

AWARD NUMBER _____

CASE NUMBER 1

PUBLIC LAW BOARD NO. 5290

PARTIES TO DISPUTE: CSX Transportation, Inc.
(formerly SCL)
and
Brotherhood Railway Carmen
Division of Transportation Communications
International Union AFL-CIO, CLC

STATEMENT OF CLAIM: Claim of the Brotherhood:

1. That under the current working Agreement, Carman Gardo Gomez of Hialeah, Florida, was unjustly dismissed on December 5, 1990.

2. That accordingly, the CSX Transportation, Inc. be ordered to put Gardo Gomez back to work and compensate Carman Gomez for all time lost from December 5, 1990, until he is restored to service plus all benefits and vacation rights as he would have had under a normal flow of circumstances as if he had never been dismissed.

OPINION OF BOARD: The relevant facts of this case are not in dispute. Claimant, Gardo Gomez, was assigned as a Carman at the Carrier's facility at Hialeah, Florida. He has worked for the Carrier since May 8, 1967.

On August 8, 1988, the Claimant was arrested and charged with possession of cocaine, trafficking in cocaine and conspiracy to traffic in cocaine. On October 16, 1990, Claimant pled guilty to the charges of "trafficking in cocaine and conspiracy to traffic" and was sentenced to five (5) years incarceration.

As a result of his conviction, a notice was sent to the Claimant on October 29, 1990, instructing him to attend an investigation regarding his arrest and conviction. A hearing was scheduled for November 15, 1990. Claimant was unable to attend due to his incarceration. The Organization requested that the hearing

be postponed until the Claimant could be present. The Carrier denied the request and conducted the hearing as originally scheduled. On December 5, 1990, Claimant was dismissed from Carrier's service.

The Organization timely appealed Carrier's dismissal of the Claimant. Carrier denied the appeal. On September 3, 1991, Claimant sent a letter to the Organization in support of his claim. Conferences were held between the Organization and the Carrier to discuss the claim, but neither party changed their position. The claim is now before this Board for adjudication.

Procedurally, Carrier asserts that Claimant was afforded a fair and impartial hearing in accordance with the Agreement. It argues that the transcript of the investigation demonstrates that all of Claimant's due process rights were fully protected and that the hearing was conducted in a fair and impartial manner. Carrier maintains that the Claimant and his representative were fully apprised of the charges against the Claimant and that no requests for a postponement of the hearing were received by the Carrier prior to the hearing. It also argues that the Claimant was very capably represented at the hearing by his General Chairman and Local Chairman.

As to the Organization's objection that the Carrier violated Rules 30, 18(b) and 19 of the Agreement by conducting an investigation without the Claimant being present, and thus did not afford Claimant a fair and impartial investigation, Carrier submits that these Rules are not applicable in this case since Claimant was

not unavoidably absent. Carrier argues that it was Claimant's own actions which lead to his confinement and that it is well-established that incarceration is not an acceptable reason for failing to attend an investigation.

In all, Carrier maintains that it acted properly in conducting an investigation without Claimant being present and that it should not be required to conduct another investigation after he is released from prison.

As to the merits, Carrier argues that the facts of record clearly establish Claimant's guilt. Specifically, it refers to the testimony of Lt. J. F. Burke, Jr., Lieutenant of Police, Miami, Florida, which establishes that Claimant entered a plea of guilty to the charges of trafficking in cocaine, four hundred (400) or more grams, and conspiracy to traffic. As a result, Claimant was sentenced to serve five (5) years in prison. Carrier also maintains that Claimant's letter to Carrier dated September 17, 1991, describes in detail the events which lead to his arrest and provides additional evidence that the Claimant was guilty as charged.

Carrier maintains that Claimant is guilty of a serious offense which requires disciplinary action. It claims that the discipline imposed in this case, dismissal, is consistent with the decisions of numerous tribunals, which have held that discharging an employee for trafficking in drugs is not only reasonable, but necessary to the Carrier's maintenance of a dependable work force. It argues that the Organization has not presented any evidence that the

discipline imposed by the Carrier was inappropriate. Thus, Carrier claims that the penalty of dismissal for this offense was fully justified.

Accordingly, and for the foregoing reasons, Carrier asks that the claim be denied.

Procedurally, the Organization contends that the Carrier did not afford the Claimant a full and impartial investigation as required by Rule 32 of the Agreement, because it conducted the investigation without the Claimant being present. The Organization also claims that the Carrier's refusal to adjourn the investigation until Claimant was released from prison violated Rules 18(b) and 19 of the Agreement.

Rule 18 (b) states:

(b) The arbitrary refusal of a reasonable amount of leave to employees when they can be spared, or failure to handle promptly cases involving sickness or business matters of serious importance to the employee, is an improper practice and may be handled as unjust treatment under this agreement.

