

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on July 15, 2003, when it dismissed the Claimant, Mr. S. B. Burr, for allegedly violating Maintenance of Way Operating Rule 1.6, Conduct; and the Carrier's Policy for Employee Performance Accountability, appendix c, Item 3, conduct leading to a felony conviction.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately reinstate the Claimant to service with benefits and seniority unimpaired and make him whole for all wages lost account of this violation. Additionally, the Carrier shall remove any mention of this incident from the Claimant's personal record. [Carrier File No. 14-03-0181. Organization File No. 10-1312-037.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. S. B. Burr, was hired by the Carrier in 1979, in its Maintenance of Way Department. On June 6, 2003, he was served a notice of charges, and directed to attend an investigation on June 16, 2003. In pertinent part, the notice set forth the following charges:

[F]or the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with BNSF Company Policy when you plead guilty to a Class 1 Felony of unlawful possession of drugs with intent to deliver, in the Circuit Court of the Ninth Judicial Circuit of Illinois-Hancock County, on Thursday, May 29, 2003.

The investigation was postponed to and held on June 27, 2003, by agreement of the Carrier and the Organization. The Claimant did not appear and the investigation was held in his absence. He

was ably represented by the Organization's Assistant General Chairman. The Carrier's sole witness, Senior Special Agent Melvin H. Robinson offered into evidence public documents obtained from the Circuit Court of Hancock County, Illinois, which disclosed that the Claimant entered into a plea arrangement with the State's Attorney, in which he pleaded guilty to a charge that he "knowingly possessed with the intent to deliver more than 2,000 grams but not more than 5,000 grams of a substance containing cannabis," a Class 1 Felony in violation of Illinois Statutes. Consequently, on May 29, 2003, he was sentenced to a term of imprisonment for five (5) years, with a fine, court costs, and fees. The Court's Sentence Order notes that he would receive credit for 303 days previously served. X

Mr. Robinson also presented in evidence certified mail receipts indicating that the initial notice of the investigation and the notice of its postponement until June 27, 2003, were delivered to the Claimant's home address and signed for by his wife, in the first case, and by another person having the Claimant's surname, in the second case. Mr. Robinson opined that the Claimant did not attend because he was imprisoned.

In the Claimant's defense, his representative obtained an admission from the witness that, to his knowledge, the Carrier had received no adverse publicity nor public criticism because of the Claimant's conviction, nor had he committed a crime on Carrier property.

The Conducting Officer caused Maintenance of Way Operating Rule (MWOR) 1.6 and Appendix C, Item 3, of the Policy for Employee Performance Accountability (PEPA), to be entered into the record. These read:

MWOR 1.6

Employees must not be

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
- or
7. Discourteous.

PEPA Appendix C, Item 3

Dismissable [sic] Rule Violations

- 3) Conduct leading to a felony conviction.

On July 15, 2003, the Carrier's Division Engineer wrote the Claimant, confirming that as the result of the investigation, he was dismissed from the Carrier's employment for violation of MWOR 1.6 and PEPA Appendix C, Item 3. The Organization's General Chairman promptly filed an appeal with the Carrier's Labor Relations Department.

The Organization did not dispute the Claimant's felony conviction. It argued, however, that because of the Claimant's previous dismissal from the Carrier's service, he was no longer an employee and therefore was not subject to the Carrier's rules and policies. It further argues that the Claimant committed no crimes while on Carrier property, brought no discredit to the Carrier, nor did the Carrier suffer any monetary loss. The Organization also questions whether the "new and revised" PEPA was in effect on the date the Claimant was convicted.

The Carrier rejoins that substantial evidence was developed to prove that the Claimant was convicted of a felony for possession of an illegal drug with the intent to distribute. While acknowledging that the Claimant had been previously dismissed from its service, the Carrier points out that his previous dismissal had been appealed and the Parties were awaiting the outcome of that appeal. It states that it is well settled in this industry that the Claimant is still an employee of record pending that outcome.

The Carrier further contends that the PEPA first became effective on July 1, 2000, and was last revised on February 26, 2001, but the policy that it replaced had a similar provision. By reason of classes, workshops, and mailings, the Claimant would have been informed of the Carrier's policy on felony convictions, it states. The Carrier denied the Organization's appeal on behalf of the Claimant.

