urged that General Rule B and E and Operating Rule 700 do not apply to this situation.

While the Board is persuaded that the language in Rule B and Rule E is not intended to address the unique concerns of off-duty behavior, the same is not entirely true for Operating

Rule 700. The Rule proscribes, inter alia, conduct which subjects the Carrier to criticism and loss of good will. The great weight of arbitral authority, both within and without the Railroad industry, has long held that although an Employer does not generally have a right to monitor or restrict the behavior of its employees while away from the work place, there are limited exceptions. The foremost of these is the right of an Employer to protect itself from the off-duty behavior of an employee which is harmful to the Company's operation or reputation. While Rule 700 contains very sweeping language, some of which may have no applicability outside the work place, the specific section of Rule 700 just referred to by the Board embodies language consistent with the well recognized exception to the general rule set forth above. See, e. g., Third Division Award No. 11052 by Referee David Dolnick in which he noted:

> "It is a generally recognized rule that an employee may be disciplined for acts done off the property. The test is whether the outside conduct affects the employer-employee relations. What conduct affects such relationship depends upon the situation in each case."

Based on the aforesaid considerations, the Board concludes that the language relied on by the Carrier in Operating Rule 700 does have application to off-duty conduct.

The Organization nonetheless urges as its third defense that there has been no showing that the Carrier has been subjected to criticism or that there has been a loss of good will. Mr. Larry W. Campbell, a special agent for the Carrier, acknowledged in the course of his testimony (see page 4 of the transcript) that there was nothing in either the newspaper or the Court records which associated Mr. Vreeland's conduct with the Union Pacific Railroad, and there was no assertion that criticism of any sort was directed at the Carrier as a result of the Claimant's conduct.

Accordingly, the Board must ask whether, indeed, the Carrier has established by substantial evidence that there was a loss of good will? Good will is generally understood to be the relationship of a business enterprise with its customers. To what extent was it demonstrated at the hearing that the conviction of the Claimant adversely affected the relationship between the Carrier and its customers? While it was shown that news of the Claimant's arrest was carried in a local newspaper, it was also established that the Carrier's name was never linked to that of the Claimant. Thus, although notice of the arrest was published, there was no evidence that the news of the conviction was ever disseminated to the public. There was no testimony by employees of the Carrier or by any member of the

public that the case ever received any singular degree of notoriety. One can, therefore, only speculate as to the extent which Claimant's conviction became known to the public at large. Although the newspaper report provides some evidence that the Carrier's image may have been subject to disparagement, the Board cannot find, without more, that this amounts to substantial evidence of an adverse impact on the Carrier's business relationship with its customers.

The Board is not making a finding that there was no harm to the good will of the Carrier, solely, that there were insufficient facts presented at the hearing in this case to establish such harm. When Mr. Campbell, the lone witness for the Carrier, was asked (see page 4 of the transcript of the hearing) whether there was anything in the North Platte Telegraph associating Mr. Vreeland with the Union Pacific Railroad, he replied:

"Not that I am aware of."

When he was asked whether there was anything in the Court documents or public record which associated Mr. Vreeland with the Union Pacific Railroad, he responded:

"Not in any of the articles that I read, no."

These questions to which Mr. Campbell responded go to the

very core of the Carrier's case insofar as Rule 700 is concerned. Was there or was there not evidence of an adverse effect upon the good will of the Carrier by the Claimant's conduct? Mr. Campbell, while undoubtedly candid in his response, fails to affirm any direct nexus between the conduct of the employee and a tarnished public image of the Employer. It is the very public who reside in the North Platte area who comprise the customer base for the Carrier in that locale. Absent substantial evidence that the relationship between the Carrier and its potential customers has been affected, the Board cannot logically conclude that the good will of the Carrier has been damaged.

Had the Carrier adopted a rule similar to the one cited in Award No. 21825 of the National Railway Adjustment Board,

> ["The conduct of any employee leading to conviction of any misdemeanor involving moral turpitude (including without limitation, the unlawful use, possession, transportation or distribution of narcotics or dangerous drug) or of any felony is prohibited."]

it would be sufficient to establish that the Claimant was convicted of a narcotics' violation in order to show that such a Rule had been violated.

In the case at issue, the Carrier has adopted a somewhat different Rule which requires a significantly different degree of evidence. It cannot merely present evidence of a conviction to establish a violation of Operating Rule 700 but must also demonstrate by substantial evidence that there has been adverse criticism leveled at the Carrier or that an erosion of the good will of the Carrier has occurred. These elements, particularly, the latter, provide a considerable evidentiary hurdle which has not, in the judgment of the Board, been satisfied in the instant case.

