

BEFORE PUBLIC LAW BOARD 5546

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

Case No.18

STATEMENT OF CLAIM: Claim of the Brotherhood that:

(1) The dismissal of Welder S. R. Potter for alleged ... violation of General Rules A, B, and L, and Rule 607 of Form 7908... 'was arbitrary, capricious, without just and sufficient cause, based on unproven charges and in violation of the Agreement ' (System File D-179/930145).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to the Carrier's service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered as a result of his being withheld from service beginning October 1, 1992 and the subsequent unjustified dismissal.

FINDINGS:

The Claimant, Steven Potter, is employed by the Carrier as a track welder and at the time of this dispute was headquartered at Pocatello, Idaho.

On March 26, 1991, the Carrier was contacted by a Special Agent of the Idaho Department of Law Enforcement informing the Carrier that a search of the Claimant's residence "resulted in the seizure of approximately 3/4 pounds of marijuana, along with recorded U. S. currency which had been used in a prior marijuana purchase of the same individual."

As a result, Carrier's Special Agent S. Martinez and a County Sheriff's officer

searched the Carrier vehicle which was assigned to the Claimant and they discovered protected bird parts (talons) and a 22 caliber fully loaded rifle behind the driver's seat.

The Claimant was charged by the State of Idaho with two felony counts of possession and intent to deliver a controlled substance and one count of failure to have in his possession a tax stamp for the marijuana. In addition, he was charged by the Department of Fish and Game with the possession of protected bird parts.

Subsequently, the Claimant was charged by the Carrier with possession of a firearm in a Carrier vehicle and a formal investigation was held on April 15, 1991. The Claimant was later found guilty as charged with respect to the weapon violation and he was dismissed from service on May 1, 1991. The Organization filed a claim on behalf of the Claimant challenging his dismissal and the claim was eventually progressed to Public Law Board No. 5288.

On September 23, 1991, while the Claimant was in his terminated status, he pled guilty in U. S. Federal District Court to the charge of possession of a controlled substance with intent to deliver. He was placed on three years probation. Because this event took place after the dismissal of the Claimant, the matter of further investigation of the charges related to the possession of drugs were suspended pending the outcome of the Claimant's appeal of the firearms charge.

In September of 1992, the Claimant's appeal of his dismissal on the weapon charge was sustained and he, subsequently, was reinstated on October 1, 1992. On the same day

that the Claimant returned to work, he was served with a notice for an investigation into the charge of possession of a controlled substance. Claimant was later found guilty of violating Rules A, B, and L and Rule 607 of the Form 7908, "Safety, Radio, and General rules for All Employees". Consequently, Claimant was dismissed from service on October 23, 1992.

The parties being unable to resolve the issue, this matter now comes before this Board.

This Board has reviewed the extensive record in this case and we find that on March 26, 1991, the Claimant's home and vehicle were searched pursuant to a search warrant and a loaded firearm was found in a Carrier vehicle and marijuana and cash were found in his residence.

On April 15, 1991, the Claimant was cited to attend an investigation at which he was subsequently found guilty of the firearm violation and dismissed from the service of the Carrier.

In September of 1992, Public Law Board 5288 in Award No. 8 reinstated the Claimant to service indicating that in matters involving firearms, "the Carrier has applied its rules reasonably" and "it has returned people to service". The Claimant was returned to service as October 1, 1992.

As soon as Claimant returned to service on October 1, 1992, he was served with charges requiring him to attend a hearing relating to the felony conviction on the drug-

related charges. He was subsequently found guilty of the drug-related violations and was again terminated from the Carrier's service. That termination was based upon his guilty plea to the felony charges for possession of marijuana.

The Organization attacks this termination of the Claimant on the basis of several procedural challenges. The Organization claims that the hearing was not held within 30 days of the original violation as is required by the rules. Moreover, the Organization contends that the Carrier should have charged the Claimant with the drug violation at the same time he was charged with the gun violation and that the Carrier violated a number of procedural due process rights belonging to the Claimant by withholding the investigation on the drug charges until a year and one-half later. Specifically, the Organization argues that the Carrier should have charged the Claimant with possession once he pleaded guilty to the charges and sentence was passed by the Court; but it failed to do that, and therefore, it cannot charge him more than 30 days after the incident.

This Board finds that the Carrier did not violate any of the procedural rights of the Claimant when it held a hearing in October of 1992 relating to the guilty plea on the drug charges that had taken place several months before. The Claimant when he pled guilty to the drug-related charges was not an active employee of the Carrier. However, at the time that drugs were found in his premises, he was an active employee of the Carrier. He had been terminated by the Carrier for the gun charges and was seeking his reinstatement at the time that he pled guilty to the drug charges.

This Carrier could not have brought the charges against him on the drug matters at the time that it brought the gun charge against him because the Claimant had not yet pled guilty to those charges. He was merely an arrestee on drug-related charges and had been convicted of nothing in that regard. Certainly, the Carrier would not have been able to prove him guilty of a drug charge simply on the basis of his arrest. Obviously, the Carrier would have had an impossible task attempting to prove him guilty of a Carrier rule relating to being convicted of a felony since he had not yet been convicted of one.

