

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13212
Docket No. 13077
98-2-95-2-104**

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(International Association of Machinists and
(Aerospace Workers

PARTIES TO DISPUTE: (

(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

"Dispute - Claim of Employee

(1) That the Terminal Railroad Association of St. Louis (hereinafter will be referred to as the Carrier) violated the provisions of Rule 32 of the April 1, 1945 Agreement, as amended, when subsequent to a formal hearing held on November 2, 1994 the Carrier unjustly and improperly dismissed from service Machinist employee C. M. Knight (hereinafter referred to as the Claimant.)

(2) That accordingly, the Carrier be ordered to:

- (a) Restore Claimant to service with all seniority and vacation rights unimpaired.
- (b) Compensate Claimant for all time lost from service, if any, commencing November 7, 1994.
- (c) Make Claimant whole for all health, welfare and insurance benefits lost while dismissed from Service."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This claim arises from Carrier's dismissal of Claimant from service for violation of Rule M, which provides that conviction of a felony or misdemeanor involving moral turpitude is cause for dismissal. A November 2, 1994 Investigation revealed that Claimant was adjudged guilty of the offense of criminal sexual assault on February 11, 1988. The record of that Investigation reveals that Claimant was on furlough since December, 1991 and the court conviction was discovered as a result of a routine background check conducted at a time when Carrier contemplated recalling Claimant from furlough status. It also appears that Claimant was recalled from furlough and performed work for Carrier between his 1988 conviction and his November, 1994 dismissal without undergoing a background check of this sort, and that Claimant was a valued mechanic and a good employee with some 20 years of service.

Carrier argues that the only argument made by the Organization on the property was that Carrier failed to prove its case, and that additional arguments concerning the fairness of the Hearing made in its Submission should not be considered by the Board. It also contends that under the provisions of Rule M, which Claimant admittedly violated, dismissal was proper, citing Public Law Board No. 1906, Awards 252, 276, 287, 309; Public Law Board No. 4110, Awards 24, 26; Second Division Award 13072; Third Division Awards 24994, 26017, 32262; Fourth Division Award 4693.

The Organization contends that dismissal is too severe a penalty under the circumstances of this case since Claimant is a 20 year employee who is sorry for what occurred; explained the underlying circumstances and the treatment he has undergone as well as the penalty he has served; has brought no discredit to Carrier; that it was a denial of due process to remove him from service for an off-duty event occurring six years previous when he had been permitted to work for Carrier in the interim and had

done so without incident. The Organization also raises arguments concerning the lack of fairness exhibited throughout the Investigation, relying upon Second Division Awards 6522, 8039, 6158 in requesting a sustaining award.

Initially we note that any issues of unfairness or denial of due process which may arise in this case do not do so as a result of the Investigation conducted prior to dismissal. Neither can we find any basis to challenge Carrier's right to conduct routine background checks on employees returning from lengthy furloughs, or to have done so on Claimant herein. There is no doubt that Claimant's conviction for criminal sexual assault falls under the category of an offense involving moral turpitude contained in Rule M. What is troublesome in this case is the fact that what was discovered as a result of this background check was not an occurrence that happened between Claimant's December 1991 furlough and his November 1994 dismissal. Rather, Carrier relied upon a six-year-old conviction which had not been the basis for denying Claimant the opportunity to continue to perform services for Carrier thereafter in applying the terms of Rule M herein.

In this case there was no evidence that Carrier was negligent in the past in conducting background checks or that Claimant had been on a lengthy furlough prior to December 1991 which may have necessitated such a check. Neither is there any evidence indicating the amount of time Claimant was permitted to work after the February 1988 conviction or that Carrier should have known about it prior to November 1994. There can be no doubt that Carrier did not have any knowledge of Claimant's conviction when it may have recalled him from furlough in the past. While it might be unfortunate in this case, there is no limitation of a specific time period for the application of the clear terms of Rule M, and we are unable to conclude that Carrier waived its right to rely upon it in this case.

Thus, we cannot find that Carrier acted arbitrarily or capriciously in exercising its right to dismiss Claimant from service when it properly discovered his prior criminal conviction. In so holding, we are not passing upon Claimant's personal fitness to perform his job or his sincere desire to do so. It is up to Carrier to determine whether he should be given an opportunity to return to work in the future. This Board can find no basis upon which to upset Carrier's November 1994 conclusion.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 26th day of February 1998.