However, these conclusions of the Board are not entirely dispositive of the case at hand. Arbitral authorities have long held that an Employer has the right under every Agreement to discipline an employee for just cause. Even if the Carrier had no specific Rule on which to rely, it could assuredly take action against an employee for assaulting a supervisor or for theft of Company property. Likewise, the absence of a specific Rule to the contrary would hardly preclude the Carrier from taking severe disciplinary action against an employee found guilty of defrauding the Employer or engaging in sabotage. Even in the absence of a particular set of Rules, the authorities unanimously agree that an Employer may protect itself from

improper conduct by taking appropriate disciplinary action, provided it can establish "just cause" for doing so. This is a principle as old as labor relations.

The parties in this case have acknowledged this principle in their own Collective Bargaining Agreement. See "Rule 84, Discipline Procedure," paragraph (b) Appeals, which states in part:

> "If it is found the employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated... ."
> (emphasis added)

The Notice of Hearing sent to the Claimant by letter dated January 31, 1984 specified that the investigation and hearing were to be conducted in conformity with Rule 84 of the Agreement between the parties. This letter was part of the Carrier's submission as Exhibit A, and the Organization's submission as Exhibit A. The entire grievance was processed pursuant to the terms of Rule 84 and the just cause provision contained therein.

The Claimant was advised that he was to be investigated as a result of criminal conduct which the Carrier also felt was a violation of Rule B, E and Rule 700. The Board does not find that a violation of Rule B, E or Rule 700 has been proven, but there remains the question of whether the Complainant's conduct is

subject to the just cause precept of Rule 84 based on the impropriety of the act itself.

Language from an Award by Referee Dolnick previously set forth above captures the essence of the arbitral principle involved in off-duty conduct cases. To recapitulate, it must be established that the outside conduct has an adverse impact on employer-employee relations. The Board has reviewed a great number of decisions, and it is apparent that many types of off-duty conduct, regardless of their repugnance to the sensibilities of the Employer, have not been held to meet the adverse impact criteria. Despite convictions for a wide variety of off-duty misconduct, such as public acts of sodomy, disturbing the peace, pornographic photography, shoplifting, passing bad checks, contributing to the delinquency of a minor (sexual involvement between a 19-year-old male and a 13-year-old female), assault and battery, solicitation of homosexual activity in a public place, etc., dismissal has not been sustained when the conduct could not be shown to have an adverse impact on the Employer's business. The rationale behind such decisions is set forth in great detail in Norton v. Macy, 417 F.2d 1161, 1165, et seq. (U.S. APP. D.C.) 1969). This case involved an appeal from a decision by the Civil Service Commission which terminated the services of an

employee who admitted involving himself in solicitation for homosexual activity. The Court overruled the Commission.

Despite a variety of Awards concerning off-duty conduct which have proved favorable to the employees concerned, the principle remains that if such conduct is related to or has an adverse effect upon the Employer's business, then, disciplinary action may be deemed to be appropriate. Of those cases which have addressed situations of admitted conviction for off-duty involvement with drugs, many have recognized the appropriateness of some degree of discipline on the part of the Employer. Rulings which reach a contrary conclusion often involve the use of marijuana and take into account the de-criminalization of this substance.

Even in cases only involving marijuana, there is a noticeable difference between the treatment afforded by arbitrators to those who merely used or possessed the substance as compared with those who engaged in trafficking. In Denenberg and Denenberg, Alcohol and Drugs: Issues in the Work Place, p., Appendix E, 185 (BNA Books, 1983), the authors cite some 23 cases in which employees have been punished for involvement with marijuana off the Company premises. The punishments varied from mild suspensions to termination. Of 8 cases in which the punishment was sustained by arbitrators, 4 involved the sale of

marijuana, and one involved its use on a customer's premises. In 6 cases in which the penalty was modified, only 1 appears to have involved a sale activity. In the remaining 9 cases in which the varying degrees of punishment were reversed, there was very little indication of sales' involvement. Four instances involved possession only. Three cases involved use either alone or with another. One case involved giving it to a friend for cost, and the 9th case involved possession with the intent to transfer. Despite marijuana's less onerous reputation, the arbitrators were generally disinclined to lessen the penalty if the off premises' conduct involved trafficking.

The reasoning of some of the arbitrators in upholding severe penalties for trafficking were articulated as follows:

> "(H)owever tolerant society may be towards personal possession and use of marijuana by individuals, there is no indication that such tolerance extends to individuals who engage in the sale of a substance for profit. This is shown in the current trend in state laws which set for possession only a considerably lesser penalty for that offense as against the sale of marijuana... .
>
> Furthermore, what studies have been made indicate that a person, who will use marijuana, will not necessarily become a user of hard drugs. On the other hand, there is no evidence available to indicate that persons, who would sell marijuana for profit, will necessarily limit themselves solely to that product, and will not also satisfy the demands of other customers for the more dangerous drugs, if and when the opportunities to do so arise. For such reasons, the conclusion

must be reached that possession of marijuana for purposes of sale for profit constitutes a far more serious violation than mere possession and use.

