

Award No. 3
Case No. 3
NMB Case No. PLB-07602-000003

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

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| BROTHERHOOD OF MAINTENANCE OF WAY |) |
| EMPLOYES DIVISION—IBT |) |
| |) |
| v. |) |
| |) |
| BNSF RAILWAY COMPANY |) |

Carrier File No. 10-12-0204
Organization File No. C-12-D070-5

Claimant — Jay L. Urbanec

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The discipline (dismissal) imposed upon Mr. Jay A. Urbanec by letter dated February 2, 2012, for alleged violation of MOWOR 1.6.2 Notification of Felony Conviction in connection with charges of conduct leading to a felony conviction on January 6, 2010 while employed as a Machine Operator on the Nebraska Division. The Carrier's first date of knowledge with regard to this rule violation was Monday, July 25, 2011.**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant Jay A. Urbanec shall now receive the remedy prescribed by the parties in Rule 40(G).**

BACKGROUND:

By letter dated July 29, 2011, the Carrier notified the Claimant of an investigation to be held August 5, 2011, to determine "your responsibility, if any, in connection with your alleged conduct leading to a felony conviction on January 6, 2010, while employed as a Machine Operator on the Nebraska Division. The Carrier's first date of knowledge with regard to this alleged rule violation was Monday, July 25, 2011." Due to a number of postponements, the investigation ultimately took place January 12, 2012.

The evidence introduced at the hearing established that the Claimant had been on medical leave from the Carrier due to a back injury since September 2009. In November 2009, the Claimant had been cleared by his physician to work on a "qualified full-time" basis, with a permanent 35-pound lifting restriction, but he had not been returned to work. On January 6, 2010, in Cuming County (Nebraska) District Court, he was found guilty of Possession of Child Pornography, which is a Class III Felony under Nebraska state law. He was sentenced to 24 months probation on March 3, 2011, but the Court did not formally reduce its order to writing until June 7, 2011. Sometime in late July 2011, the Carrier's Director of Administration contacted a Special Agent on the Railroad Police and asked him to look into rumors that the Claimant had been arrested and convicted of a child pornography charge. By memorandum dated July 25, 2011, the Special Agent informed the Director of Administration that the Claimant had in fact been found guilty of a charge of Possession of Child Pornography, which was a felony under state law, and sentenced to 24 months probation. The Claimant testified that on the advice of his attorney, he pled no contest in lieu of possibly going to jail.

MOW Operating Rule 1.6.2, Notification of Felony Conviction, states: "The conduct of an employee leading to a conviction of any felony is prohibited. Any employee convicted of a felony must notify the proper authority of that fact within 48 hours after the employee receives notice of the conviction." The Claimant testified at the investigation that he did not notify the Carrier of his conviction at any point in time because he was unaware of any obligation to do so. The record is not clear that employees receive specific training on Rule 1.6.2. In his six years of employment with the Carrier, the Claimant had no prior discipline on his record.

Following the investigation, the Carrier issued the Claimant a letter of dismissal dated February 2, 2012, based on its finding that he was in violation of MOW Operating Rule 1.6.2.

FINDINGS AND OPINION:

The Public Law Board, upon the whole record and all the evidence, finds that the carrier 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 Public Law Board has jurisdiction over the dispute involved herein.

The Organization first contends that the Claimant was not provided the fair and impartial hearing guaranteed to him by the parties' collective bargaining agreement. After due consideration, the Board does not find its arguments persuasive. The Organization first objected to the hearing being held before the Claimant returned to work from his medical leave, on the basis that there was a past practice of holding such disciplinary matters in abeyance until such time as the accused employee returned to work. It introduced evidence of such a practice as it related to another employee. However, a single other instance is not enough to establish a binding past practice. For the Organization to prevail on this argument, it would have to establish the traditional standards for finding a binding past practice: that it was, essentially, standard operating procedure, known and accepted by both parties over an extended period of time.