At the time that the Claimant finally pled guilty to the drug-related charges, he had been terminated by the Carrier but was actively seeking his reinstatement. Consequently, the Carrier had no ability to charge him at that time since he had already been dismissed. However, when his dismissal was reversed by the Public Law Board, the Carrier then had 30 days within which to bring up the charges relating to his felony drug conviction. The Carrier brought the new charges against him within the first 30 days of his reinstatement.

Consequently, this Board finds that there are no procedural problems with the Carrier having brought the charges at such a late date given the fact that the Claimant had not been an active employee and the Carrier would not have had authority to bring those charges at any earlier time.

With respect to the merits, this Board has reviewed the evidence and testimony in this case and we find that there is sufficient evidence that the Claimant was in violation of the Carrier rules since he pled guilty to felony possession of marijuana. That guilty plea

is a clear-cut admission of a violation of the Carrier Rules. Although the Claimant contends that he merely pled guilty to protect his wife, and he really was not guilty himself, the record is clear that he took the blame himself because there was a great deal of marijuana and cash in his home and it is very likely he would have been convicted. The whole purpose of the rules with which he was charged by the Carrier is to protect this Carrier from the type of loss that may result by having convicted drug felons on its payroll. Certainly no employer wants that, especially not a railroad.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

Given the guilty plea of the Claimant, even if his wife was the actual person who was mainly involved with the drug ring, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the claim will be denied.

AWARD

Claim denied.



PETER R. MEYERS
Neutral Member



Carrier Member

Organization Member

DATED: _____

DATED: _____

(Dissent attached)

ORGANIZATION MEMBER'S DISSENT
TO
AWARD 18 OF PUBLIC LAW BOARD NO. 5546
(Referee Meyers)

A dissent must be filed to this award because of the Board's attempt to rewrite the Agreement between the parties.

The Carrier had knowledge in November 1991 that the Claimant plead guilty to a possession charge and knowledge that he was progressing an appeal for reinstatement at the same time. Hence, the Carrier was contractually required to timely charge him in that regard if that was its desire. This is not an issue where the Carrier can plead ignorance since the Carrier Member on this Board was also the Board Member on Special Board of Adjustment No. 279 when it issued Award 396. In that award, the Organization argued that the Carrier could not charge that Claimant because he had already been dismissed even though his claim was under appeal. Award 396 held:

**** What is here argued by the organization is that Claimant was not an employee of the Carrier. He had been removed from service July 29, 1986. Claimant did not receive pay during the period August 23, 1986 through February 8, 1988 and allegedly therefore he was not an employee of the Union Pacific Railroad. However, a claim thereon was filed before Public Law Board 3539 which in, Award No. 19, Case 25, Claimant was reinstated to pay.

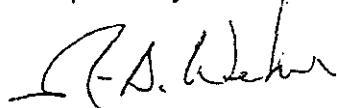
The Board finds that Claimant held an employment relationship with Carrier for the purposes of the processing of his claim in Case 25 which resulted in Award No. 19. The effect of said Award No. 19 was that Claimant was reinstated effective with the date of his discharge. Hence the period between the date of his discharge and the effective date of Award No. 19, was the period of Claimant's suspension from service. ****

The Carrier simply ignored the time limit provisions of Rule 48 and the Board sanctioned the violation.

The award is therefore palpably erroneous and of no precedential value.

I, therefore, dissent.

Respectfully submitted,



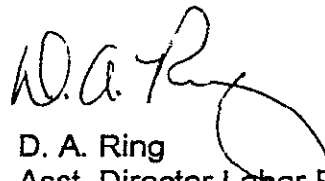
R. B. Wehrli
Organization Member

CARRIER'S RESPONSE
TO
ORGANIZATION MEMBERS DISSENT
TO
AWARD 18 OF PUBLIC LAW BOARD NO. 5546

Contrary to the Organization Members assertion in his "Dissent", Award No. 18 the Referee did not err in his findings nor is the award palpably erroneous.

The Organization Member in his submission to the Board Hearing and in the Executive Session advanced the same arguments contained in this "Dissent". The Carrier Member finds it interesting that he cites Special Board of Adjustment No. 279, Award No. 396 to which the Carrier Member was signatory to. However, it is apparent that once again the Organization Member is incorrectly reading an award. Public Law Board 3539 Award No. 19 had reinstated the individual to service on May 4, 1988. The individual was charged on June 16, 1988 (for outside activities while in a dismissed status). The hearing was held on June 22, 1988, and he was dismissed from service on June 30, 1988. The facts of SBA 279 Award No. 396 are therefore parallel to the case of the Claimant in Award No. 18 of this Board. In this case Claimant was reinstated by Public Law Board 5288 Award No. 12 in September of 1992. He was served with a Notice of Investigation upon his return to service on October 1, 1992 (for outside activities while in a dismissed status). The hearing was held in October of 1992 and the Claimant was subsequently dismissed. Consequently, the Organization Member has mistakenly built his "Dissent" around an Award which addresses a like situation and in which the outcome was the same.

In any event, the Carrier considers the Award to have precedential value and the Carrier will continue to cite the above findings in similar disputes.



D. A. Ring
Asst. Director Labor Relations
Union Pacific Railroad
Carrier Member to PLB 5546