...

The nature of drug sales is such that [they are] not easily detected, and to require that a company cannot act against employees, who engage in the sale of illegal drugs for profit, unless it catches them in the act on company property, would deny to the company the power to police successfully its work force either to prevent the creation of a drug problem among its employees or to combat effectively an existing problem that may have arisen."

National Steel Corp., 60 LA 613, 617 (T. McDermott, 1973).

"One engaged in selling drugs for profit is already beyond the law. The profit motive will be a strong incentive to expand the market and broaden the product line. Few, if any, drug dealers could be caught if they refrained from selling to unknown customers. Opportunity for profit led the grievant to deliver drugs to an unknown undercover agent. An even stronger incentive would exist to sell to those well-known, such as fellow employees. The same disregard for law would permit rather than limit sales on company property."

Joy Mfg. Co., 68 LA 697, 701 (Freeman, 1977).

"(T)he distinction between use of and trafficking in drugs is important in an employment context; a person engaged in the latter type of conduct is involved in activity for profit that can result in slipshod work performance by those employees who might purchase the drugs from him. The peddler need not be a user himself, but that in no way diminishes the danger that his activity creates for the users or those persons associated with such users; indeed, the danger increases,

for drug control or rehabilitation programs are of no rehabilitative value to the peddler."

Hofman Industries, 273 AAA 9 (Stulberg, 1981).

See, also, Alcohol and Drugs: Issues in the Work Place, supra, at pp. 26-27

Similarly, the U. S. Court of Appeals for the Second Circuit affirmed in 1983 the right of the Federal Aviation Administration to fire an air traffic controller because of a conviction for selling drugs, even though he was never proven to have used drugs, and even though the conviction was for an act that occurred in his off work hours. Bosari v. FAA, 699 F. 2d 106 (2d Cir. 1983), held that when an employee's misconduct conflicts with an agency's mission, the employee can be dismissed for off-duty conduct despite an absence of any proof of direct impairment.

It would thus appear that a substantial body of authority supports the proposition that there is a well-founded basis for concluding that off-duty drug trafficking, even of marijuana, has a direct relationship to the business of the Employer. There is a genuine and justified concern for the safety of the public and fellow employees. Employees who become involved in drug trafficking compromise the safety of the Employer's operations and often involve other employees in their activities. A Carrier need not wait until a serious mishap has occurred in order

to take steps to protect its interest. The strong position of the Carrier on this subject was expressed by General Manager M. E. Meritt in his June 8, 1984 letter to General Chairman F. A. Garges, included as Exhibit G of the Carrier's submission.

The Claimant was adequately apprised of the offense with which he was charged, and General Manager Meritt's letter, in denying the grievance, leaves no room for doubt as to the concerns of the Carrier. The Claimant acknowledged at the hearing that he had been found guilty of aiding and abetting in the sale of controlled substance and of participating in a conspiracy to further these ends. Under the circumstances, the Board finds that the Carrier had just cause for invoking disciplinary action against the Claimant.

It remains to be determined whether the penalty of discharge is appropriate in light of the Claimant's conduct. In making this determination, a number of factors come into play. One of these is an evaluation of a Claimant's prior work record to determine whether the length and quality of his service to the Employer warrants mitigation of any penalty which has been imposed. In the instant case, the employee's work record was not offered for consideration, and it, therefore, is not available for consideration as a mitigating factor. While there is no evidence of prior involvement in a like offense, the criminal conduct of the Claimant was quite serious. He was convicted

of personally distributing cocaine and additionally, of conspiring with others over a 2-year period to distribute cocaine, marijuana and other controlled substances. The seriousness of the offense can be gauged by the penalty imposed by the Court, a term of 8 years in the Federal penitentiary on both counts, to be served concurrently. In his own behalf, Mr. Vreeland stated at the investigative hearing that he had been without work between November 27, 1981 and December 5, 1982, and his financial situation was a desperate one. With a wife and a child to support, he unfortunately involved himself in drug trafficking as a means of earning additional income.

The Board finds it indeed regrettable that this employee should have come to such grief. Nonetheless, considering all of the above facts, the Board finds substantial evidence to support the conclusion that the Claimant's conduct was seriously detrimental to the Employer. The Board further finds by substantial evidence that this constitutes just cause, as provided in Rule 84 of the Agreement as recognized by established principles of labor relations for the imposition of discipline. Because of the gravity of the offense, the Board reluctantly must concur in the determination by the Carrier that discharge was warranted.

AWARD: Claim denied.

Michael A. Murphy
Chairman and
Neutral Member

James L. Thornton
Employee Member

Al C. Hallberg
Carrier Member

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