PUBLIC LAW BOARD NO. 4121

CASE NO. 20

AWARD NO. 20

PARTIES TO DISPUTE: UNITED TRANSPORTATION UNION (FORMER GN) and BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Seattle Switchperson Joyce R. Dempsey for reinstatement to service with seniority rights and vacation privileges unimpaired, with payment for all time lost since withheld from service March 7, 1986, and subsequent unjust and unwarranted dismissal from service, March 24, 1986.

FINDINGS: On March 6, 1986, Claimant was assigned from the extra list to fill a yard helper position on Switch Job No. 367, 11:30 p.m., at Seattle. The caboose assigned to Job 367 was on Track 15; when the crew tied their engine onto the caboose, Claimant put her personal bag, or "grip", onto the caboose. The crew, working shorthanded, switched five cars and the caboose into Track 19, then took their engine to the lead in front of the yard office to wait for the third man to join the crew. Meanwhile, at about 1:00 a.m., a railroad policeman searching the caboose for possible trespassers, found Claimant's bag and opened it in order to identify its owner; inside Claimant's purse, inside the bag, he found a film canister in which were several marijuana roaches, the butts of marijuana cigarettes. He found Claimant's name on a sales slip in the bag and removed the bag from the caboose intending to inform his supervisor of what he had found.

While Claimant and her foreman were waiting for the third man, they were instructed by the yardmaster to go have coffee. Claimant decided to get her bag first and while enroute to do so met the policeman carrying it. She identified it as hers and the policeman gave it to her, saying nothing about the marijuana. He reported the matter to his supervisor and they contacted the trainmaster. The trainmaster then told Claimant that the policeman had found marijuana in her bag, and requested that she accompany him to his office and bring the bag. At the office, in the presence of the trainmaster, the policeman and his supervisor, she was requested to open the bag and remove the contents, specifically the canister, and she agreed to do so. Both at that time and in her testimony at the investigation, Claimant denied that the canister or roaches were hers and disclaimed any knowledge of how they got into her purse. The trainmaster asked her to agree to a urinalysis and she did so. The urinalysis showed negative for all drugs. According to the trainmaster and the policeman, the Trainmaster asked Claimant at the time whether she used marijuana and she replied, "Yes, sometimes"; when questioned at the investigation, Claimant denied making that statement. Claimant had her bag in her possession for about an hour between the time it was given to her by the policeman and the time the trainmaster asked her to bring it to his office.

After the investigation, which brought about the above-related facts, Claimant was dismissed for violation of Rule G - possession of illegal controlled substances on Company property.

The issue is whether there is sufficient evidence to support the conclusion that the canister and its contents were brought on the property by Claimant. Carrier argues that in the absence of evidence to show that any other person had a "vendetta" against Claimant or other motivation to plant the canister in her purse, the only logical deduction that can be made is that the canister did in fact belong to Claimant. The Organization contends that there must be a clear and convincing evidence to show that the canister belonged to Claimant and that the evidence advanced by Carrier failed to meet that test. The bag was unattended and unlocked and thus the opportunity existed for a third person unknown to plant the marijuana. Claimant denied that the canister was hers or any knowledge of how it got into her purse. Her conduct in freely opening her bag and purse upon request, and in not disposing of the canister during the approximately one hour that she had it in her possession after it was given to her by the policeman, is consistent with her testimony. The testimony on the whole leaves considerable doubt as to whether the canister was in fact Claimant's, and in an offense involving moral turpitude, Claimant is entitled to the benefit of the doubt.

We must agree with the Organization in this situation. It is generally held, and has been held specifically on this property (in a case quite similar to this one (PLB 3007, Award 2)), that the standard of proof in a so-called moral turpitude discharge is greater than the "substantial evidence" or "preponderance of the evidence" standard more

usually applied. In the absence of evidence that we consider to be clear and convincing that Claimant knowingly had possession of the illegal substance on Company property, we hold that the violation of Rule G was not proved and that the claim for reinstatement and pay for time lost, not including vacation, and subject to the usual practice on the property with respect to deductions for outside earnings must be sustained.

Award: Claim sustained as per Findings.

