

AWARD NO. 51

CASE NO. 65

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 J. A. Bain was improper, unwarranted, and on the basis of unproven charges (Carrier File No. D-11-1-350).
- (2) J. A. Bain be restored to service with all rights unimpaired and compensated for all time lost."

OPINION OF BOARD:

This case involves the dismissal of Mr. J. A. Bain who was employed by Carrier for some two years. In June 1977 Carrier accused Claimant and nine other employees of possessing and/or using marijuana on Carrier's property while on duty. Thus, under date of June 15, 1977 Claimant, among others, received the Notice to attend a hearing on July 21, 1977 reading in pertinent part as follows:

CHARGE: Your responsibility for violation of Rule G of the General Regulations and Safety Rules in that you were in possession of and/or smoking marijuana while on duty or on company property or in a company owned truck of Roadmaster Hegelund's territory between Girard and East St. Louis, Illinois, on June 15, 16, 22 and/or 24, 1977, and various other dates in June, 1977.

That hearing was held on July 21, 1977 as scheduled. But in the meantime Claimant and two of the other employees accused in the marijuana use incident were served with another set of charges related to alleged intimidation of

a company witness as follows:

CHARGE: Your responsibility for vicious, dishonest, disloyal conduct on July 14th in the vicinity of Nilwood, Illinois, in threatening bodily harm to Foreman F. J. Ray, scheduled to be a company witness in an investigation concerning charges against you in violation of Rule G. And attempting to coerce him in giving testimony unfavorable to you at an investigation.

That second hearing was originally scheduled for July 22, 1977, but was rescheduled and held on July 28, 1977. On the day after that hearing, July 29, 1977, Claimant Bain received the following notice of discharge:

You are hereby notified that after investigations of your responsibility for violation of Rule G of the General Regulations and Safety Rules in that you were in possession of and/or smoking marijuana while on duty or on company property or in a company owned truck on Roadmaster Hegelund's territory between Girard and East St. Louis, Illinois, on June 15, 16, 22 and/or 24, 1977, and various other dates in May and June, 1977; and your responsibility for vicious dishonest, and disloyal conduct on July 13, 1977, in the vicinity of Nilwood, Illinois, in threatening bodily harm to Foreman F. J. Ray scheduled to be a company witness in an investigation concerning charges against you of violation of Rule G, and attempting to coerce him from giving testimony unfavorable to you at an investigation, the following discipline has been applied: DISMISSAL Effective July 13, 1977

(Signed) J. H. Koch
Assistant Vice President &
Division Manager

At the outset we do not find persuasive the Organization's procedural objections regarding the Notice of Hearing. We have examined those notices and cannot find that they are too vague, inadequate or otherwise deficient to apprise Claimant of the nature of the charges against him and enable a reasonable person to formulate a defense. Nor do we find those charges to be prejudicial in their format or wording. Accordingly, the Organization's procedural objections in those respects are denied.

Turning to the other procedural objection, however, we find it to be well placed. Specifically, the record shows that Carrier's Vice President and Division Manager J. H. Koch did not receive the transcript of the July 28, 1977 hearing on the intimidation charges until, at the earliest, August 3, 1977. Notwithstanding, on July 29, 1977 Mr. Koch dismissed Claimant citing evidence adduced at "investigations" of marijuana and/or use and threatening bodily harm to Foreman Ray. (Emphasis added.) It is patent that Koch dismissed Claimant without ever receiving the testimony or documentary evidence of the investigation upon which he at least in part based his decision. This smacks unmistakably of pre-judgment and is a fundamental defect in the disciplinary decision which we cannot ignore. The purpose of a transcribed stenographic record is to permit review and reflection prior to judgment. Particularly is that necessary where, as here, the testimony is inconsistent, confusing and in large measure downright contradictory. Instead there was in this case an unseemly and fatally unfair rush to judgment without ever considering the transcribed testimonial evidence. We have no alternative in the circumstances but to declare null and void so much of the dismissal decision as is based upon the alleged intimidation of Foreman Ray.

The only question remaining is whether Carrier has carried its burden of persuasion that Claimant did in fact use and/or possess marijuana on Carrier property. The sole evidence on this point is the testimony of one Darrell Riva. So far as we can determine, Riva was an unemployed musician and user of marijuana who, on the basis of those credentials, was solicited by Captain Greening of Carrier's Security Department and utilized as part of Greening's investigation into suspected marijuana use on the property among employees. In our Award No. 48 we described a more formal and professional

investigation in which Carrier enlisted the services of a professional detective and private investigation agency. The contrast in personnel, methods and results between that case and the heavy-handed and amateur approach utilized in this case is apparent to anyone who, as this Board, has studied the respective records.

Riva worked as a Trackman for some two weeks in June 1977 until he was terminated by the Claimant who was his Section Foreman. Riva testified that he was laid off but Claimant stated that he fired Riva for smoking marijuana on the job. No Company records were adduced at the hearing to resolve that controversy. In any event, by Riva's testimony Captain Greening called him in and Riva at first refused to provide any information. However, Greening then advised Riva he would be "busted" and turned over to the State Police unless he turned informer and gave Greening names and dates of all of the other employees who might have used marijuana. Even if the genesis and bona fides of Riva's testimony were not so questionable, review of the transcript shows that his testimony itself is inconsistent, contradictory and unreliable. The uncorroborated testimony of a self-confessed marijuana user as to events occurring while he was on a marijuana high, which testimony has been coerced by threat of prosecution, does not measure up to our notions of substantial and convincing evidence. We should not be read to in any way condone marijuana use or possession on the job. Proven violations of that activity might well warrant the ultimate penalty of dismissal. But Carrier has fallen far short of proving the alleged misconduct in the present case.

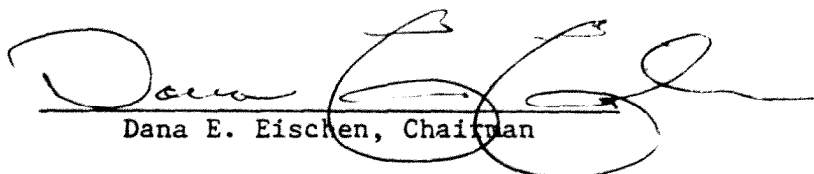
FINDINGS:

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 violated

AWARD

Claim sustained, with damages consistent with Rule 19(d) of the Agreement. Carrier is to comply with this Award within thirty (30) days of issuance.


Dana E. Eischen, Chairman


H. G. Harper, Employee Member


R. W. Schmiede, Carrier Member

Dated: June 14, 1979