

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41221
Docket No. MW-41431
12-3-NRAB-00003-100343

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Texas Mexican Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. A. Jimenez by letter dated October 20, 2009 for alleged violation of General Code of Operating Rules 1.6, 1.6.2 and 1.9 and System Special Instructions, Rules 1.6 and 1.6.2 in connection with charges of alleged conduct leading to a felony conviction and alleged failure to notify the proper authority within 48 hours of receiving notice of felony conviction was arbitrary, capricious and in violation of the Agreement (System File TM-205-WF-09 TMR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Jimenez shall now ‘. . . have his personal record cleared of all charges. Also that Mr. Jimenez, have his seniority unimpaired and all other rights due to him by the collective bargaining agreement.’”

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.

This claim, dated November 23, 2009, alleges that the Carrier failed to meet its burden of proof during the formal Investigation because the documentary evidence it relied upon came from the State of Texas' Department of Public Safety (DPS). In this regard, according to the Organization, DPS ". . . cannot guarantee the records . . . obtain[ed] through [its] [web]site related to the person [Claimant] about whom you are seeking information . . ." and ". . . [t]he only way to positively link someone to a criminal record is through fingerprint verification." The Organization argues that because the source of the Carrier's evidence is problematic, the charges leveled against the Claimant should be dismissed.

Aside from the lack of evidence, the Organization argues that the Carrier assumed that the Claimant elected not to attend the Investigation without undertaking any effort to determine the reason for the Claimant's absence. Because the Claimant already had been dismissed by the Carrier on September 24, 2009 in connection with another matter (Third Division Award 41220) the instant Investigation served only as retaliation and humiliation of the Claimant. Furthermore, the Notice of Investigation is vague because it does not cite any alleged Rule violations.

In response, the Carrier states there is conclusive evidence of the Claimant's lewd behavior, felony conviction, and failure to report it based on penal records and the registered sex offender list. The Claimant's action (lewd behavior) and inaction (failure to report) violated General Code of Operating Rules 1.6 (Conduct), 1.6.2 (Notification of Felony Conviction) and 1.9 (Respect of Railroad Company) as well as the identically numbered companion Rules set forth in the System Special Instructions.

The progression of this claim on the property shows that it was timely processed in the usual and customary manner, including placement before the highest officer of the Carrier designated to handle it with a conference being held on February 16, 2010. Accordingly, the claim is now properly before the Board for adjudication.

The record evidence establishes that on June 3, 2008, the Claimant was convicted of a felony under Texas Penal Code § 21.11 (INDECENCY WITH A CHILD) based on lewd behavior with a six-year old girl. As a result of that conviction, the Claimant is on the DPS' Public Sex Offender Registry.

The Claimant's felony conviction means there was evidence beyond a reasonable doubt of the Claimant's culpability. The burden of proof in a criminal proceeding (beyond a reasonable doubt) is demanding and tantamount to a moral certainty that the behavior occurred, whereas the burden of proof in this industrial proceeding is a less demanding, i.e., substantial evidence or such relevant evidence that a reasonable mind may accept as adequate to support a conclusion.

The lewd behavior which resulted in the Claimant's felony conviction violated Rule 1.6 (Conduct) as set forth in the General Code of Operating Rules and System Special Instructions; both Rules proscribe dishonesty and immoral acts. The Claimant's dishonesty and immoral acts also violated General Code of Operating Rule 1.9, Respect of Railroad Company, which proscribes behavior that may subject the railroad to criticism resulting from the employee's behavior, that is, employment of a convicted felon.

Rule 1.6.2 as set forth in the General Code of Operating Rules and System Special Instructions required the Claimant to report his felony conviction to his supervisor within 48 hours after the Claimant received notice of his conviction. Not until September 23, 2009, did the Carrier become aware that the Claimant incurred a felony conviction on June 3, 2008. Because the Claimant never reported his felony conviction, he violated the 48-hour notice requirement prescribed in Rule 1.6.2.

With regard to the Organization's objection relative to the sufficiency of the Notice of Investigation, the Board finds that the subject notice, which was issued to the Claimant on September 24, 2009, contains sufficient specificity and clarity as to

the purpose and scope of the Investigation - “. . . to ascertain the facts and determine your responsibility, if any, in connection with your alleged conduct leading to a felony conviction and your alleged failure to notify the proper authority within 48 hours after your received notice of this felony conviction.”

The Claimant received two weeks advance notice of the Investigation, as evidenced by the written confirmation of receipt at the Claimant's address of record. Notwithstanding the Claimant's receipt of notice specifying that a Hearing would be conducted regarding the matter of his felonious conduct, the Claimant did not present himself to dispute the charges even though the Organization argues that the Public Sex Offender Registry may contain inaccurate or out-of-date information and is not sufficient evidence to conclude the Claimant is a felon.

A final effort to reach the Claimant occurred at the outset of the Investigation when the Hearing Officer allowed the Organization to contact him but there was no response. An exhaustive undertaking to determine the Claimant's whereabouts or reason for his absence beyond the normal course of business method to notice by U.S. certified mail is not required in the circumstances of this claim.

The Carrier's effort to notify the Claimant of the Investigation was sufficient to afford the Claimant access to substantive and procedural Agreement due process under Rule 17 (Discipline and Grievances). Additionally, the Public Sex Offender Registry contains information of substantial evidentiary value to sustain the charges leveled against the Claimant in this forum.

The Claimant's 18-year tenure with the Carrier does not insulate him from the consequences of his dishonesty and immoral acts, his failure to report such acts to his supervisor within 48-hours of his conviction and his absence at the Investigation where he could have rebutted the charges and offered mitigating factors to lessen the penalty.

As for the Claimant's dismissal in connection with another matter which was pending at the time of his dismissal in the instant case, the Board notes that the two claims are based on different circumstances and charges. When the Carrier became aware of this matter (September 23, 2009) the Claimant still was employed as

Welder Foreman. By initiating this action the Carrier exercised its right to discipline or dismiss the Claimant in a timely manner for Rules violations.

Notwithstanding the two different claims, the Board notes a commonality between them. Although the Claimant received both Notices of Investigation at the same address of record, he did not appear at the Investigation which culminated in the instant appeal, but he did attend the Investigation which culminated in the companion claim.

In sum, the Carrier complied with the Agreement. A fair and impartial Hearing was conducted with advance written notice issued to the Claimant of the matters to be investigated and, at that Hearing, evidence was adduced proving the charged misconduct, which was subsequently acted upon by the Carrier in its dismissal of the Claimant.

These findings culminate in the conclusion that the Claimant's dismissal was neither arbitrary nor capricious and did not violate the Agreement. Consequently, the Claimant's dismissal will not be disturbed and the claim will be denied.

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 Third Division**

Dated at Chicago, Illinois, this 22nd day of February 2012.