

Public Law Board No. 4747

Claimant - Mario H. Miramontes  
Award No. 3

Case No. 3

PARTIES  
TO  
DISPUTE

Brotherhood of Maintenance of Way Employes  
and  
Union Pacific Railroad

STATEMENT  
OF CLAIM

The dismissal assessed Trackman Mario H. Miramontes for alleged violation of company rules as indicated in Mr. D. E. Pecaut's letter of September 20, 1989, was arbitrary, capricious and unwarranted.

The claimant's record shall be cleared of the discipline referred to in Part (1) and he shall be reinstated with seniority and all other rights restored unimpaired including those specified in Article V Section 5. of the December 11, 1981 National Agreement and shall be made whole for all losses sustained.

FINDINGS

Upon reviewing the record, as submitted, the Board finds that the Parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended, and that this Special Board of Adjustment is duly constituted and has jurisdiction of the Parties and the subject matter; with this arbitrator being sole signatory.

By letter dated August 28, 1989, the Claimant was advised to appear at a formal investigation to be held on Thursday, September 7, 1989. The hearing was actually held on September

8, 1989, at the request of the Organization. The purpose of the hearing was to examine evidence and determine whether the Claimant had violated General Rules B, L and 607 of Form 7908, (effective April 27, 1986) which read:

B. Employees whose duties are prescribed by these rules must have a copy available for reference while on duty.

Employees whose duties are affected by the timetable and/or special instructions must have a current copy immediately available for reference while on duty.

Employees must be familiar with and obey all rules and instructions.

L. Employees must conduct themselves in such a manner that their Company will not be subject to criticism or loss of good will.

607. CONDUCT: Employees must not be:

- (1) Careless of the safety of themselves or others;
- (2) Negligent;
- (3) Insubordinate;
- (4) Dishonest;
- (5) Immoral; or
- (6) Quarrelsome.

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 drugs including marijuana or controlled substances) or of any felony is prohibited.

Following the investigation, the Company determined there was more than a sufficient degree of evidence to find the Claimant guilty of the rule violations. He was dismissed from service by letter dated September 20, 1989.

A review of the facts in this case, show that the Claimant was arrested on August 4, 1989, along with four other men. He initially was charged with (1) count of accessory to the delivery of cocaine, which is a felony charge. The Claimant remained in jail from Friday, August 4, 1989 until August 10, 1989. On Monday, August 7, he was to report to work, but was unable to because of his incarceration. A co-worker advised Mr. Caldwell, Track Supervisor that Mr. Miramontes had an emergency and would not be at work. The next day, the same employee told the Supervisor the Claimant had an emergency and had to go to Mexico and therefore wanted to take vacation time. The Supervisor advised the employee that the Claimant would have to make the request personally. That evening, August 8, 1989, the Claimant's sister-in-law called the Supervisor and indicated the Claimant needed vacation since he had gone to Mexico for an emergency. Reluctantly, the Supervisor granted the vacation time to the Claimant. The next day, it was rumored the Claimant was in jail. The Supervisor investigated the rumors and found them to be true. He canceled the vacation, but did not contact the Claimant. The Claimant believing he was still on vacation, did not report for work until Saturday, August 12. After a discussion with Mr. Caldwell, he admitted he had been in jail. He was informed he would be getting a 48(k) letter, which in essence would have severed the Employee's service for being absent five (5) consecutive days without authority. The letter was rescinded after the Union protested and the above referenced charges were brought against the Claimant.

Between the time of his arrest and October 27, 1989, the Claimant, through his attorney, entered into a plea bargain. The charge of accessory to the delivery of cocaine was dismissed. And on October 27, 1989, he pled guilty to the misdemeanor charge of possession of a controlled substance.

Generally, whether or not an employe should be disciplined for off-duty conduct is dependent upon the existence of a discernable negative impact on the employer. Certainly there has to be some evidence of a nexus between the outside actions of the employe and his employment. And where the employer contends the actions of the employe have been detrimental to the employe/employer relationship or to the reputation and/or efficient operation of the company, they must bear the burden of proving their contention.

There can be no argument in this case, that in an attempt to protect his job, the Claimant attempted to conceal the truth from the Carrier regarding his arrest. While he did make sure his absence was reported, thereby meeting the call-in requirements, he lied about the reason for which he needed to take vacation time. It is not clear whether this was simply to hide the truth or to avoid losing pay for the period of time he spent in jail or a combination of both. In any case, the Claimant was wrong.

However, the Claimant had been employed by the Carrier for nearly nine years at the time of the incident. During that period, his record is exemplary. There is no recorded evidence of disciplinary actions against him. He apparently has never

been suspected of either possession or use of alcohol or other drugs on Company property. If this doesn't count for anything else, it has to at least afford the Claimant a benefit of a doubt relative to his contention that he was caught up in something he had nothing to do with.

The incident involving the Claimant took place in Cheyenne, Wyoming. The Claimant lives in Colorado. There was nothing in the papers which connected him to the Union Pacific Railroad, nor did there appear to be anything brought out in the court papers which called attention to the Employer. And while, some of the co-workers were aware of the Claimant's arrest, there was actually no evidence presented by the Carrier to show a reluctance on the part of these workers to work alongside the Claimant. In addition, as mentioned above, there has never been any evidence showing the Claimant to be a user of drugs while on Company property or in possession of drugs on Company property. The Company has failed to show a nexus in this case.

The other factor in this case, centers around the Claimant's guilty plea upon the advice of his attorney. While it was the Claimant's choice, it resulted from the advice of an expert. Even though he could have pled innocent and had gone through a trial, his defense was dependent upon the testimony of three other individuals against whom the evidence seems to have been rather thorough. There was risk in relying on a jury to accept their testimony that the Claimant was an innocent bystander. Therefore, despite the guilty plea, this Board questions its validity in view of the Claimant's record and his

apparent concern about protecting his job. Lastly, there is merit in the attorney's contention that the case against the Claimant was very weak. First of all, the undercover agents had been following the operations of the other three men for some time. If the Claimant had been involved from the start, there would have been little likelihood the court would have been willing to listen to a plea bargain. Secondly, the court was not only receptive to the entry of a lesser charge, but saw no reason to detain the Claimant beyond the time he had spent in jail. It would seem they did not consider the Claimant a serious risk to the public.

Therefore this Board believes there is doubt as to the Claimant's actual involvement in the "drug deal" and can find no evidence which shows the Claimant has violated any rules while on the Company's property. There is also no concrete evidence that the Employee's off-duty arrest has damaged the Carrier's reputation or that his fellow employees would refuse to work with him. But, the Employees attempt to conceal the real reason he required a vacation was dishonest. The only thing which mitigates this act, is his forthrightness when he was asked point blank if he had been in jail during his absence. In this regard, it is necessary for the Employer to take some action against the Claimant, but the Board does not believe it should be the ultimate penalty of discharge.

AWARD

The Claimant is to be reinstated with all seniority rights unimpaired, provided he successfully passes a Company-directed medical examination. The discharge is to be rescinded and converted to a ninety (90) day suspension. The Claimant is to be reimbursed any loss of earnings in excess of this amount.



Carol J. Zamperini  
Neutral

Submitted:

December 22, 1989  
Denver, Colorado