

PUBLIC LAW BOARD NO. 1850

Award No. 5

Docket No. 7

ORG File No. WRRG-1901

Carrier File No. 2-MG-1517

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Baltimore & Ohio Railroad Company

Statement of Claim: Claim filed on behalf of Western Region Rail Gang Track Foreman Aaron D. Kinser for restoration of his seniority unimpaired and reimbursement for all time lost at the applicable rate of pay as a result of the discipline of dismissal administered to Mr. Kinser following a hearing held on January 12, 1976 on charges of conduct unbecoming an employee and the possession and use of a hallucinogenic drug while on railroad property on December 23, 1975.

Findings: The Board finds, after hearing upon the whole record and all evidence, that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated October 27, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearings held.

Claimant Track Gang Foreman A. D. Kinser, along with five (5) members of his gang in their Camp Car No. 114, were placed under arrest and removed therefrom on December 23, 1975 about 11:30 p.m. by the Grove City, Ohio Police as a result of a public disturbance complaint registered with said police by a neighbor, for "disturbing the peace." Subsequent search of their Camp Car by the police produced four plastic bags containing cannabis sativa, commonly called "marijuana." Additionally, a cigarette and pipe were found which also contained the same substance, marijuana. As a result thereof, all said employees were additionally charged with possession of marijuana. The employees were released on bond from jail the following morning.

Claimant returned to service and he continued working until January 12, 1976, at which time he attended an investigation held to hear the charges concerning the December 23, 1975 incident. As a result thereof, Claimant, on January 27, 1976, was advised:

"It has been found that you were at fault for conduct unbecoming an employee by participating in a disturbance on the camp cars to the extent that it was necessary for the neighbors to call the Grove City police and that you are at fault for possession of, and use of, an hallucinogenic drug while on camp cars located on Railroad Company property at Grove City, Ohio, which led to your arrest by Grove City Police at 11:27 P.M. Tuesday, December 23, 1975, in violation of Rule 14 of the Engineering Department, Maintenance Rules, and the discipline administered is dismissal from service of the Railroad Company."

Rule 14 provides:

"The use of intoxicants, narcotics or dangerous drugs by employees subject to duty, while on duty or on Company property is prohibited. Possession of intoxicants, narcotics or dangerous drugs or participation in any transaction involving same by employees while on duty or on Company property is prohibited."

There were no procedural questions attaching which prevented the Board from addressing the merits of this dispute.

The charges made against all the employees involved in the December 23, 1975 incident were premised on the occurrence of first, conduct unbecoming an employee, and, secondly, the possession and use of marijuana. Either of such charges, if proven, would warrant the imposition of stern discipline. Carrier correctly identified the test to be met when it stated:

"The central issue in this case is whether there was sufficient probative evidence adduced from the investigation to support the charge with respect to Track Foreman A. D. Kinser."

The Board finds that there was not sufficient probative evidence adduced to support the charges made against Claimant. Claimant had categorically denied all charges and allegations. The necessary supporting evidence to support a conclusion of guilt was here lacking.

The transcript reflects that Camp Car No. 114 had four (4) rooms, or compartments, to which seven (7) trackmen were assigned. Claimant Track Foreman Kinser had one compartment while six (6) trackmen were assigned, two each, to the other three (3) rooms. The December 23, 1975 incident under investigation occurred in the compartment occupied by Trackmen Ken Harget and Dave Cage and which was located on the north end of the camp car. These two employees, along with two other trackmen

involved, although notified, chose not to attend the investigation. Claimant Foreman's room was located several rooms away towards the South end of the car. The evidence given reflects that Claimant Track Gang Foreman had stayed in the Camp Car. He had not gone into town with the other members of his track gang where they admittedly had been drinking. Nor was Claimant in the compartment involved when a disturbance (argument) with a complaining neighbor occurred. Claimant testified that he had earlier turned off the stereo in said compartment, because it was blaring, that he was in bed because of not feeling well, that he got up, got dressed when he heard the aforementioned disturbance with a neighbor. Claimant stated that he went out, talked with and pacified the complaining neighbor and that thereafter he went into the compartment in question where he was about to try to tone the five trackmen down when the Grove City police came into the room. There was no evidence that Claimant possessed any marijuana nor was there clear evidence that he had used a hallucinogenic drug.

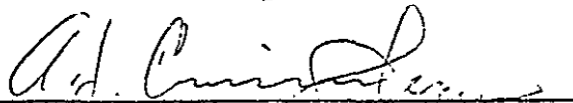
The circumstantial evidence as to the use of marijuana may be linked to others at the scene of the incident but not to Claimant.

In the circumstances of weighing the evidence to conclude whether Claimant was in that compartment on December 23, 1975 in his role as a supervisor to try to quiet the gang down or whether Claimant was in there as one of the participants in the noisemaking and use of marijuana, it would represent an abuse of discretion to conclude, as did Carrier here, the latter. The doubt raised by the testimony of Claimant which was corroborated in part by the testimony of other trackmen, the paucity of clear, probative evidence offered by the city police office at the investigation on the drug allegation as related to Claimant, and the fact that such drug charge was later dropped by the city's prosecuting attorney, all should have redounded to the benefit of Claimant. The charges were extremely serious and the penalty paid therefor was more so. Suspicion cannot be permitted to be a substitute for the needed convincing evidence. Therefore, the

Board, in the circumstances, is impelled to sustain the claim.

Award: Claim sustained.

Order: Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.



A. J. Cunningham, Employee Member



L. W. Burks, Carrier Member



Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Atlanta, Georgia; June 9, 1977.