NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1063

Parties to Dispute:	
BROTHERHOOD OF LOCOMOTIVE ENGINEERS	OPINION AND AWARD
and	CASE No. 576
NORFOLK SOUTHERN RAILWAY COMPANY	Claimant G. L. Dutcher, Jr.

STATEMENT OF CLAIM:

"Claim on behalf of Lake Division Engineer G. L. Dutcher, Jr. for restoration to service and payment for all time lost in connection with indefinite suspension for conduct unbecoming an employee after being arrested and charged with impersonating a public servant, a Class "D" felony, on October 20 2002."

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

Following Claimant Dutcher's arrest on Sunday, October 20, 2002, on felony charges of impersonating a public servant (police officer), Claimant was instructed on October 22 to report to an investigation held on November 4. Subsequently, by letter dated November 12, 2002 Norfolk Southern's Assistant Division Superintendent D. C. Talley notified him as follows:

> "You are hereby suspended from all services of he company until such time as a court has finally determined your guilt or innocence of the charges filed against you. If the ultimate outcome is that you are determined by the court to be guilty of the charges or any lesser related offenses, your suspension from service will be converted to permanent dismissal."

The record herein reflects that on May 27, 2003 pursuant to Claimant's plea of guilty to the above charges he was sentenced to be committed to the Indiana Department of Corrections to be confined for a period of one and one-half years, with sentence suspended

in lieu of active adult probation for that period, costs assessed and time credited for days served. In consequence of Claimant's guilty plea, on June 3, 2003, Mr. Talley followed up with Claimant in accordance with his prior communication, advising him as follows:

> "As a result of your appearance in Allen County Superior Court on May 27, 2003 [in which] you have pled guilty and been convicted of impersonating a public servant, a Class "D" Felony...you are hereby dismissed from the service of he company."

The Organization protested Carrier's action on July 15, 2003, asserting that dismissal not only represented additional discipline above and beyond that assessed on November 12, 2002 but also was an untimely modification of the earlier disposition beyond the 15-day time limit specified in Article 41 of the Agreement. Carrier responded on July 18, 2003 indicating that conversion of Claimant's initial suspension to dismissal in the wake of his guilty plea did no violence to any provision of the Agreement and was consistent with Carrier's handling of employees faced with criminal charges over a period of 25 years, as confirmed by numerous prior arbitration awards. After ensuing appeals to higher levels of Carrier management failed to produce a resolution of the dispute it was appealed to this Board for final adjudication.

The Organization here presses the argument that Carrier was not in any way prejudiced by Claimant's brush with the law since there was no nexus with his workplace: no connection was made by the media to employment with Carrier; and the offense involved no act of violence, immoral conduct or any other conduct that might compromise a smooth working relationship with his co-workers.

The Organization's basic argument is not without the germ of rationale. Insofar as this record is concerned, although silent on the question of missed work, there appears to be little if any linkage between Claimant's off-duty misconduct and his work life. It is undisputed that Claimant was arrested on October 20, 2002 after attempting to use "police style" emergency equipment to detain a woman in her automobile while in unauthorized possession of a federal marshal's badge. The incident attracted the attention the *Ft. Wayne Sentinel* and the local NBC TV affiliate on October 21 and *The Journal Gazette* in Ft. Wayne on October 22, although no media source identified Claimant as a Norfolk Southern employee. Claimant was apparently incarcerated for one day and then released

after posting bond in the amount of $2500. After seeing a television report on the arrest, however, Norfolk Southern Police Officer K. L. Spitznagel recognized Claimant as a Norfolk Southern employee and commenced an investigation, ultimately leading to Carrier's dismissal action after Claimant entered his guilty plea.

Standing alone, that factual background might give the Board pause over Carrier's dismissal action. But in context, the Organization's case leaves a few plot strands dangling. Nothing in its analytic arsenal is brought to bear on the fact that, as the Carrier argues, generations of arbitration awards on this property with this Organization and others have sustained the dismissal of employees in analogous circumstances on grounds that conduct such as Claimant has admitted to is a serious violation of Carrier's rule forbidding "conduct unbecoming an employee." Thus, *see e.g.* Public Law Board 1261, Case No. 359 (Zumas) (1983) (arrest for off-duty sale and distribution of cocaine warrants dismissal; Carrier "has every reason to expect that its employees will be honest and law-abiding..."); Public Law Board 3312, Award No. 91 (Zumas) (1994) (plea of guilty to felony charge of indecent behavior with a minor justifies dismissal; claimant's conduct was criminal, immoral, abusive and "unbecoming in the extreme..." Fact that it occurred outside Claimant's duty hours is irrelevant...); Public Law Board 3751, Award No. 16 (Muessig) (1989) (dismissal for guilty plea to incest charges was for just cause; "numerous arbitral decisions have held that offenses of the general nature as in this mater are sufficient grounds for dismissal...").