H. Raymond Cluster, Neutral Member

R. G. Shinn, Carrier Member

M. M. Winter, Employee Member

Date: August 3, 1987

PUBLIC LAW BOARD NO. 4121

Cases 1, 27, 20, 33
Awards 1, 18, 20, 29

INTERPRETATION

In Awards 1 and 20, issued August 3, 1987, and Awards 18 and 29, issued May 21, 1988, the Board ordered that employees be reinstated and paid for time lost. In Award No. 20, the actual language used was "claim sustained for reinstatement and all time lost in excess of thirty days." The other three awards provided for pay for all time lost "subject to the usual practice on the property with respect to deductions for outside earnings." In none of the cases did the parties present any argument to the Board on the issue of whether or not it was the usual practice on the property to deduct outside earnings, although in some or all of its written submissions, Carrier proposed that outside earnings be deducted and cited Awards 2, 3 and 4 of Public Law Board No. 3007, issued June 14, 1983, which reinstated employees and ordered pay for time lost less the "usual and customary deductions for outside earnings, etc. on this property" (Award No.2) or less the "usual and customary offsets" (Award No. 3) or less the "usual and customary set-offs" (Award No. 4) on the property. This Neutral, at the time he prepared the proposed awards herein involved, was not aware that there was an existing dispute between the parties; rather, he assumed because of the many years of contractual relationship between the parties, and also because of the language of the awards of PLB 3007 that there was agreement between the parties as to a "usual and customary practice" of deductions or offsets of outside earnings, and he therefore adopted the language used in the awards of the predecessor Board. (The Neutral was not aware at the time that the Organization had filed special concurrences to the three awards of PLB 3007 pointing out that the question of deductions or offsets of outside earnings had not been argued before the Board in those cases and asserting that that there was no custom or practice on the property for such deductions or offsets.) In any case, the Board did not intend to and did not in fact rule on the issue of deduction of outside earnings in any of those four awards.

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When Carrier, in purportedly complying with the back pay orders in Awards 1, 18, 20 and 29 of this Board, sought to deduct outside earnings, the Organization objected; the parties eventually requested that the Board schedule a hearing on the disputed issue and such a hearing was held on June 23, 1988, at which, for the first time, the issue was fully argued to the Board. At this hearing, the Organization submitted a written brief and the Carrier resubmitted the relevant material in its original submissions in the cases. Following the hearing, both parties submitted additional written materials.

It is clearly established by many awards that where, as here, the schedule rules provide simply that wrongfully discharged employees will be reimbursed for any loss of compensation, without mention of deduction of outside earnings, the intention of the parties in that regard must be determined by reference to the actual practice of the parties in applying the rule. In this case, it is not disputed by the Carrier that from the inception of the rules in the early 1900s until the issuance in 1983 of Awards 2, 3 and 4 of PLB 3007, employees ordered reinstated with pay for time lost were paid for actual time lost without deduction of outside earnings. Indeed, in 1967, Carrier unsuccesfully served a Section 6 notice on the Organization seeking to amend the rules to provide specifically for such deductions.

Carrier argues that the practice changed in 1983 with the issuance of the PLB 3007 awards, asserting that in the computation of the some $130,000.00 back pay due to the employee reinstated by Award No.2 of PLB 3007, $1,057.29 of outside earnings was deducted. Carrier also cites Awards 18, 20 and 29 of this Board as authority supporting the deduction of outside earnings.

The Organization argues that the question of outside earnings was not argued before PLB 3007, that it made that point in its special concurrences, that there was no reference to the $1,057.29 deduction in its correspondence with Carrier relative to the computation of back pay due the employee reinstated by Award No. 2 of PLB 3007 and that it did not agree to such deduction. Further, that in a later case, Award No. 7 of PLB 3436, issued in 1986, no deduction from full back pay was made although the reinstated employee had outside earnings during the period of his dismissal.

There is no indication in Awards 2, 3 and 4 of PLB 3007 that the question of outside earnings was presented to, considered or decided by that Board as a disputed issue. The use of the language "usual and customary" with respect to the deduction of outside earnings in those awards, just as in Awards 18, 20 and 29 of this Board, is a reference to whatever the actual past practice was, not the establishment of some different practice. It is clear that the actual past practice prior to the issuance of the PLB 3007 awards was not to deduct outside earnings; that is not disputed by Carrier. The evidence submitted by Carrier to the Board as to the deduction of the outside earnings in the computation of back pay due the reinstated employee in Award 2 of PLB 3007 consists of internal communications between Carrier officials; reference to that deduction does not appear in the correspondence between Carrier and the Organization submitted to the Board by the Organization, and thus cannot be said to have been acquiesced in by the Organization. Under these circumstances, the deduction in that one instance cannot be said to have changed the consistent, long-standing practice of the Carrier and Organization over many years of interpreting the applicable rules to mean that outside earnings are not to be deducted in the computation due to wrongfully discharged employees reinstated with pay for time lost.

We therefore rule that there shall be no deduction of outside earnings in the computation of the pay for time lost awarded to employees in Awards 1, 18, 20 and 29 of PLB 4121.

H. Raymond Cluster
Chairman and Neutral Member

Baltimore, Maryland
January 20, 1989