The Organization next objected that the notice of investigation was not sufficiently specific to permit the Claimant or the Organization adequately to prepare for the hearing. The Notice does not indicate what specific rule the Carrier believes that the Claimant may have violated, but it does indicate that the investigation is related to Claimant's felony conviction on January 6, 2010. Presumably the Claimant knows what he has been convicted of and can convey that to his union representative. While investigations might proceed more smoothly if the Carrier indicated what specific rule was at issue, the MOW Operating Rules are readily available to both Claimants and their representatives. There cannot be too many rules relating to felony convictions to choose from. Moreover, this is not a case where the Carrier had in its possession documents that were not available to the Claimant and the Organization—one would expect that the Claimant had a copy of his conviction, which is also a matter of public record.

Finally, the Organization objected that the notice of investigation was not timely issued, because the Carrier's first knowledge was not actually July 25, 2011, but several days before, when the Director of Administration approached the Special Agent and asked him to look into the rumors of Claimant's conviction. At that earlier date, the Carrier did not have specific knowledge of the conviction; it had only rumor. It would be unfair to both the Carrier and the accused employee to require the Carrier to act on the basis of rumor alone, without any verification of the facts. It was not until the Special Agent completed his investigation and reported back to the Director of Administration on July 25, 2011, that the Carrier can fairly be said to have had objective knowledge of the Claimant's felony conviction.

Turning to the substance of the case, the Claimant was found to have violated Rule 1.6.2. The Organization focuses on his failure to notify the Carrier of his conviction, contending that termination is unreasonable and excessive, especially when Claimant did not know that he had an obligation to report his conviction. However, while Rule 1.6.2 is narrowly titled "Notification of Felony Conviction," it actually contains *two* substantive provisions: (1) "The conduct of any employee leading to conviction of any felony is prohibited," and (2) the actual requirement to notify the Carrier of a felony conviction. The first provision is explicitly articulated as a dismissible offense in the Carrier's PEPA disciplinary policy as one of its "Stand Alone Dismissible Violations":

A non-exhaustive list of Stand Alone Dismissible violations is provided in Appendix B; the violations identified in Appendix B may result in immediate dismissal.

Appendix B states:

The following is a non-exhaustive list of violations which may result in immediate dismissal.

Stand Alone Dismissible Violations

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- 3) Conduct leading to a felony conviction. This includes any plea of guilty, deferred adjudication, and/or any plea which results in a felony conviction where sentencing is delayed or suspended, or the felony conviction is subsequently modified or reduced.

The evidence is irrefutable that on January 6, 2011, the Claimant was adjudicated guilty of a Class III felony. The fact that the offense occurred off the property and while he was on a medical leave does not change the applicability of Rule

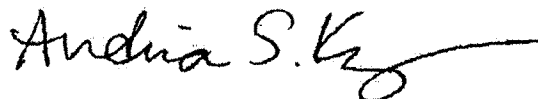
1.6.2 to him. Criminal convictions are matters of public record, and some employers are sensitive about having known criminals represent them in the communities they serve. This is especially true where the crime at issue is considered to be one involving moral turpitude—which includes child pornography offenses. Regardless of whether the Claimant notified the Carrier of his felony conviction, the mere fact of the conviction put the Claimant in violation of Rule 1.6.2 and subject to immediate termination under the explicit terms of the PEPA.

AWARD

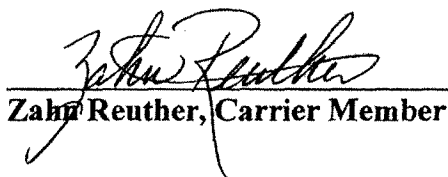
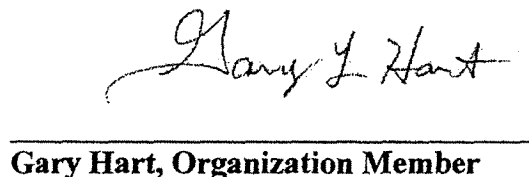
Claim denied.

ORDER

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



Andria S. Knapp, Neutral Member


Zahn Reuther, Carrier Member
Gary Hart, Organization Member

April 29, 2013
Date