

AWARD NO. 48

CASE NO. 57

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of System Committee of the Brotherhood that:

- (1) The dismissal of James Calvin, Jr., was without just and sufficient cause based on unproven charges (Carrier File D-11-17-233).
- (2) Claimant Calvin be reinstated with all rights unimpaired and compensated for all time lost because of the violation referred to within Part (1) of this claim."

OPINION OF BOARD:

The record shows that from time to time Carrier retains, through its Security Department, the services of private investigators to go undercover and investigate suspected violations of safety regulations. Operatives are placed in the workforce without the knowledge of the employees or the Division Management, and their reports are channeled back to Carrier's Security Department. If and when that Department deems that sufficient evidence of violations has been accumulated, it notifies Division Management which handles any disciplinary proceedings which might arise. If charges are brought against an employee and the investigator is used as a witness, then naturally his "cover" is "blown" and he can no longer serve in an undercover capacity.

In April 1977 Carrier's Security Department retained an E. R. Kirby Associates, a private security agency, to make a general audit of employee activity on the property. A Kirby operative, one Jerry D. Stevens, hired on as a B & B Carpenter Truck Driver on April 18, 1977 and worked in that capacity until he "resigned" on August 26, 1977. During his period of employment Stevens apparently posed as a narcotics user. He filed periodic reports of his investigations with Kirby Associates, who in turn channeled them to Carrier's Security Department. In late August 1977 Stevens "came in from the cold" and, based upon his revelations, charges were filed against several employees, one of whom was Claimant.

Claimant entered Carrier's service on April 20, 1977 and, like Stevens, he was employed as a B & B Carpenter Truck Driver. Under date of September 12, 1977 Claimant was served with Notice to attend a hearing into charges described as follows:

Your responsibility in possession of narcotics while on company property in violation of the General Regulations and Safety Rules, Rule G and Rule G Addition on May 31, 1977 and June 28, 1977.

Based upon evidence developed at that hearing Claimant was judged guilty and discharged from all service on September 23, 1977. This claim by the organization was appealed on the property and to this Board on two grounds:

(1) the hearing on September 12, 1977 was fatally untimely since the alleged misconduct occurred on May 31 and June 28, 1977 and , (2) Carrier failed to carry its burden of proof that Claimant actually violated Rule G. For ready reference the Rules in question read as follows:

G. The use of alcoholic beverages or narcotics by employees subject to duty is prohibited. Being under the influence of alcoholic beverages or narcotics while on duty or on Company property is prohibited. The use or possession of alcoholic beverages or narcotics while on duty or on Company property is prohibited.

RULE G (Addition)

Except as otherwise provided below, employees are prohibited from reporting for duty or being on duty or on company property while under the influence of, or having in their possession while on duty or on company property, (1) any drug the possession of which is prohibited by law; (2) any drug belonging to the generic categories of narcotics, depressants, stimulants, tranquilizers, hallucinogens, or anti-depressants; or (3) any drug assigned a registration number by the Federal Bureau of Narcotics and Dangerous Drugs not included in category (2).

It is permissible for an employee to take and use a drug coming within categories (1), (2) and (3) above as medication for treatment of chronic health problems or temporary illness provided that when medication is prescribed by a licensed medical doctor the employee obtains from the doctor a written statement (which, upon request, will be submitted by the employee to his supervisor) certifying that in the doctor's opinion the medication prescribed does not adversely affect the employee's ability to safely perform his duties with the company.

We deal first with the alleged violation of Rule 19, the applicable clause of which reads as follows:

...The hearing will be held within ten (10) calendar days of the alleged offense or within ten (10) calendar days of the date information concerning the alleged offense has reached the Assistant Division Manager-Engineering.

This Board has dealt exhaustively with the issue in our Award No. 26 and the controlling principles are fully developed therein. It remains only to apply those principles in the instant case. We find that the Organization has made a colourable prima facie case for a violation of the Rule since the hearing was held substantially more than ten days from the occurrence of the alleged offenses. Carrier asserts that information concerning the alleged offenses did not reach the ADME until September 9, 1977 and accordingly he timely served Notice on September 15, 1977. Carrier has the dual burden of proving that fact to our satisfaction and of explaining and justifying the

delay in forwarding such information to the ADME. Of course, each such determination must turn on its own facts on an ad hoc basis.

In the particular facts of this case, we are persuaded that Carrier has met its burden on the disputed points. We might well require documentary evidence, including affidavits from the ADME regarding the source of his knowledge in a different case. But on this particular record, we are convinced that ADME Kuehn was not informed of the results of Stevens' investigations until September 9, 1977. There is evidence which, if believed, shows that such information was conveyed orally to Kuehn by Division Manager Milcik, who had the information from Carrier's Security Department. To avoid negative inferences and a possible evidentiary default in future cases, however, Carrier should consider that ordinarily we would expect a "paper trail" or some documented proof of the channel through which the information was communicated to the ADME. As a general rule, anything less would leave the door open for possible manipulation and bootstrapping by Carrier management, thus rendering the requirements of Rule 19 worthless. In this case, however, the ADME's assertions are believable because at least one of the alleged offenses occurred within 60 days of Claimant's hiring date. The ADME, had he possessed such information earlier, could easily have dismissed Claimant as a probationary employee without any necessity for a formal hearing under Rule 19. As for the rationale for withholding the information from the ADME until September, we find probable and reasonable the explanation that an undercover agent placed to deal with a suspected general problem of illicit narcotics would not be called in and thus have his cover blown after one encounter with one violator. Based upon all of the foregoing we find no violation of Claimant's Rule 19 rights in this case.

Turning to the merits, we have reviewed the transcript of the hearing with care. Stevens testified in extreme detail about how Claimant approached him on May 31, 1977 and gave him a marijuana cigarette or "joint" in the locker room of the B & B Shop. Thereafter, on June 21, 1977 Claimant sold Stevens a "lid" of marijuana for fifty dollars and made delivery on June 28, 1977, again in the B & B Shop locker room. The physical evidence of these transactions was present at the hearing and available for examination by all parties. Stevens' specific, detailed and persuasive testimony remained unshaken on cross examination. Claimant offered only a general denial of wrongdoing. On this record, Carrier did not err in accepting the testimony of the investigator, even if there were no other direct witnesses to corroborate the transactions. See Awards 2-4744 and 3-13953. Substantial persuasive evidence supports the conclusion that Claimant violated Rule G as charged.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. that the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
2. that the Board has jurisdiction over the dispute involved herein;
and
3. that the Agreement was not violated.

AWARD

Claim denied.


Dana E. Eischen, Chairman


H. G. Harper, Employee Member


R. W. Schmiede, Carrier Member

Dated: June 14, 1979