

PARTIES TO THE DISPUTE

Transportation-Communications International  
Union

vs

Norfolk and Western Railway Company

Hearing Held: November 16, 1990 at the Norfolk Southern  
Corporation's Labor Relations Offices, 223 East  
City Hall Avenue, Norfolk, Virginia

STATEMENT OF CLAIM

Claim 6652-W of the System Committee of the Union that:

The Carrier violated the provisions of Rule 27 of the Master Agreement dated April 1, 1973, as amended, when, as a result of the Carrier's test of the charges as contained in its letter of January 12, 1990, it arbitrarily and capriciously dismissed Mr. J. H. Gossom from all service, effective January 30, ~~1989~~ 1990, without just cause and reason.

In view of such arbitrary, capricious, unjust, discriminatory and unreasonable action by the Carrier, it shall now be required to:

1. Restore Mr. J. H. Gossom to service of the Carrier with all seniority, vacation and other rights unimpaired.
2. Compensate Mr. J. H. Gossom for all time lost, commencing with January 12, 1990 and continuing each day until he is restored to full service.
3. Reimburse Mr. J. H. Gossom any amounts he incurred for medical or surgical expenses for himself or his dependents to the extent that such payments would have been paid by Travelers Insurance Company under Group Policy No. GA-23000 and, in the event of the death of Mr. Gossom, pay his estate the amount of life insurance provided for under said policy. In addition, reimburse him for premium payments he may have made in the purchase of substitute health, welfare, and life insurance,

as provided in Article IX, Section 1 of the National Agreement effective April 15, 1986.

4. Mr. Gossom should be reinstated to his former position or a comparable position, in accordance with his full seniority rights, the alleged charges expunged from his record, and should be compensated for the difference between the amount earned while out of service, or while otherwise employed, and the amount he would have earned had he not been held out of service.
5. Compensate Mr. J. H. Gossom for all monies lost, with interest at the rate of twenty (20) per centum, compounded annually on the anniversary of this claim, for amounts due under Item (2) supra.

OPINION OF BOARD

An investigation was held on January 22, 1990 to determine Claimant's responsibility in connection with conduct unbecoming an employee in that on December 5, 1989 he entered a plea of guilty in the Circuit Court of St. Louis County, Missouri to a charge of assault - first degree, a felony, and the charges of attempted sexual misconduct and resisting arrest. As a result of this plea, Claimant was placed on conditional probation with the State of Missouri Board of Probation and Parole. Immediately prior to the investigation, Carrier's Director of Industrial Development apprised Claimant by letter dated January 8, 1990, that effective January 12, 1990, Claimant was relieved of his position as Staff Assistant to the Industrial Development Department. On January 11, 1990 Claimant attempted to exercise seniority by displacing into Carrier's Revenue Accounting Department in St. Louis, Missouri, but was denied this displacement move. In the meantime, the

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investigation was conducted on January 22, 1990 and based upon the investigative findings, Carrier dismissed him from service. In its January 30, 1989 discipline notification letter Carrier set forth its reasons for the dismissal action.

"This action is taken as a result of your admission to entering a guilty plea in the Circuit Court of St. Louis County, Missouri, on December 5, 1989 to a charge of assault - first degree, a felony, and the charges of attempted sexual misconduct and resisting arrest, two misdemeanors, all committed on July 7, 1989."

In defense of its actions, Carrier asserts that since Claimant pled guilty to the cited charges, he indisputably manifested conduct unbecoming an employee and consequently, it had the right to remove him from service. It maintains that Arbitrators have invariably held that a guilty plea in a court of law was tantamount to a conviction, irrespective of whether the State exercised leniency by not recording a judgement. It referenced several awards on this point, including Award No. 2 of Public Law Board No. 1790 involving the same Organization and Carrier. In that Award the Board held in part:

"Whatever weight of authority such awards may have upon this Board, they are not acceptable precedents here because there is no legitimate dispute about the guilt of the accused. Where, as here, the guilt is admitted, there can be no challenge to a fair and impartial hearing. The proceedings admittedly were fair and impartial by reason of the admitted guilt."

See also Award 450 of Public Law Board No. 450, Award 33-B of Public Law Board No. 2578, Award 80 of Public Law Board No. 2971 and Award 16 of Public Law Board No. 3751, et al.

