

PUBLIC LAW BOARD NO. 7138

AWARD NO. 1

CASE NO. 1

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

PARTIES

TO DISPUTE:

and

CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Bridge Tender B. Lesperance, by letter dated August 4, 2000, for alleged violation of Carrier's NORAC Operating Rules, General Rule D was without just and sufficient cause, based on unproven charges and in violation of the Agreement [Carrier's File 12(00-0623) CSX].

(2) As a consequence of the afore-cited violation, Bridge Tender B. Lesperance shall now be allowed the remedy prescribed in Rule 25."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter. The parties were given due notice of hearing, which was held in Toronto, Ontario on April 14, 2008. Claimant appeared along with a French interpreter, spoke on his own behalf and presented documentation which was not part of the record on the property and was procured subsequent to the closure of such record.

This claim protests Carrier's action in dismissing Claimant on August 4, 2002 for conduct unbecoming an employee in violation of NORAC General Rule D, Employee Conduct, which provides, in pertinent part:

To remain in service, employees must refrain from conduct that adversely affects the performance of their duties, other employees, or the public. Employees must also refrain from conduct that discredits

the Company.

Acts of insubordination, hostility or willful disregard of the Company's interest are prohibited.

Claimant received written notice to attend an investigation on July 31, 2002 on this charge and to determine the facts in connection with Claimant's being found guilty of the crime of possession of explosives for an unlawful purpose on June 1, 2000 in Canada Superior Court of Justice East Region. Claimant was incarcerated at the time of the hearing but was represented by the Organization's Assistant General Chairman. The transcript of the investigation reveals that Claimant had a service date of 7/13/87 and a Bridge Tender seniority date of 7/31/96. At the time Carrier acquired portions of Conrail in June, 1999 and Claimant became an employee of Carrier, he was on furlough unqualified status. The Organization's appeal of the disqualification was denied in Third Division Award 36199 in September, 2002. Claimant never rendered any service for Carrier and had not worked for Conrail for at least two years. The record contains evidence that Claimant was sentenced on June 1, 2000 to 12 months in custody followed by 2 years probation for possession of explosives, including four hand grenades, for an unlawful purpose in February, 1998. There is no dispute that Claimant was not on duty or an active employee at the time of the incident. By letter dated August 4, 2000 Claimant was found guilty of the charges and dismissed from service.

In this claim protesting the dismissal, the Organization argues that Claimant was denied a fair and impartial hearing, the Hearing Officer improperly prejudged Claimant, citing First Division Award 24874 and Third Division Award 30757, and Carrier failed to prove how Claimant's off duty conduct adversely affected or discredited the company, relying on Third Division Awards 20874, 21293, 30554, 30894, 35765. The Organization questions how Claimant can engage in conduct unbecoming an employee when he never worked for Carrier. It also maintains that Carrier failed to meet its burden of proving the alleged offense by substantial evidence or that Claimant engaged in culpable misconduct, citing Third Division Awards 29574, 31369 and 31862. The Organization contends that since Claimant is a 13 year employee with a good record, his dismissal should be set aside based upon procedural errors and substantive deficiencies of proof.

Carrier's asserts that Claimant received a fair and impartial hearing and that there was no

improper prejudgment, as the Organization had the ability to cross-examine the witness who appeared and presented the facts for Carrier, and the Hearing Officer and Carrier official who assessed the discipline were different individuals. Carrier argues that there is substantial evidence in the record to support the conclusion that Claimant engaged in conduct unbecoming in violation of NORAC Rule D by being tried, convicted and sent to prison for a very serious criminal offense involving possession and intended use of weapons of destruction. Carrier contends that the very nature of this unconscionable offense in today's society provides the required nexus between Claimant's conduct and his employment relationship in this industry, where it must be diligent about the safety of other employees and the public at large, and where such conduct has a natural adverse effect on business, citing Special Board of Adjustment No. 279, Award 489 and Public Law Board No. 5737, Award 6. Carrier notes that the fact that Claimant was not an active employee or working at the time of his conviction does not remove him from the coverage of the NORAC rules as he was a rostered employee whose conduct adversely affected the public, nor does it lessen the seriousness of the offense and its potential impact on Carrier's business, relying on Third Division Awards 31931 and 37274.

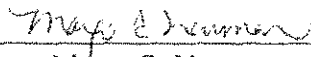
A careful review of the record convinces the Board that there is substantial evidence to support Carrier's action in dismissing Claimant. We find no merit to the Organization's contention that Claimant was denied a fair and impartial hearing or that Carrier improperly prejudged the guilt of Claimant. Carrier presented a witness who testified from both personal knowledge and valid documentary evidence concerning the relevant facts, and was cross-examined by the Organization's representative. Neither he, nor the Hearing Officer, were the individuals who reviewed the record and assessed the discipline in this case.


The crux of this case is whether the nature of the criminal offense that Claimant was found guilty of and imprisoned for, is sufficient to prove the nexus required between off duty conduct and the employment relationship to support the disciplinary action being challenged. As noted in the cited cases, "off duty misconduct may be the subject of employer discipline where the conduct was found to be related to his employment or was found to have an actual or reasonably foreseeable adverse effect upon the business. The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible." Third Division Award 20874.

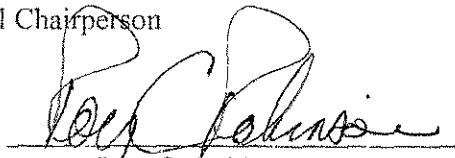
The Board is convinced that the absence of publicity identifying Claimant as being employed by Carrier is not determinative of whether Carrier is able to establish a reasonably foreseeable adverse effect on its business of retaining in its employ an individual who has been convicted and imprisoned for possession of explosives for unlawful purposes. Special Board of Adjustment No. 279, Award 489; Third Division Awards 30757, 30894, 30554. As noted in Third Division Award 30894, the work environment here involved is one in which safety is a primary concern. The nature of Claimant's offense in this case is one which potentially involves public safety and which relates directly to Carrier's operations and its overall commitment to the safe transport of its customers. See, Third Division Award 21293. This fact distinguishes this case from those relied upon by the Organization where no nexus between the employee's conduct and the employer's interest was found. See, Third Division Awards 20874, 21293, 30554, 35765. NORAC Rule D requires employees to refrain from conduct that adversely affects other employees and the public. There is substantial evidence in the record to support Carrier's conclusion that Claimant violated NORAC Rule D by his conviction for the serious crime of possession of explosives for an unlawful purpose. A review of the documents submitted by Claimant at the hearing concerning the current state of his criminal record do not change the facts underlying the basis for Carrier's charge. The Board is unable to find that the discipline assessed for such violation in this case is arbitrary, capricious or unreasonable. Accordingly, the claim is denied.

AWARD:

The claim is denied.


Margo R. Newman
Neutral Chairperson


James T. Klimtazak
Carrier Member


Roy C. Robinson
Employee Member

Dated: August 5, 2008

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