Rule 19 states:

In case an employee is unavoidably kept from work he will not be discriminated against. An employee detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible.

The Organization contends that these Rules required the Carrier to grant its request for an adjournment and that the Carrier's failure to do so fatally undermined the fairness of the investigation.

Thus, the Organization avers that Claimant has been denied his due process rights in the handling of the investigation and asks

that the claim be sustained on procedural grounds alone.

As to the merits, the Organization asserts that Carrier's decision to discharge Claimant was improper. It refers to Claimant's September 3, 1991 letter in which Claimant alleges that he was unjustly accused of trafficking in drugs. Although the Claimant admits to having been present at the time of the sale of drugs by a friend to a police informant, he claims that since the drugs at issue did not belong to him, he should not have been accused of trafficking. Claimant also argues to have been set up by the police informant. The Organization argues that since the Claimant only was required to serve eleven (11) months of his sentence, the State could not have truly believed him to have been guilty of trafficking in narcotics.

In all, the Organization claims that the Claimant should not have been disciplined for his actions in this matter. Therefore, it asks that the claim be sustained on its merits as well as for procedural reasons.

After reviewing the record evidence, we are convinced that the procedural arguments must fail. The evidence indicates that Claimant and his representative were aware of the charges against Claimant. They were also aware of the scheduled date of hearing and neither requested an adjournment prior to the hearing. Moreover, Claimant was very capably represented at the hearing by his General Chairman and Local Chairman.

There also was no violation by the Carrier of Rules 18(b), 19 and 32 of the Agreement.

On their face, Rules 18(b) and 19 apply to unavoidable absences from work, not to absences from investigatory hearings. Moreover, rather than being unavoidably absent, as required by Rule 19, Claimant's absence from the investigatory hearing was caused by his own criminal conduct. Therefore, it clearly was avoidable.

In addition, Rule 32 does not require that investigatory hearings be postponed so long as the employee being investigated remains in prison. It is well established that incarceration is not an acceptable reason for failing to attend an investigatory hearing. See, e.g., Second Division Award No. 7262 (Zumas) "[C]onfinement in jail does not constitute unavoidable absence for good cause."; Second Division Award No. 11201 (Carter) "We find and hold that the conducting of the Investigation in absentia...did not deprive Claimant of a fair and impartial Investigation. Claimant's incarceration was attributable to his own actions."

Thus, it is clear that there was no violation of Rules 18(b), 19 and 32 and that the Carrier conducted a fair and impartial investigation.

As to the merits, the record evidence clearly establishes there is absolutely no doubt as to Claimant's guilt. Claimant pled guilty to trafficking in cocaine and conspiracy to traffic in cocaine and received a five (5) year prison sentence. Claimant's September 3, 1991 letter to the Carrier leaves no doubt that he actively aided and abetted the sale of narcotics. Claimant contacted a dealer, made arrangements for a meeting at which the sale would take place and served as a translator during the

transaction. Although Claimant might have been "set up" by a police informant, there is no evidence that he was entrapped. In all, Carrier's conclusion that Claimant willingly involved himself in the sale of narcotics was amply supported by the evidence.

The remaining issue before the Board is the measure of discipline assessed. The Claimant was properly found guilty of a serious charge. Since trafficking in narcotics is a matter of serious concern to the Carrier, even when it occurs off the Carrier's premises, discharge was an appropriate penalty. It was neither arbitrary, capricious nor excessive.

Accordingly, and for the foregoing reasons, the claim is denied in its entirety.

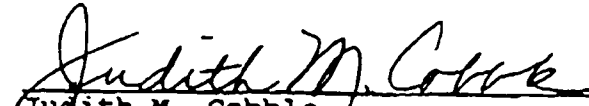
FINDINGS: The Public Law Board No. 5290 upon the whole record and all of the evidence, finds and holds:

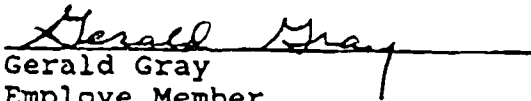
That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934;

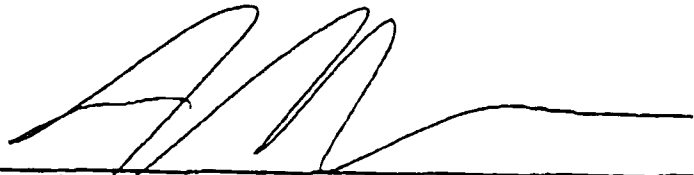
That the Public Law Board No. 5290 has the jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD: Claim denied.


Judith M. Cobble
Carrier Member


Gerald Gray
Employe Member


Martin P. Scheinman, Esq., Neutral Member

4/11/94