PUBLIC LAW BOARD NUMBER 3445

Award Number: 71

Case Number: 71

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

And

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant, T.L. Holland, 919 Washington Avenue, Talladega, AL 35160 was dismissed on March 23, 1989 for alleged conduct unbecoming an employe and violation of Norfolk Southern's Drug Policy. Claim as filed in accordance with Railway Labor Act and agreement provisions. Employes request reinstatement with pay for all lost time with vacation and seniority rights unimpaired.

FINDINGS

Claimant entered the Carrier's service on October 8, 1981. At the time of the events in issue here, Claimant was assigned to the Birmingham, Alabama Material Yard.

By letter date March 1, 1989, Claimant was directed to attend a formal investigation on charges he violated the Carrier's Drug Policy and committed acts unbecoming an employee. The formal investigation was held March 13, 1989. Claimant was dismissed based on establishment of a violation of the Drug Policy and conduct unbecoming.

The issue to be decided in this dispute is whether Claimant was dismissed for just cause under the Agreement; and if not, what should the remedy be.

On December 24, 1988, Claimant was arrested and charged with possession of cocaine. The Carrier learned of this matter on December 27, when Claimant's father called to mark Claimant off. On February 3, 1989, Claimant pleaded guilty to the charge of possession of cocaine and was sentenced to 5 years' probation and fined $1,000.

At the formal investigation, Claimant testified that he possessed the cocaine in an effort to protect his brother, who was the true owner of the cocaine. His brother, who was in Claimant's car when the police stopped them, was on probation and would have faced severe penalties if found to be in possession of illegal drugs. Claimant testified that he took his brother's cocaine and pretended it was his own so his brother would not "take the rap."

The Carrier's Drug Policy provides:

> The policy on drugs of 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 tested positive for a prohibited substance will not be permitted to perform service until he or she provides a sample that tests negative. While an employee withheld from service by the Medical Department under this policy is not thereby being subjected to discipline, disciplinary action will be taken if that employee fails timely to provide a urine sample that tests negative.
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> Employees who are convicted in connection with incidents involving off-the-job drug activity will be considered in violation of this policy.

The position of the Carrier is that Claimant was dismissed for just cause. The Carrier maintains that Claimant's guilty plea and conviction are clear evidence of his violation of the Drug Policy and constitutes conduct

unbecoming an employee. In light of the terms of the policy and the serious threat drugs produce (as recognized by this Board and others) the Carrier contends that dismissal was warranted.

The position of the Organization is that Claimant was unjustly dismissed, asserting that the discipline of dismissal is unduely harsh in light of Claimant's possessing the cocaine only in an effort to protect his brother. The Organization also cites Claimant's substantial punishment in court (5 years' probation and $1,000 fine) as well as Claimant's embarrassment and shame as proof that he has suffered considerably already. The Organization also asserts that Claimant was unaware that he was due a fair and impartial hearing before the Carrier could dismiss him.

After review of the entire record, the Board modifies Claimant's discipline to reinstatement with seniority unimpaired, but without back pay. Reinstatement is conditioned on a successful completion of a return-to-work physical examination.

The Carrier has sustained its burden of proof by establishing, through substantive credible evidence in the record, that Claimant both possessed cocaine and pleaded guilty to related charges. Claimant's action caused harm to the Carrier's reputation and challenged its Drug Policy. Moreover, any involvement with drugs by a Carrier employee runs the risk of serious or disasterous harm to the Carrier, fellow employees and the public. The Carrier's Drug Policy is sound and is in no way dimished by the decision in this matter. The Policy is an intelligent and reasonable response to the drug menace and the concept and substance has been sustained in the past.

However, based on the unique facts and circumstances in this matter, the Board finds that the more appropriate discipline is reinstatement without back pay. This reinstatement can only follow a successful completion of a physical examination. The resolution of this case may not be construed as precedent in future cases because of the unique factual nature of the case.

AWARD

Claim disposed of per Findings herein.

Neutral Member

Carrier Member

Bryce L Hall

Organization Member

Date: FEB. 22, 1990