

**PUBLIC LAW BOARD 6394**

**AWARD NO. 30**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

**(MW-PITT-05-24-LM-370)**

Statement of Claim:

Claim on behalf of D. J. Cole for reinstatement with seniority, vacation 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 23, 2006 in connection with his conduct unbecoming an employee and off-the-job activity, as a result of pleading guilty in the State of New York, to conspiracy to possess with intent to distribute cocaine..

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 under Public Law 89-456 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.

**AWARD**

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

D. J. Cole, the Claimant herein, entered the Carriers' service on May 21, 1975 as a Laborer, and was working as a B&B Foreman on October 17, 2005<sup>1</sup>, his last date of service, at the Carrier's Northern Region. The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

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<sup>1</sup> All dates noted herein occurred in calendar year 2005 unless otherwise noted.

The record evidence shows that on June 13<sup>th</sup>, the Claimant pled guilty in United States Court, Western District of New York to conspiracy to possess with the intent to distribute cocaine. As a result of his plea, the Claimant was sentenced to one year on prison. In October, the Claimant contacted B&B Supervisor L. L. Ohl to request a leave of absence in order to serve his prison sentence while preserving his job. The Claimant's request for a leave was denied and his plea resulted in a disciplinary hearing. The Claimant was directed to attend a formal investigation, which was ultimately held *in absentia* on March 23, 2006. By letter dated April 7, 2006, the Hearing Officer, following his review of the transcript together with evidence admitted at the formal investigation, determined that the Claimant was guilty of the charge of conduct unbecoming an employee, and advised the Claimant that he was dismissed from the Carrier's service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

#### DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

At the hearing, held *in absentia*, the Carrier sustained its burden of proof by establishing, through substantive credible evidence, consisting primarily of the Claimant's plea agreement with the Federal Court, containing the Claimant's plea of guilty to the charge of Conspiracy to Possess with Intent to Distribute a quantity (0.92 grams) of Cocaine Base. Accordingly, it was determined that the Claimant violated the Carrier's Policy on Alcohol and Drugs of the Norfolk Southern Safety and General Conduct Rules subjecting employees to discipline. The relevant portion of the Carrier's Rule provides:

Employees who are convicted in connection with incidents involving off-the-job drug activity will be considered in violation of this policy and subject to dismissal.

This Policy is clear, sound and well reasoned, and has been the subject of numerous decisions rendered on this property, the majority of which have sustained termination of employment for proven violations.

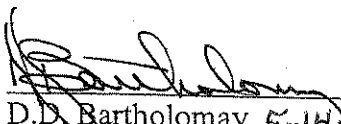
Turning now to the discipline sought to be imposed, the Board finds unique and extraordinary circumstances that must be considered. In this regard, the record evidence reveals that the Claimant provided dedicated and continuous service to the Carrier since 1975. During this time, the record reveals that the Claimant maintained a perfect disciplinary record. Accordingly, it is a reasonable conclusion that during his tenure with the Carrier, the Claimant was subjected to drug and alcohol tests, and a further reasonable conclusion that he passed every such test. These undisputed facts have given the Board pause to consider the Claimant's record in light of his plea and conviction. Given the totality of our review, we find that this case presents extraordinary circumstances which favor the Organization's plea for leniency on behalf of the Claimant. In reaching this conclusion, the Board was moved the Grievant's long and unblemished record with the Carrier. The Board also noted that Raymond Bulson, the Claimant's attorney, indicated that during his investigation into the matter, he found no evidence to conclude that his client was involved in any drug related offense. Mr. Bulson concluded that the Claimant was between the proverbial rock and hard place, facing a possible sentence of up to twenty years under the Federal Sentencing Guidelines, and a monetary penalty of up to \$1,000,000. The Claimant concluded that the range of possible sentencing and flexibility with the U. S. Attorney's Office regarding the sentence to be imposed precluded going to trial with the chance of a possible greater sentence. Upon review of the Plea arrangement with the Court, the Board notes that the Claimant pled to a "conspiracy", defined as "[a]n agreement between two or more persons to accomplish an unlawful purpose." The "interdependence" definition contained in the plea agreement noted, in relevant part, that "a defendant need not participate in all the acts or statements of the other members of the conspiracy to be bound by them . . ." This definition is significant given the Claimant's stand on his innocence and the rational given for entering into the Plea Agreement with the Court. Finally, while this is a very serious matter, the Board notes that the record does not contain any evidence showing that the Carrier suffered harm to its business or honorable reputation as a result of the Claimant's plea arrangement.

Accordingly, given the foregoing unique facts and circumstances in this matter, and without setting a precedent for future cases, the Board finds that a more fitting and appropriate discipline is reinstatement without back pay, a "last chance" to demonstrate that he is a productive, law abiding employee who is capable of following the Carrier's Rules. The Board's decision in this regard is in keeping with other decisions from notable Boards who have concluded in a like fashion when faced with similar facts and circumstances. Claimant shall therefore be reinstated to service, without back pay for time held out of service. It shall also be presumed, for the purpose of the Claimant's reinstatement, that the Claimant had his first positive test under the terms of the Carrier's Policy on Alcohol and Drugs. Accordingly, the Claimant may be required by the Carrier's Medical Department during the 5-year period following the date of his return to service to report to a medical facility for testing to determine whether he is free from prohibited drugs. Claimant is well advised that consistent with this Policy, a positive test during this period will result in his dismissal from service. The Claimant shall also be required to remain in compliance with all conditions, restrictions and other terms of the Carrier's Drug and Alcohol Rehabilitation Services ("DARS") program. Finally, the Claimant shall be required to sign necessary releases in order that the Carrier can monitor his compliance with the terms set forth herein.

#### CONCLUSION

The Claim is sustained in accordance with the findings and conclusions noted and discussed above.

  
Dennis J. Campagna  
Chairman and Neutral Member

  
D.D. Bartholomay 5-14-07  
Organization Member

  
D.L. Kerby  
Carrier Member

Dated April 27, 2007, Buffalo, New York