

PUBLIC LAW BOARD NO. 6394

Award No. 19

Parties to Dispute:

Brotherhood of Maintenance of Way Employees
(Consolidated and Pennsylvania Federations)

and

Norfolk Southern Railway Company

Statement of Claim:

Claim on behalf of W. F. Maddox for reinstatement with seniority and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on March 7, 2003, for conduct unbecoming an employee in that on May 2, 2000, he pled guilty to burglary with a firearm specification, a felony, in Common Pleas Court, Lucas County, Ohio.

(Carrier File: MW-PITT-03-04-SG -14)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

Claim disposed of as follows:

There is no dispute in the record that on May 2, 2000, Claimant pled guilty in the Court of Common Pleas, Lucas County, Ohio, to burglary with a firearm specification. Accordingly, we find that Carrier proved the charge by substantial evidence.

The Organization contends that Carrier violated Rule 30(a) which provides, in relevant part, "The investigation shall be held within thirty (30) days of first knowledge of the offense." Although the guilty plea occurred on May 2, 2000, and the investigation was not held until almost three years later, it is also apparent from the record that the General Division Engineer's first knowledge of the guilty plea came at the end of January 2003. Accordingly, we find that the investigation was timely.

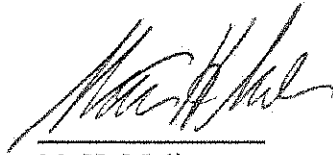
We next consider the severity of the discipline imposed. Claimant pled guilty to burglary with a firearm specification. He was sentenced to two years in prison on the burglary conviction and an additional one year in prison on the firearm specification. This is an extremely serious offense that generally warrants dismissal. Carrier's policy providing for such has been in effect and adhered to for a considerable period of time. Carrier cannot be expected to maintain such a convicted felon in its employ, as to do so would pose a significant risk to Carrier's operations and to the safety and well-being of Carrier's employees. See PLB 3791, Award No. 6; PLB 3443, Award No. 68; PLB 4769, Award No. 45; PLB 1760, Award No. 154; PLB 4851, Award No. 46. A Board should reduce discipline in such circumstances only under highly unusual and extremely compelling circumstances.

Our review of the record convinces us that the instant case presents the very rare but highly compelling circumstances in which the penalty of dismissal is excessive. Claimant had twenty-three years of service. Claimant had entered Carrier's DARS program. It became apparent that Claimant was not complying with the requirements of the DARS program and an investigation was held in November 2000. At that investigation, it was revealed that Claimant was incarcerated. According to the General Division Engineer, it was agreed at that point that it was not necessary to explore the details behind Claimant's incarceration. It appears from the record that the primary concern was whether Claimant was involved in a substance abuse rehabilitation program in prison acceptable to the DARS program. Claimant continued in Carrier's employ with a medical hold because of his substance abuse rehabilitation. We find under the peculiar facts presented that Carrier's delay in investigating the reasons for Claimant's incarceration mitigates against the penalty of dismissal.

Furthermore, General Division Engineer Barefoot testified that Claimant "was a good worker. I had no problems with the man. I got a lot of input from supervisors on his gang and they had no problems with Mr. Maddox. In fact I think as a worker he a lot of times did things above and beyond what he was you know had to do." Similarly, Division Engineer Stump testified that he considered Claimant "a pretty good worker." When asked if he believed Claimant could again be an asset to Carrier, Division Engineer Stump opined, "If all the issues with DARS and the drugs and that is worked out, if everything is clean then he could be an asset, yes."

Thus, we face a long term employee who was regarded very positively by supervision and who's dismissal stemmed from an incarceration that Carrier was aware of for more than two years before it investigated and took action. Under these highly unusual circumstances, and without disturbing prior precedents that generally support dismissal of even long term employees for similar criminal convictions, we conclude that dismissal was excessive.

Carrier is to return Claimant to service, subject to the DARS program's terms, conditions and restrictions, with seniority unimpaired but without compensation for time out of service.



M. H. Malin
Chairman and Neutral Member



P. K. Geller, Sr.
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois, November 29, 2003.