

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31931
Docket No. MW-32082
97-3-94-3-486**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE:(
(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. N. J. Marquar on November 15, 1993 for alleged violation of conduct unbecoming an employee of CSX Transportation, in connection with his April 23, 1992 indictment by the United States Federal Grand Jury for various violations of the law, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File 17(31)(93)/12(93-1245) LNR].**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and shall be compensated for all wage loss suffered."**

FINDINGS:

The Third 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.

Prior to his dismissal, Claimant held seniority in the Carrier's Bridge and Building Subdepartment of the Maintenance of Way Department. He was elected to the position of General Chairman of the Dixie Federation of the Organization in 1980. He continued to hold that position until he presented notice to Carrier on September 23, 1993, advising that he wished to exercise his seniority within the Maintenance of Way ranks as of October 12, 1993. By letter of October 13, 1993, Claimant was notified to appear for an Investigation. That letter read in pertinent part as follows:

"You are charged with conduct unbecoming an employee of CSX Transportation, Inc. This charge stems from the fact that on April 23, 1992, while on leave of absence from your employment in the B&B Subdepartment, you were indicted by the United States Federal Grand Jury for various violations of the law, including embezzlement of union funds, making false entries concerning expenses, charging personal expenses as union expenses, and making false entries in union statements relative to expenses. You were subsequently arrested by the United States Marshall Service and posted \$10,000 bond. You were arraigned in Federal Court on May 8, 1992, and entered a plea of not guilty. Subsequently, as a result of on-going plea bargaining, on October 8, 1993, you entered into an agreement with the United States Attorney wherein you agreed to make restitution in the approximate amount of \$3,500.00, resign as General Chairman, not serve as a union representative or labor relations consultant for 18 months, perform 50 hours of community service and sign a statement accepting responsibility for the charges contained in the indictment of the Federal Grand Jury."

An Investigation was held on October 21, 1993. Following the Investigation, Claimant was notified on November 15, 1993, that he was dismissed from Carrier's service. That discipline was appealed and subsequently progressed in the usual manner including conference on the property.

At the outset the Organization protested that Claimant was not given a fair Investigation. A review of the transcript of the Investigation in this case indicates that, the Organization's protestations notwithstanding, Claimant was afforded a full and fair Investigation. While the exchanges between the Organization representative and the Hearing Officer were occasionally argumentative and contentious, the Organization was not impeded in its efforts to present its defense on behalf of Claimant.

With respect to its merits, this is certainly not a case of first impression. Numerous Awards on this and other Boards have supported the Carrier's right to dismiss an employee on similar grounds. For example, in Second Division Award 5043, a case directly on point, the Board upheld the dismissal of an employee for embezzling union funds. In that case, as here, the Organization asserted that the criminal charges had no connection with or impact upon the Carrier. The Board held, however that "no reason is given in support of [the Organization's] contention that the Carrier must keep a proven thief or embezzler in its employ unless the theft or embezzlement was of its property." Nor has a plea of *nolo contendere*, or "no contest" been found to insulate an employee against dismissal. (See for example, First Division Award 24066; Third Division Award 21228; and Fourth Division Award 4647.)

On October 8, 1993, Claimant signed an "Agreement for Pretrial Diversion." As part of that Agreement, Claimant accepted responsibility for his behavior; *to wit*, "violation of 29 U.S.C. §§ 501(c) and 439 (b) and (c), in that [he] converted to [his] own use the assets of a labor organization, and made false statements on labor union reports." As with a plea of *nolo contendere*, Claimant's signing of the Agreement for Pretrial Diversion has "the same legal effect as a plea of guilty, so far as regards all proceedings on the indictment, and on which the defendant may be sentenced." *Black's Law Dictionary*, 4th Ed.

In light of the foregoing circumstances, and the strong tide of precedent on this matter, the Board sees no reason to disturb the discipline assessed.

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 Third Division**

Dated at Chicago, Illinois, this 4th day of March 1997.