The matter of whether the Carrier may charge and discipline an employee who had already been dismissed is a threshold issue which the Board will first address. The Claimant's personal record shows that he was dismissed on December 10, 2002, for failure to comply with instructions to provide medical information pertaining to his request for a continued leave of absence.

That disciplinary decision was appealed by the Organization and came before this same Board in August, 2003. The record in that case indicated that the Claimant had suffered an off-duty injury in May, 2001, and had been on a leave of absence from July, 2001, until June, 2002. The Carrier had unsuccessfully sought medical information for the purpose of determining whether the Claimant was fit to return to service, or to continue his leave of absence. When he did not produce the requested medical evaluations, he was charged with failure to follow instructions and failure to report for duty. He did not appear for that investigation, either, and was dismissed from service.

In its Award No. 305, this Board found there were mitigating circumstances: the Claimant's doctors' recalcitrance, planned surgical procedures, and, as far as the record showed, the

Claimant had not yet been convicted, although his confinement for an alleged crime was known to the Board.

Loath to terminate 24 years of seniority on the record as it was known at that time, the Board explicitly restored the Claimant's seniority and employment relationship, subject to stated conditions. The Board remanded the case to the Parties with instructions to the Carrier to give the Claimant a last chance opportunity to provide the required medical evidence of his fitness for service or, in the alternative, his disability. Award No. 305 was adopted on September 22, 2003.

Clearly, if other, more serious events had not been transpiring in the Claimant's life, he could have been returned to the Carrier's service as physically fit, or his leave of absence could have been continued, or his dismissal would have been final, if he failed or refused to provide evidence of his physical fitness.

In the National Railroad Adjustment Board's Third Division Award No. 24179, the appellant organization there contended that because the claimant had already been discharged, he was no longer an employee and the carrier lacked authority to impose discipline. The Board responded:

We must reject the Organization's objections. Even though Claimant had been dismissed prior to the investigation dealing with the personal injury report charge, Claimant still had an employment relation with the Carrier since he retained a right to appeal the first dismissal. Pennsylvania Railroad Co. v. Day, 360 U.S. 548 (1959). Indeed, on August 23, 1979, prior to the second investigation, the Organization timely filed an appeal challenging the propriety of the Carrier's decision to discharge Claimant. . . .

See, also, Award No. 4, Public Law Board No. 6102, involving this same Carrier, Organization, and Referee.

The Board finds, therefore, that on the date charges were brought against the Claimant, June 6, 2003, his previous dismissal was under appeal and he retained an employment relationship at that time.

The Board observes that the PEPA was put into effect on July 1, 2000, and was revised on February 26, 2001. The Claimant's personal record indicates that he was absent on medical leave from December 26, 2000, until May 10, 2001. But the revisions in 2001 were described in a cover letter to its employees' union representatives in these words:

The changes in PEPA are relatively small, but they do increase the consequences for track authority and signal violations. We felt this step was necessary, given the number of train and on-track equipment collisions we've seen lately.

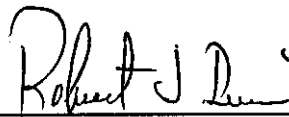
From these words, the Board concludes that the PEPA revisions did not make any changes in Appendix C, Item 3, after December 26, 2000, the date the Claimant's medical leave commenced. He was not entrapped by a "new" rule.

While the Organization argues, correctly, it seems, that the Carrier suffered no loss of reputation by the Claimant's conviction, nor was the crime committed on the Carrier's property, the Board is not persuaded by this argument. Arbitrators in this industry, as well as in other industries, have been divided on the issue of discipline for off-duty conduct. The Board finds there are two facts here which are decisive. First, there is a specific rule which states that conduct leading to a felony conviction is a dismissible violation. Second, the conviction itself, and the penalty, five years' confinement, renders the Claimant unable to perform the duties of his job. His off-duty conduct, therefore, has a direct, negative impact on his employment.

Further, possession of a quantity of cannabis sufficient to find intent to deliver is clearly a dishonest act, and therefore violates MWOR 1.6. There are no extenuating or mitigating circumstances in the record which would permit this Board to modify or expunge this disciplinary decision. The claim is denied.

AWARD

The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

3/10/04
Date