

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13944
Docket No. 13793
NRAB-00002-060007
(06-2-7)**

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**(International Association of Machinists and Aerospace
Workers
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Dispute – Claim of Employee:

That the Union Pacific Railroad Company (hereinafter referred to as Carrier or Company) violated Agreement dated June 1, 1960, as amended, between the International Association of Machinists, District 19 and the Union Pacific Railroad Company when it dismissed Machinist Ron Alexander (hereinafter referred to as claimant) from the service of the Carrier.

Relief Requested:

That the Union Pacific Railroad Company be ordered to reinstate the Claimant, compensate him for all lost wages, and give back to him all lost benefits.”

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.

The Claimant at bar was notified to attend an investigation to determine responsibility, if any, for possible violation of Union Pacific Rule 1.6 stating that, "Any act of hostility, misconduct . . . affecting the interests of the company or its employees is sufficient cause for dismissal and must be reported." The Claimant was also alleged to have violated Rule 1.6.2, Notification of Felony Conviction. The Carrier investigated the charges on July 19, 2005. Subsequently, the Claimant was found guilty and dismissed from the Carrier's service.

The Organization argues that the Carrier failed to properly notify the Claimant of the charges against him, violating Rule 32 (b) wherein there was no precise charge. Further, the investigation searched for a reason to support improperly withholding the Claimant from service after he had already been disciplined. The Claimant had spent ninety days incarcerated and was disciplined for being absent from work. The Claimant was assessed a Level 2 discipline for absenteeism.

The Organization contends the Carrier now inappropriately argues that the Claimant failed to properly notify the Carrier that he allegedly plead guilty to a second degree felony. The Organization maintains that the Carrier certainly knew of the guilty plea, as several Carrier officers had full knowledge of his jail term. His immediate Supervisor testified he was aware of the jail time, due to approving overtime to fill his position. The Shop Director and others were aware, as they had put the Claimant on a leave of absence during his jail sentence. Not only did the Carrier officers know, but in fact, the Claimant's record does *not* show a felony conviction, but deferred adjudication. There is no proof in this record of the Claimant's failure to notify the Carrier (Rule 1.6.2) or violation of Rule 1.6.

The Carrier denied any procedural violation of due process. The notification was specific and clear as to the charges against the Claimant. It detailed the Rules violated and provided more than enough specific information to fully comply with the Agreement. As for prior discipline for absenteeism, the Claimant waived his rights and accepted a Level 2 discipline for excessive absenteeism. The current

charge has nothing to do with excessive absenteeism, but failing to disclose a felony conviction.

As for merits, the Carrier finds that the officers who knew of the Claimant being in jail did *not* know that the cause of jail time was a felony conviction. Further, the Carrier maintains that any argument that the Claimant did not have a felony conviction is misplaced. The Claimant may have obtained a "differed adjudication" to avoid penalties and now argue that he was never convicted of a felony, but he plead guilty to second degree felony and notified no Carrier Officer. As such, the Claimant's guilt was proven and dismissal fully justified.

The Board finds no support for any procedural error. The notice of investigation specifically stated the Rules which may have been violated. It further stated:

"On or about June 16, 2005, the Carrier's EEO/AA Department received a telephone call advising that you allegedly pled guilty to a second-degree felony. Information received by this office on or about June 30, 2005 confirmed you entered a guilty plea and you may have been dishonest when you allegedly failed to notify the proper Carrier officer."

A full review indicates that the Claimant was aware of the issue to be considered at his investigation. The Claimant was prepared, not prejudiced or confused as to what conduct or charges were being considered. We are persuaded that there were no procedural errors.

As to merits, the Carrier has the burden of proof. In this record, there is testimony from Manager McCown, Shop Director Gatewood and Claimant's immediate Supervisor Barber. It is clear from the testimony that both of them knew that the Claimant was in jail, with Manager McCown aware that the term of incarceration was ninety days. The issue however, is whether Carrier officers were fully knowledgeable that this was a felony conviction.

The Board finds no proof that Carrier officers had been informed; were aware; or testified that the Claimant notified them that he had pled guilty to a *felony*. The Claimant maintains that he has no felony conviction. The Organization

argues forcefully that some testimony against the Claimant was false. The Organization also argues that given his prior discipline it is obvious that the Carrier knew full well that the Claimant was in jail and that it was for a felony.

The Claimant certainly argues that Carrier officer's knew. He testified that he told Shop Director Gatewood, "what I went to jail for" and that it was a felony conviction; "He knew." The Claimant maintains however that he ultimately had no felony conviction, in that with his deferred adjudication, he had cleared his record which would confirm no conviction of a felony. The Claimant states in pertinent part:

"... to get deferred adjudication, you have to make a plea, but when you finish your probation, you don't have any record ..."

The Board, after full consideration of the record, finds the following. There were no procedural errors. There is no proof that the Claimant informed the Carrier that he was found guilty of second degree felony. The Carrier produced the evidence wherein the Claimant pled guilty to aggravated assault, "the offense of a felony". The Claimant signed, initialed and accepted deferred adjudication with all of its implications and consequences. In this instant case, the Carrier has proved that the Claimant violated Rule 1.6 and 1.6.2.

In short, the Claimant violated the Carrier's Rules. The Texas Court may have agreed that he could have a legal deferred adjudication, but the Agreement is clear. The Claimant violated the Agreement Rules. Discipline of permanent dismissal is not viewed by this Board as arbitrary, capricious or excessive under these circumstances. The claim must be denied.

AWARD

Claim denied.

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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 15th day of July 2008.