PUBLIC LAW BOARD NO. 1760

Award No. 125

Case No. 125
Carrier File MW-DEC-89-49

Parties to Dispute: Brotherhood of Maintenance of Way Employes
and
Norfolk and Western Railway Company
(Former Wabash)

Statement of Claim: Claim on behalf of T. A. Willis requesting reinstatement and pay for time lost as a result of his dismissal following a September 20, 1989 investigation in which he was charged with conduct unbecoming an employee in connection with his plea bargain to the felony charge of unlawful possession of marijuana nd the misdemeanor charge of unlawful production of cannibis sativa plant (marijuana).

Findings: The Board has jurisdiction of this case by reason of the parties Agreement establishing this Board therefor.

The Claimant, Lead Carpenter T. A. Willis, went on vacation in the middle or latter part of May 1989. Project Supervisor, W. E. Hayes, read an article in the Central Illinois Newspaper which detailed Claimant's arrest and subsequent felony drug charge for production of cannibis and possession of cannibis. The Claimant did not protect his assignment on the first scheduled work day following his vacation, Monday, June 5, 1989.

After being released on bond, he was a patient in a drug rehabilitation program at St. Mary's Hospital. The Claimant was released therefrom a month later and returned to work.

The Carrier decided to not take any action pending the outcome of the Claimant's court case. He completed a return to work physical examination, including a drug screen which was negative, and was permitted to return to work on July 12, 1989.

On August 29, 1989, as a result of a legal arrangement made pursuant to Chapter 56 1/2 of the Illinois Criminal Codes, Section 710, which thereby permit if certain criteria is met therein, and the Claimant met such criteria and the State agrees, that he can then be placed under supervision for one year after entering a plea, upon which no judgment or the plea is entered by the court and at the end of the one year supervision, if nothing has occurred in the interim

whereby an individual gets in trouble, the original court charge is then dismissed so that it is never a matter of record thereafter. Consequently, a conviction on the plea entered at the time becomes not a matter of record. The record is, for all intents and purposes, expunged. This legal process meant that the Macon County Circuit Court Report which indicated that Claimant was charged on two counts, Count 1 - unlawful possession of cannibis and Count 2 - unlawful production of cannibis sativa plant, the latter count was the only count upon which the plea was based, were stricken from the record after his one year good quality conduct supervision.

Following the plea arrangement of August 29, 1989, the Carrier sent a notice of formal investigation, dated September 8, 1989, on the charge:

"...conduct unbecoming an employee, in that on August 29, 1989 you plea bargained the charge of class 4 felony, unlawful possession of cannibis and class A misdemeanor, unlawful production of cannibis sativa plant in Macon County Circuit Court to a charge of Class A misdemeanor, unlawful production of cannibis sativa plant to which you pled guilty..."

As a result of the investigation held September 20, 1989, the Carrier concluded therefrom that Claimant was culpable of the charges placed against him. He was dismissed from service as discipline therefor.

The Carrier, in essence, asserted that Rule 30 - Discipline, was fully complied with, that the removal of Claimant from service and the timeliness of the hearing was completely in compliance with the rule, i.e., the charge was filed within 30 days of the August 29, 1989 guilty plea, and that the removal of the service was in accordance with the rule and awards interpreting that rule. On the merits, the Carrier argued that its policy reading:

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

was violated by the Claimant's guilty plea. He did plead guilty to a lawful charge. The Claimant was sentenced to probation and he paid a monetary fine. It is fact that the successful completion of the supervised program resulted in removal of this incident from his criminal record. However, it is also fact that the August 29, 1989 action was in violation of Carrier's drug policy. Awards in support of Carrier's position were filed.

The Employees contend that Rule 30 was violated by holding the investigation much later than the prescribed 30 days. The removal of Claimant from service was violative of the discipline rule. The predicate for the decision was the plea of August 29, 1989. That plea, however, was, by the law and the passage of one year, removed from the Court record, thus leaving nothing in the Court record for the Carrier to base its decision upon. The discipline assessed, in light of all the circumstances, was both unreasonable and an excessive abuse of authority. The Employees allege that Carrier never sustained the charge of conduct unbecoming an employee. Awards supporting this position were cited.

The Board finds this to be a most unique case that cries out for compassion. The case represents more a shadowy form of a minor drug activity rather than the substance of a real activity. There was neither use nor "for sale" involved. Because of the Court conviction, which by law is forgiven and disappears, possible technical violation of the policy at the time of the investigation was held. Claimant was not however in violation of Rule G. When a drug screen was involved, the Claimant's tests proved negative.

The Carrier's drug policy reads:

"Policy on Drugs for Norfolk Southern Corporation and its railroad subsidiaries does not permit the employment of persons who use drugs which may impair sensory, mental or physical functions. All physical examinations required of employees of the corporation and its subsidiaries include a drug screen urinalysis. An employee whose urine has been tested positive for a prohibitive substance will not be permitted to perform service until he or she provides a sample that tests negative. While an employee with health and service by the medical department under this policy is thereby being subject to discipline, disciplinary action will be taken if that employee fails timely to provide a urine sample that tests negative.

Employees who are convicted in connection with incidents involving off-the-job drug activity will be considered in violation of this policy." (underscoring added)

Arguably, the particular circumstances and facts of this arrest represents, at best, a technical violation of the Carrier's policy. The Claimant had not been proven guilty of use or selling. Yet, public policy gave forgiveness if its requirements were lived up to. He did. The record only shows that the plants were grown for

experimental reason. Absent further examination thereof, the matter was left in limbo.

The Claimant had voluntarily, entered a drug and alcohol rehabilitation program. Despite the slanted views of Supervisor Russell the record does reflect a consciencious, hard working loyal employee. He is well thought of by his supervisors and possesses a good service record.

Ever mindful of the Carrier's policy and its purpose within the realization that all drug incident cases are not alike and are subject to careful review by a Board, we are impelled to conclude that to hold in this particular case that dismissal should be permanent would be harsh and excessive discipline. The policy cannot always be black and white. There must be room for a gray finding when the facts so indicate. This case is it. The majority of the Board will, therefore, conditionally reinstate the Claimant to service with all rights unimpaired but without any pay for time lost subject to his adherence of the following conditions. The Claimant must, of course, pass a return to service physical exam including a negative urinalysis. Then he will be placed in a probationary status for 5 years. During that 5 year period, the Claimant will be subject to random testing by Carrier. Also, the Claimant will be required to consult with the DARS counselor and will be subject to and required to comply with their determination of whether he must and does enter a DARS program.

The right to random test is granted for the protection of the Carrier's policy. It should not be a reason to harass the Claimant. The Board is aware that frequency of use is not necessarily indicative of harassment. However, timing thereof might well be. Reasonable people will apply reasonable conditions. Unreasonable people will do as expected.

The Carrier was not in violation of the discipline rule when it held Claimant out of service pending the holding of the investigation. Said rule recognizes that fact because it permits the Carrier to remove the Claimant from service prior to the investigation.

The claim will be disposed of as per findings and is not to establish any precedent in any other proceeding.

Award: Claim disposed of as per findings.

Order: Carrier is directed to make this Award effective within thirty days of date of issuance shown below.

Sol Hammons Jr.
S. Hammons, Jr. Employee Member

L. F. Miller, Jr. - Dissent to reinstatement.
L. F. Miller, Jr., Carrier Member

Arthur T. Van Wart
Arthur T. Van Wart, Chairman
and Neutral Member

Issued December 31, 1991.