Although the Board has no obligation to show abject deference to either arbitrary Company rules, the inconsistent administration of its legitimate policies or prior arbitral decisions that are unpersuasive or distinguishable, the box score in this instance cannot be ignored. By application of the principle of *stare decisis*, the established precedent on this property is overwhelmingly supportive of Carrier's position. Once that principle is recognized, regardless of what the Board may have concluded independently, the value in the stability and predictability of the parties' relationship and in knowing clearly the outside boundaries of permissible behavior is paramount. The process is not advanced under those circumstances by an isolated, competing and autonomous decision not anchored in principle.

For the same reasons we scan that with a baleful eye the Organization's protest to Carrier's "suspension pending" action. The principle of *stare decisis* is dispositive of as well of the contention that Carrier was precluded from suspending Claimant upon first notice pending the outcome of disposition of the criminal charges and deferring its final action until such time. *See e.g.*, Public Law Board No. 6434, Award No. 3 (Simon) (2002) (Board bound by prior arbitral authority to support Carrier's right to suspend employee indicted for felony pending ultimate verdict by the court); Public Law Board 959, Award No. 92 (Criswell) (1978) (Carrier acted properly in accordance with prior arbitral citations in suspending employee arrested on four counts of transporting, receiving concealing and selling stolen vehicles pending final determination of the charges.); and Public Law Board 1063, Award No. 371 (Euker) (2001) ("Like the criminal justice system, the Carrier had probable cause to suspend claimant from service and hold a trial when informed of the indictment, pending the ultimate verdict by the court. Prior arbitral citations support this conclusion...")

In sum, we conclude that the Organization's contentions here are not vigorous enough to climb up through the established case authority. Additionally, there are no extenuating circumstances identified on this record--putting aside the explanation of combining drinking and taking oxycontin, itself a study in reckless behavior--and some aggravating factors. A summary of Claimant's personal service records in evidence discloses that he had been dismissed twice previously, once for "conduct unbecoming" and returned to service on both occasions.

Based upon the foregoing, we find that management did not violate any term of the Agreement, express or implied; its dismissal of Claimant was consistent with established practice on the property and the controlling authority in similar and identical situations.

AWARD

Claim denied. Carrier had just cause to dismiss the Claimant.

James E. Conway
Chairman and Neutral Member

Paul T. Sorrow
Employee Member

S. R. Weaver
Carrier Member

Dated at Great Falls, VA
June 8, 2004

DISSENT OF EMPLOYEE MEMBER

SPECIAL BOARD OF ADJUSTMENT No. 1063

AWARD No. 576

Neutral Member James E. Conway

The Board's Majority fully recognized the fact that the Carrier failed to demonstrate that the Claimant's felony conviction, in and of itself, demonstrated the Claimant's unfitness as an employee. Despite, however, having credited such an argument on another property involving this Organization, indeed involving much more serious criminal charges, they chose in the instant case to seek refuge in a *stare decisis* rationale, citing to three previous arbitration Awards involving this Carrier. This strongly implies, in their view, that the Organization will never successfully defend any employee who undergoes any kind of felony conviction on this property regardless of any showing that Carrier suffered any harm as a result of such conviction.

Stare decisis is not well applied to just cause discipline standards. Every discipline case is unique, which is why arbitrators are loathe to endorse such schemes as "no fault" attendance policies that ignore particular, individual circumstances. However, the Board's majority signals their approval of this very sort of a scheme whereby all that the Carrier has to do to demonstrate just cause for permanent dismissal is to prove a felony conviction without any consideration of the circumstances involved. Just cause cannot be satisfied in all circumstances by such a perfunctory showing. We do not deny that some felony convictions could signal, *prima facie*, an employee's unfitness for service. In the majority of cases, however, it is fundamentally unfair, hence unjust, to base a dismissal decision on the mere fact of a conviction alone without looking closer to see if the Carrier has a legitimate reason to deem the employee unfit.

