

Award No. 23

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 L. D. Root 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 October 21, 2003, for conduct unbecoming an employee and violation of the Company's Policy on Alcohol and Drugs in that on September 5, 2003, he pled guilty to attempted possession with intent to deliver methamphetamines, a felony, in Jackson County Court, Jackson, Michigan (Case No. 03-000275-FH).

(Carrier File: MW-DEAR-03-20-LM -286)

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:

On February 26, 2003, a search warrant was executed at Claimant's residence, following which Claimant was arrested on felony narcotics and firearms charges. On September 5, 2003, Claimant pled guilty to one count of attempted possession with intent to deliver methamphetamines. Sentencing was scheduled for November 13, 2003.

By letter dated September 15, 2003, Carrier notified Claimant to report for an investigation on September 29, 2003. The notice charged Claimant with conduct unbecoming an employee and violation of Carrier's Policy on Alcohol and Drugs in light of the guilty plea. The investigation was postponed three times at the Organization's request and rescheduled for October 31, 2003. On October 31, 2003, Claimant did not appear. The Assistant General Chairman did appear and requested a further postponement. When Carrier denied the request, the Assistant General Chairman left the hearing which proceeded in absentia.

The Organization contends that Carrier denied Claimant's due process rights by proceeding in absentia. The Organization submitted a letter from Claimant's doctor attesting that Claimant had

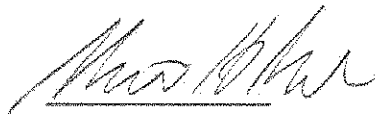
Hepatitis C and cirrhosis, had undergone certain surgeries and would have to undergo additional surgeries, and that Claimant was unable to work, attend school or training due to his inability to function properly, and opining that it was extremely unlikely that Claimant's health would improve sufficiently to enable him to perform his job. Carrier submitted the letter to its Associate Medical Director who opined that Claimant was medically fit to attend the investigation.

The Organization attacks the Associate Medical Director's assessment on the ground that she never examined Claimant. However, Carrier medical personnel routinely evaluate claims of medical fitness or the lack thereof based on documentation submitted. We note that the letter from Claimant's doctor indicated that Claimant was not medically fit to perform his duties, attend school or training, but was silent as to Claimant's fitness to attend a hearing. When the hearing officer denied the Organization's request for further postponement, the Assistant General Chairman did not seek leave to provide supplemental medical evidence; instead he simply left the hearing. Under these circumstances, we cannot say that Carrier acted contrary to the Agreement by proceeding in absentia.

The record reflects that Claimant pled guilty to a felony narcotics violation. As we stated under comparable circumstances in Award No. 19:

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.

We recognize that Claimant's seniority dates from 1978 and consider it very unfortunate that Claimant chose to jeopardize such a long-term career by his conduct. However, the record does not contain any evidence of highly unusual and extremely compelling circumstances such as those present in Award No. 19 which would render the penalty of dismissal arbitrary, capricious or excessive. Accordingly, the claim must be denied.



M. H. Malin
Chairman and Neutral Member



P. K. Geller, Sr.
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois, October 19, 2004.