Moreover, as to the Organization's correlative procedural objections, namely, the Hearing Officer's trial conduct, the

alleged hearsay testimony of Carrier's Police Officer, the unspecificity of the investigative charges, the methods used to obtain Claimant's court records and the assertion that Claimant was not subject to a Rule 27 investigation prior to securing a covered position, Carrier asserts that the Organization has not advanced serious credible proof to substantiate said objections.

In defense of its appeal's petition, the Organization contends that Claimant was not afforded a fair and impartial investigation and importantly, Carrier failed to meet its required proof burden. Specifically, it contends that Carrier's Hearing Officer disregarded the objections raised by the TCU representatives and admitted prejudicial hearsay testimony by Carrier's police witness. It also charges that the Hearing Officer improperly allowed the "surreptitiously acquired" closed court records to be admitted into the investigation, which by extension adversely affected Claimant's defense. More pointedly, it observes that Claimant had a valid reason for the plea agreement of December 5, <sup>1989</sup>~~1990~~, since said admission was solely for the purpose of clearing his name. It further notes that while Claimant was placed on probation for two (2) years, his records in St. Louis County will not show a conviction if he maintains a blemish free record for two (2) years. It takes umbrage at Carrier's disciplinary action, arguing that it was indeed punitive and predicated upon specious considerations.

In effect, it asserts that Carrier suffered no harm by Claimant's alleged questionable deportment and moreover, the alleged conduct occurred off the property while he was on vacation. It argues that since Carrier was not able to establish that Claimant's off duty behavior damaged Carrier's reputation or carried with it a potentially serious threat of disrupting the orderly, efficient and safe conduct of Carrier's operations, then there was not a substantial basis for assessing such quantum of discipline. It referenced Third Division Award Nos. 21293, 20874, 22314, et al. as dispositive authority.

In considering this case, the Board concurs with Carrier's position on both the procedural objections raised and the substantive merits underlying the discipline assessed. Firstly, careful reading of the investigative record does not reveal that Claimant was denied contracted for due process or was precluded from conducting a vigorous thoughtful defense. There was no evidence of prejudgement on the part of the Hearing Officer or palpable indications that said official conducted an incompetent hearing. Based on the circumstances of Claimant's apprehension, it was not impermissible for Carrier's law enforcement authorities to acquire the court records or for Carrier police officials to review the report compiled by the Kirkwood Police Department. In fact, the same police official who reviewed the report at the January 22, 1990 investigative hearing also personally attended the St. Louis County Circuit pretrial hearing on December 5, 1989. Secondly, there has been

no persuasive showing that the controlling schedule Agreement would not apply, when Claimant attempted to displace to a covered position on January 11, 1990. Rule 27 does not support this assertion. Thirdly, contrary to the Organization's contention that the charge of conduct unbecoming an employee was not specific, we find that the central focus of the investigation pivoted on this concern.

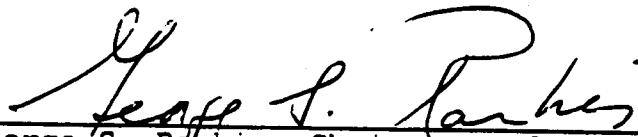
Similarly, as to the merits of the dispute, Claimant's guilty plea in court and probationary assessment explicitly indicates conduct unbecoming an employee and accordingly, Carrier is not estopped from taking disciplinary action. We have reviewed the Awards submitted by both sides relative to adjudicated court action, particularly where employees plead guilty to serious offenses and the significance to be attached to off duty misconduct and upon this review and the facts herein, we are constrained to support Carrier's position. It might well be that Claimant entered an "Alford Plea" whereby a defendant may maintain his innocence while pleading guilty, provided the guilty plea represents a voluntary choice of alternatives available to him at the time and the record before the Court provides strong evidence of guilt. In this instance, the Court accepted Claimant's plea, together with the State's recommended suspended imposition of sentence (SIS) with two years probation, including a requirement that he does not violate the law during the prescribed probationary period. See North Carolina v. Alford, 400 U.S. 25 (1970). In view of his admission and within the context

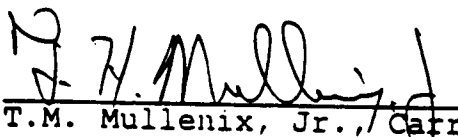
of the awards cited, we find no basis for varying Carrier's decision.

Upon the whole record and all the evidence, this Board finds that the Carrier and Employee involved are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction over this dispute.

AWARD

Claim Denied.

  
George S. Roukis, Chairman and Neutral Member

  
T.M. Mullenix, Jr., Carrier Member

  
W. M. Flynn, Employee Member

Dated: November 20, 1990