Neither does the application of *stare decisis* to this case bare any logic, especially in light of an earlier decision in which this same Neutral Member participated on another property. To endorse, under the mistaken rubric of *stare decisis*, a different standard of just cause on the basis of some earlier disciplinary Awards, which each addressed unique facts and circumstances, is to make a mockery of just cause. In Third Division Award No. 33944, Referee Malin rejected such nonsense with respect to the universality of due process rights, holding that:

> "To excuse the breach of Claimant's right to an independent appellate review because of Carrier's size would relegate Claimant and other employees of small railroads to being second class citizens in the industry."

The Board's Majority has made a serious error both in their consideration of this record and their judgment thereon. In the recent Findings in Award No. 23 of SBA 1116, a case

involving an employee dismissed in connection with a conviction for sexual abuse of a minor, the Board (including the same Neutral Member as in the instant case) wrote that:

> "In sum, we find no reasonably discernable connection between Claimant's plea of guilty to these unsavory incidents and his job or his employer's business..."

This Finding was based, of course, on the mountain of authority (which was also presented in the instant case) holding that an employer may not discipline an employee for off-duty conduct unless it demonstrates, through a series of tests, an adverse impact on the employer's business or is serious enough that it demonstrates, *prima facie*, the employee's unfitness as an employee. These authorities hold consistently that a conviction of *any* felony does not, in and of itself, constitute just cause for dismissal. The Findings in Award No. 23 of SBA 1116 manifest the understanding of this principle by this Board's Neutral Member as well.

What is most troubling about this Award (aside from the injustice it has perpetrated upon the Claimant) is the artifice employed to deny application of a prior Award, indeed one that the Neutral Member participated in, to the instant matter. The Neutral Member commits several mistakes in his finding that *"... generations of arbitration awards on this property with this Organization and others have sustained the dismissal of employees in analogous circumstances on grounds that conduct such as Claimant has admitted to is a serious violation of Carrier's rule ...."* For the record, the Awards cited to the Board by the Carrier are summarized below:

Award No. 179 of PLB 1261 (Zumas), BLE v. Southern Railway
Sale and distribution of cocaine.

Award No. 92 of PLB 959 (Criswell), UTU v. Southern Railway
Trafficking in stolen motor vehicles.

Award No. 371 of SBA 1063 (Euker), BLE v. NSR (former NW proper)
Theft of property.

Award No. 3 of PLB 6434 (Simon), BLE v. NSR (former Southern)
Murder and aggravated assault.

Award No. 101 of PLB 868 (Guthrie), UTU v. CNO&TP
Stolen property and drugs – incarcerated.

Award No. 91 of PLB 3312 (Zumas), TCU v. NS
Indecent behavior with a minor.

Award No. 95 of PLB 3372 (Criswell), UTU v. CNO&TP
Felony possession of cocaine, four years in prison.

Award No. 16 of PLB 3751 (Muessig), TCU v. NS
Incest with son, five years in prison.

Award No. 21 of SBA 1063 (VanWart), BLE v. NSR (former Southern)
High speed police chase, aggravated obstruction of police officer, running red light, speeding 100mph in a 35 mph zone.

Award No. 1 of PLB 6605 (Fischbach), UTU v. NSR (former Wabash)
Aggravated criminal sexual abuse of a minor.

The Neutral Member errs in his consideration of these Awards as precedent applying to *these parties*. Not a single award cited by the Carrier and listed above represents a dispute between *this* General Committee of Adjustment, *or any of its antecedent components*, and this Carrier. Thus, these Awards do not speak to the application of *this collective bargaining agreement*, which was what the Board was asked to interpret. These Awards do not stand for the proposition that this General Committee has ever acquiesced in this Carrier's approach to employee discipline

Without prejudice to the above, the Awards summarized do not stand for the proposition that criminal conduct is, *per se,* evidence of an employee's unfitness. Each Award considered a unique offense and found that the offense merited dismissal. It is palpable error for the Board's Majority to consider these Awards as establishing, in the aggregate, a lower standard of just cause for the employees represented by this General Committee than those in the balance of the industry.

In justifying their misplaced application of the doctrine of *stare decisis* in this case, the Board's majority cautions that applying the earlier Award No. 23 of SBA 1116 to this case would result in "*...an isolated, competing and autonomous decision not anchored in principle.*" This begs the question, what principle utilized in Award No. 23 was unsound?

We will not accept this Award as having any validity whatsoever to the extent it is ever held up to signify that the employees we represent are protected by a lesser standard of just cause than obtains in the balance of this industry.

P. T. Sorrow

P. T. Sorrow, Employee Member