

PUBLIC LAW BOARD NO. 2960

AWARD NO. 34

CASE NO. 46

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Trackman D. J. Gibson for alleged possession of marijuana was without just and sufficient cause and on the basis of unproven charges. (Organization's File 40-2536; Carrier's File D-11-3-355)

(2) Trackman D. J. Gibson shall be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered."

OPINION OF THE BOARD:

This Board upon the whole record and all the evidence finds and holds that the Employes and the Carrier involved in this dispute are respectively Employes and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

On October 9, 1981, the Carrier directed a letter to the Claimant. It read in pertinent part as follows:

"You will arrange to appear for hearing as indicated below:

PLACE: ADM-E Office, Boone, Iowa
DATE: Wednesday, October 14, 1981
TIME: 1:00 PM
CHARGE: Your responsibility in connection with possession of marijuana while on duty at Loveland, Iowa, October 7, 1981, in violation of Rule G of the General Regulations and Safety Rules.

You may be accompanied by one or more persons of your own choosing subject to applicable rules of the Brotherhood of Maintenance of Way Employee's schedule, and you may, if you so desire, produce witnesses in your own behalf without expense to the Transportation Company. This notice will confirm that you are withheld from service with the Transportation Company pending results of hearing."

Rule G states:

"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; (3) any drug assigned a registration number by the Federal Bureau of Narcotics and Dangerous Drugs not included in category (2); or (4) any liquid containing alcohol."

The investigation was held on October 15 after a postponement and subsequent to the investigation, the Claimant was dismissed. The letter of dismissal read in part:

"Enclosed please find all papers in connection with hearing conducted at the Roadmaster's Office, Blair, Nebraska, on October 15, 1981, to determine the facts in connection with your responsibility in connection with possession of marijuana while on duty at Loveland, Iowa, on October 7, 1981, in violation of Rule G of the General Regulations and Safety Rules.

Please sign receipt for Discipline Notice No. 81-90 indicating assessment of discipline of dismissal effective October 23, 1981, detach receipt and return to this office promptly."

The basic facts in this case are not in dispute. On October 7, 1981, the Claimant was assigned as a Trackman on a Tie Gang working in the vicinity of Loveland, Iowa. On that date, surveillance of the Tie Gang was being performed by Carrier's Inspector of Police P. V. Kunze and Special Agent R. C. Elffner. At approximately 9 a.m. Inspector Kunze noticed the Claimant and a couple of other employees away from the work site and based on their mannerisms suspected they might be smoking marijuana. The Agents then approached the employees and took them aside to search for contraband. As Inspector Kunze was searching the Claimant, he believed he saw the Claimant take something from his pocket and drop it to the ground. Later when the Claimant was asked to pick up his foot, a plastic bag was found where the Claimant's foot had been. A chemical analysis of the substance in the bag disclosed it was marijuana.

The Carrier argues that the charge against the Claimant and the discipline was warranted. There is no doubt that the bag containing marijuana was found under the Claimant's foot; however, the Claimant's story that he had no idea how the package got under his foot is simply not credible. The Carrier also asserts that inasmuch as the charge was proven, the Board must find that the discipline assessed was not unreasonable. The Carrier has consistently dismissed employees found in violation of Rule G and has refused to reinstate such employees when the offenses involve the use of drugs.

The Organization directed attention to Mr. Gibson's testimony and based on that testimony asserts that he was not guilty. In addition to denying that he smokes marijuana, the Claimant testified as follows:

"Q. How did Mr. Kunze perform this search?

A. He started in my coat, he checked all my pockets in my coat and then he made me take my coat off and looked through it then. And he set that down, and he went through my pockets in my pants, first he felt them and then he stuck his hand in my pockets. And my pants might have been too tight. I don't know, he couldn't pull anything out, so he asked me if I would empty my pockets. So, I put both my hands in there, I pulled them out and I put everything on the hood of the pick up. And from there he searched down my legs, he checked my sock on the right side and he came over to the left side and did the same thing. Went down, he was on his knees, he went down to my socks and that is when he came up with the bag of pot from on the ground."

The Organization also asserts that it is not credible to believe that the marijuana found near Mr. Gibson was his. They note that the wind was blowing quite strongly, enough for the officer to caution the Claimant to hold on tight to the paper money which was in his hands as he emptied the pockets. Inasmuch as the wind was blowing quite sternly, Mr. Kunze's testimony as to detecting a brief flash of white falling from the Claimant's pocket does not support the Carrier's allegation that the flash of white was a plastic bag of marijuana which

was found in the area where the Claimant had been standing. Surely if a plastic sandwich bag had been dropped from the Claimant's pocket was from his possession, Mr. Kunze would have noticed the large object immediately. The fact of high wind during the time of the search would have made it virtually impossible to drop such a large object straight down without it having been blown away. Yet this is what Mr. Kunze proposes was the case. They note that Mr. Kunze, a trained observer, could not detect that the Claimant did actually drop the package. The Organization believes the Claimant was found guilty solely based on the fact he was standing near a bag alleged to contain marijuana.

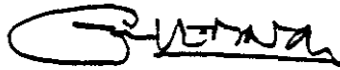
It is the conclusion of the Board, based on the record, that there is substantial evidence to support the Carrier's finding that the Claimant was in possession of marijuana. Special Agent Kunze testified that he caught a glimpse of something fall from Gibson toward the ground coupled with the fact that the marijuana was found under his foot and the fact that there was no other reasonable explanation for its presence there is sufficient to prove the charges under the substantial evidence test. Certainly the evidence relied on by the Carrier is somewhat circumstantial; however, the Carrier need not prove the charges beyond a reasonable doubt. It has previously been stated that circumstantial evidence is sometimes convincing. Under the individual facts and circumstances of this case, the evidence supports the charges. It is not credible to believe, as the Organization suggests, that the marijuana was under the Claimant's foot by wind-blown chance. Moreover, it is noted that the plastic bag was folded approximately three times according to the testimony of Kunze, thus, it is possible that the bag, when dropped from a pocket would have dropped straight down without being affected significantly by the wind.

Regarding the appropriateness of the discipline, it has often been stated that discharge is appropriate for Rule G violations. Thus, there is no

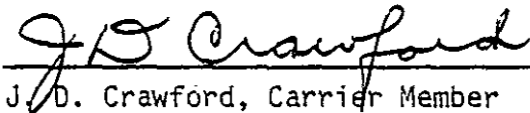
basis for setting aside the discipline.

AWARD

Claim Denied.



Gil Vernon, Chairman



J. D. Crawford, Carrier Member



H. G. Harper, Employee Member

Date: June 28, 1983