

SPECIAL BOARD OF ADJUSTMENT NO. 936

Parties
to the
Dispute

Brotherhood of Maintenance of Way Employes
vs.
Norfolk and Western Railway Company (Lake Region)

Case No. 7
Award No. 7

STATEMENT OF CLAIM

(1) The dismissal of Machine Operator C. P. Stark, Laborer T. E. Buckley and the ninety (90) day suspension assessed Laborer S. E. Esposito for alleged use of narcotics while on duty was without just and sufficient cause, on the basis of unproven and disproven charges and in violation of the Agreement. [File Nos. MW-BVE-81-21; MW-BVE-80-27; MW-BVE-81-20].

(2) The Claimants shall be allowed the remedy prescribed in Rule 22(e).

OPINION OF THE BOARD

Claimants were employed by Carrier Rail Gang R-2 working in the vicinity of Muncie and Eaton, Indiana. On June 24, 1981, Carrier Police conducted an unannounced inspection of the Camp Cars used by Rail Gang R-2. A variety of narcotics and drug paraphernalia were found. Subsequent to this inspection, Carrier placed two undercover agents on the job, working as Laborers on the Rail Gang.

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On July 27, 1981, as a result of this undercover activity, Carrier preferred charges against four employes (Claimants) and D. Gibson. They were charged as follows:

You are hereby notified to report to the Division Engineer's Office, 1st Floor, Old Administration Building, Foot of Wood Street, Bellevue Ohio at 9:00 a.m., Friday July 31, 1981, for a formal investigation to determine your responsibility in connection with your use of narcotics while on duty and on company property during the week of July 20 to July 24, 1981, in the vicinity of Eaton and Muncie, Indiana.

If you desire to have a representative and/or witnesses present at this formal investigation, please arrange for their presence.

The hearing in the matter was held on August 14, 1981, and continued and completed on August 28, 1981. Claimants were found guilty as charged and discipline was imposed. Stark and Buckley were dismissed from service, while Claimant Esposito was assessed a 90-day suspension. The Organization contends that the charges were vague and unclear and that, as such, they were not specific enough for Claimants to mount a proper defense. Petitioner also argues that the hearing was procedurally flawed because two hearing officers were involved. It further claims that the burden of proof was not met by Carrier and it was not proven on the record that Claimants were guilty as charged. It finally states that even if the charges were true, the penalties imposed were much more severe than justice would require.

Carrier contends that two undercover agents actually observed

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Claimants on company property. In the case of Stark and Buckley, he saw them smoking marijuana while on duty. The agents identified the marijuana by sight and by smell. It further contends that the two agents were Carrier Police assigned to the detail and would have absolutely nothing to gain by fabricating such stories. The evidence in this case, according to Carrier supports its actions and the claim should be denied in its entirety.

This Board has carefully reviewed the hearing transcript and other material that is a part of the record of this case. We have concluded that Claimants were afforded a full and fair hearing and that they were sufficiently aware of the charges against them to mount an adequate defense. This Board has also concluded that the testimony of the undercover Police was appropriate and that Carrier's Hearing Officer had a perfect right to rely on it.

The Board is also persuaded that given the apparent lack of control of the activities of the men on the R-2 Gang, the penalties imposed on the three Claimants in this case were far more severe than may have been necessary for Carrier to make its point with the men in R-2. In fact, the record reveals that Carrier was willing on April 27, 1982, to settle this dispute and return Stark and Buckley to service on a leniency basis. While this Board does not consider that offer of leniency an admission by the Carrier that it was wrong in taking the original action, it does serve to signal the

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Board that perhaps the point has been made with Buckley and Stark. It is hoped that they could return to work and become worthwhile employes.

Claimants had an opportunity to return to work in April 1982. They chose not to do so. They made that choice at their own peril. The best this Board can do, based on the record before it, is give Claimants a second opportunity to return to work. We will therefore direct that Claimants be reinstated to their former positions with no loss of seniority but with no back pay for lost time or benefits.

As for Claimant Esposito, this Board is not persuaded that the undercover agents' testimony concerning Esposito is accurate. There is considerable contradictory testimony concerning the location of Esposito when it is alleged by the agent that the marijuana cigarette was passed around and smoked on July 22nd at about 5:00 P.M. The weight of the testimony on this point does not support a finding of guilt on the part of Esposito. This Board will therefore sustain the Esposito claim.

AWARD

Claimants Buckley and Stark shall be returned to service with seniority intact but with no pay for lost time or benefits.

The Esposito' claim is sustained. He shall be made whole for all lost time and benefits in accordance with Article 22(e) of the Agreement. Carrier shall implement these awards within 30 days of the date this Board signs the award.

R. E. Dennis
R. E. Dennis, Neutral Member

S. C. Lyons - Carrier Dissents H. G. Harper
S. C. Lyons, Carrier Member *to the Award* H. G. Harper, Employee Member

MAY 10 1984