

AWARD NO. 49

CASE NO. 67

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Bridge and Building Carpenter Otis Smith was without just and sufficient cause and on the basis of unproven charges (Carrier File No. D-11-17-229.
- (2) Bridge and Building Carpenter Otis Smith be reinstated with all rights unimpaired and compensated for all time lost, all in accordance with Rule 19(d)."

OPINION OF BOARD:

Claimant was hired by Carrier on April 20, 1977 and worked as a B & B Carpenter until his termination on September 23, 1977. The charges against Claimant were the product of undercover detective work by one J. D. Stevens, an operative for a private investigative agency hired by Carrier's Security Department. The details of Stevens' undercover operation are described in our Award No. 48 (Case No. 57). The gravamen of the charges against Claimant are that he violated Rule G by possession of cocaine and sold a quantity of that narcotic to Stevens on August 2, 1977. The Notice of Hearing was dated September 12, 1977 and reads in pertinent part as follows:

CHARGE: Your responsibility for possession of narcotics while on company property in violation of the General Regulations and Safety Rules, Rule G and Rule G Addition on August 2, 1977 and your responsibility for violation of the General Regulations and Safety Rules, Rule 8 on August 2, 1977.

Procedural objections regarding timeliness of the hearing under Rule 19 were advanced in this case as they were in Award No. 48. For reasons developed more fully in that earlier Award, we find that no recognizable violation of Rule 19 occurred herein. However, we reiterate our reminder to Carrier that it has serious burdens of proof to carry whenever it seeks to avoid the strict ten-day rule limit of Rule 19. And ordinarily we will expect documentary evidence on the issues of ADME first knowledge and the channel of communication through which such information is passed.

Turning to the merits of the case, the incriminating evidence consists of investigator Stevens' testimony, testimony of Carrier's Special Agent Wojtko, and a foil of white powder identified as cocaine. Stevens testified that Claimant solicited him for sale of cocaine and was paid fifty dollars in late July 1977. Thereafter, on August 2, 1977 in Carrier's parking lot, Smith delivered to Stevens a foil packet containing white powder which Smith represented to be cocaine. This packet was turned over to Carrier's Special Agent Wojtko who testified that he maintained custody of the powder and had it tested by the Northern Illinois Police Crime Laboratory, which reported the substance to be .51 grams of white powder of cocaine. No written laboratory report was offered by the Special Agent but neither was one requested or demanded by Claimant or his representative. The packet of the powder was present and available for examination during the investigation. The direct testimony of Carrier's agents were specific, detailed and consistent throughout and they withstood cross examination by Organization representatives and by a private attorney retained by Claimant. Claimant's flat general denials do not in our judgement impeach or discredit that testimony. Nor can we adhere to the Organization's view that the testimony of a professional investigator is presumptively biased and unreliable. In that connection we quote

from Third Division Award 13953 (Referee W. Coburn) as follows:

The main thrust of the Brotherhood's argument on the merits in this case appears to be that the Carrier committed prejudicial error when it accepted as credible the testimony of a paid investigator who was present when the events giving rise to the disciplinary action occurred. We find no merit in this contention. A review of that testimony shows no prejudice on the part of the witness toward the accused nor can it fairly be said to have been adduced solely to incriminate him. It was clearly an account limited to what the witness observed at the time, and, as such, was credible. The fact that the witness was a paid investigator for the Carrier, standing alone, is not sufficient grounds to support the allegation of prejudice or discrimination.

Based upon our careful review of the record we find no reason to reverse Carrier's imposition of the maximum penalty in this case. The proven misconduct is serious enough in nature to warrant dismissal for a single occurrence.

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
Dana E. Eischen, Chairman

H. G. Harper
H. G. Harper, Employee Member

R. W. Schmiede
R. W. Schmiede, Carrier Member

Dated: June 14, 1979