

Award No. 29
Case No. 30

PUBLIC LAW BOARD NO. 4244

PARTIES) ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
TO) AND
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM: 1. That the Carrier's decision to remove New Mexico Division Trackman D. C. Martinez from service was unjust.

2. That the Carrier now reinstate Claimant Martinez with seniority, vacation, all benefit rights unimpaired and pay for all wage loss as a result of investigation held 10:00 a.m., December 9, 1988 continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial, credible evidence that proved that the Claimant violated the rules enumerated in their decision, and even if Claimant violated the rules enumerated in the decision, permanent removal from service is extreme and harsh discipline under the circumstances.

FINDINGS: This Public Law Board No. 4244 (the "Board") finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and the subject matter involved.

In this dispute former New Mexico Division Trackman D. C. Martinez (the "Claimant") was notified to attend a formal investigation on December 9, 1988, concerning his alleged dishonesty and failure to report the circumstances surrounding his arrest on June 4, 1988 and subsequent conviction on a charge of possession of a controlled substance on October 12, 1988 involving possible violation of Rules A, B, L, 1004, 1007 and 1018, of the Carrier's Safety and General Rules for All Employees, Form 2629 Std., effective April 1, 1988. Pursuant to the investigation the Claimant was found guilty of the rules violation and he was removed from service.

At the investigation the Carrier introduced a Plea of Guilty document which had been filed in the 237th District Court of Lubbock County, Texas on October 17, 1988. According to the document the Claimant plead guilty to a charge that he intentionally and knowingly possessed less than twenty-eight (28) grams of a controlled substance.

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In response to the Carrier's entry of the Plea of Guilty document, the Organization requested that the Order for Deferred Adjudication, which was also filed on October 17, 1988, be made part of the record of the investigation. The Order stated in pertinent part that an adjudication of guilt will not be entered by the Court and the Claimant will be put on probation for two (2) years provided that certain terms and conditions of probation are met by him. Moreover, upon the successful completion of the Claimant's probation, the proceedings against the Claimant will be dismissed by the court.

The Claimant admitted at the investigation that he entered the guilty plea but that he did so as a result of negotiations between his attorney and the Texas district attorney.

The Board has examined carefully all the evidence of record. Based on its review the Board finds that under the circumstances of this case the Claimant was prejudged by the Carrier and that the Carrier failed to prove that the Claimant violated its rules as alleged in its November 11, 1988 letter.

The transcript of the investigation shows that the Organization raised the charge of prejudgment at the conclusion of the formal investigation. The charge was made in response to the closing remarks made by J. A. Yarbrough, the chairman of the investigation. It was incumbent upon Yarbrough to be objective throughout the investigation and to conduct a fair and impartial hearing. However, at the conclusion of the investigation, Yarbrough declared that the Claimant was guilty of possession of a controlled substance, and therefore, he was removed from service. Based upon such remarks the Board can only conclude that the Carrier had predetermined the Claimant's guilt and thereby deprived him of his right to a fair and impartial investigation.

Notwithstanding the Board's finding of prejudgment, the Board also finds that the Carrier did not meet its burden of proof concerning the charges set forth in the notice of investigation. The Carrier had the burden of proving the following charges: 1) the Claimant was dishonest; 2) the Claimant failed to report the circumstances surrounding his arrest and conviction; and/or 3) the Claimant was convicted of possession of a controlled substance. It is the Board's opinion that the Carrier either failed to prove the charges or the charges are not supported by the cited rules.

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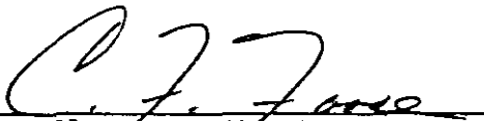
First, there is nothing in the record which shows that the Claimant was dishonest. The transcript of the investigation shows that the Claimant answered every question to the best of his ability and no attempt was made by the Claimant to withhold information from the Carrier. Second, there is no rule which requires a Carrier employee to report one's arrest or the circumstances surrounding the arrest to the Carrier where such events are not directly related to the Carrier's operations. Moreover, no evidence was presented to show that under the circumstances surrounding the Claimant's arrest, a duty was created whereby the Claimant was then obligated to inform the Carrier of the disposition of the legal case. Last, the Carrier has maintained that the Claimant was convicted of possession of a controlled substance. However, a close examination of the exhibits shows that although the Claimant formally entered a plea of guilty, an adjudication of guilt was not entered against the Claimant by the State of Texas.

The Board finds that the Carrier erred in its determination that the Claimant was guilty of the cited rules violation. It is clear to the Board that the Carrier's charges were not supported by the evidence of record or the rules. Accordingly, the Claimant must be reinstated to the Carrier's service with seniority and other claimed benefits unimpaired and with pay for time lost.

AWARD: Claim sustained.



Alan J. Fisher, Chairman
and Neutral Member



Clarence F. Foose
Organization Member



Lyle L. Pope
Carrier Member

Dated: March 2, 1989

Chicago, Illinois