

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 137

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of B. A. Emery for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for time lost as a result of his dismissal from service following a formal investigation held on January 14, 2004, in connection with his conduct unbecoming an employee regarding his off the job drug activity in possessing less than one ounce of marijuana on January 16, 2003, when on March 3, 2003, he failed to appear at the Lamar County Courthouse and forfeited \$1,000.00 bond as a fine for such violation.

(Carrier File MW-ROAN-03-33-LM-208)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

AWARD

After thoroughly reviewing and considering the transcript and the parties' presentations, the Board finds that the claim should be disposed of as follows:

Claimant B. A. Emery entered the service of the Carrier as a laborer in the Maintenance of Way Department on July 8, 1991. At all times relevant to this matter, he lived in Roanoke, Virginia. This case involves Claimant's January 16, 2003 arrest for possession of a marijuana cigarette while on vacation in Georgia. He posted \$1,000 bond, which he forfeited as a fine for the misdemeanor possession charge when he failed to appear in Court on March 3, 2003. The record shows that Claimant subsequently submitted himself to Carrier's DARS rehabilitation program.

On June 25, 2003, anonymous phone calls to Carrier's Virginia Division Engineer's office and Police Department informed the Carrier that Claimant was involved in off duty drug activity. The Police Department was able to verify the facts of Claimant's arrest and bond forfeiture.

Subsequently, by letter dated July 11, 2003, Claimant was notified to attend an investigation and charged with conduct unbecoming an employee regarding the off duty drug possession arrest. After several postponements, the investigation was held on January 14, 2004. Claimant admitted to the arrest, and testified that he forfeited his bond rather than travel to Georgia because the bond was the same amount as the fine, and it was unnecessary for him to appear in Court. A letter from a manager of the bond company corroborated Claimant's testimony.

As a result of the investigation, Claimant was advised by letter dated January 30, 2004, that he was dismissed from service. Claimant's representative appealed the discipline on the basis that it was harsh and excessive, and in violation of Carrier's policy on drugs and alcohol. The Carrier maintains that the drug possession was conduct unbecoming an employee and a violation of Carrier policy, which specifically states that an employee convicted for off-duty drug activity "will be considered in violation of this policy and subject to dismissal."

Claimant was guilty as charged, and Carrier's policy clearly subjects to dismissal any employee convicted in connection with off duty drug activity. As noted in Award No. 2 of Public Law Board No. 6644 (Malin):

Carrier's policy of dismissal of employees with such criminal convictions is long-standing and has been upheld in numerous prior awards. Indeed, such transgressions as Claimant committed are extremely serious and will rarely result in a finding that the penalty of dismissal is excessive.

We note that there is great similarity between the instant case and that addressed in Award No. 2 of PLB No. 6644,; however, the Board found that permanent dismissal was excessive in that case. Although that Award, like this one, does not and is not intended to establish a precedent, the reasoning contained in that Award is applicable to the case under review here.

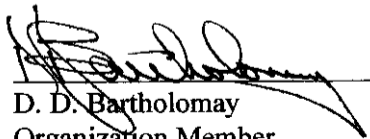
Permanent dismissal in this case was excessive for the following reasons: First, the conviction was for a misdemeanor, not a felony. While we hesitate to quantify degrees of unbecoming conduct, the distinction between misdemeanor and felony has merit, and has been given consideration as a factor in this decision. Second, and equally important to the Board in reaching this award, Claimant, who worked without incident from the time of the January arrest until June, when the Company became aware of the incident, promptly voluntarily presented himself for treatment in Carrier's DARS program, and was actively participating prior to the investigation for the charge of violation of Carrier's policy. Third, he has thirteen years of prior service with a clean record; significantly, he has no prior Rule G violation.

Therefore, the Board will sustain this claim, in part. Claimant shall be reinstated to service without compensation for time held out of service. Such reinstatement is subject to Claimant's compliance with all conditions, restrictions and other terms of Carrier's DARS program.

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board sign this award.



Mark D. Selbert
Chairman and Neutral Member



D. D. Bartholomay
Organization Member



D. L. Kerby
Carrier Member

Issued at Saint Augustine, Florida, on September 28, 2004