Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 24155
FIRST DIVISION Docket No. 43840
92-1-92-1-U-1668

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

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
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(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim for reinstatement of Engineer G. G. Gettmann, expungement of discipline assessed, and pay for all lost time with all seniority and vacation rights restored unimpaired."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimant was notified by certified letter of March 1, 1991, to attend an Investigation to determine alleged responsibility in a plea of no contest to a charge of sodomy. After postponement, the Investigation was held on March 18, 1991. Claimant was subsequently notified that he had been found guilty and dismissed from Carrier's service for violation of General Rule B, General Rule 607, and General Order No. 3, dated April 1, 1990.

The Organization challenged the Carrier's compliance with the procedural guidelines of the Agreement. At the Investigation it argued that the Carrier had violated the time limits of Rule 76. It further argued on property that the Rules for which Claimant was dismissed were not cited in the March 1, 1991 Notice of Investigation, prohibiting the Organization from preparing an adequate defense. On merits, it maintains that Claimant complied with the Rules in that he properly informed the Nampa Service Unit administrators of the court trial and outcome. The Organization further charges Carrier with disparate discipline in its actions against Claimant compared with other similar circumstances.

With respect to the procedural issues raised by the Organization, we find no evidence of a Carrier violation of any Agreement Rule. The Carrier complied with Rule 76, which states that:

> "(c) When an engineer is charged with an alleged fault that in the judgement of the Company might warrant his dismissal, he will be advised of such fact in writing, stating cause therefor, and hearing will be held within seven (7) days from date charges are made. If held out of service pending hearing, such hearing will be within five (5) days from date held out of service."

The Organization points to the date when the Carrier was aware of the facts in this case. Specifically, the Organization points to the investigation proceedings demonstrating that Claimant was fully appraising the Carrier supervisor of his situation and subsequent sentencing. This occurred months prior to the March 1, 1991 Investigation notice. The Board finds the language of the Rule, supra, clear. The Hearing must be timely with respect to the date of charges. We find no violation of the Time Limits Rule.

With respect to the other procedural issues raised by the Organization, we find no evidence for a Carrier violation of any Agreement Rule. There is no evidence that the Claimant was unaware of the specifics of the charge or that the Organization was unable to prepare an adequate defense. A full review of the procedural issues herein finds a lack of probative evidence that any of the Claimant's Agreement rights were violated.

With respect to the testimony and evidence of record we find that it supports the Carrier's conclusion of guilt. We have made a long and detailed study of this record and conclude that the evidence is substantial that Claimant violated the cited Rules.

The no contest plea in these instant circumstances was unmistakably accepted by the Court and understood by the Claimant as a guilty plea. Therefore, this Board finds no relevance in legal differences between pleas in the case at bar. Claimant understood his plea and was sentenced among other penalties to a nine year suspended sentence, five years probation, sixty days of electronic surveillance, treatment, economic restitution and prohibitions from contact with his stepdaughter and minors. Claimant was convicted of a felony.

The Board has similarly reviewed arguments pertaining to Carrier Supervisors assuring Claimant that this plea would not result in action. There is no record substantiating this assertion. The Board reaches that conclusion without utilizing the disputed letter from the Terminal Manager.

Herein, the Board finds substantial probative evidence that Claimant entered a plea and was found guilty of a felony. Carrier has the Agreement right to pursue this action. The discipline by the Carrier was not shown to

be disparate treatment and the Claimant's conviction reported in the local newspaper can seriously effect the Carrier's public image. General Order No. 3 referring to conduct of an employee states in pertinent part that:

> "The conduct of any employee leading to conviction of any misdemeanor involving moral turpitude...or of any felony is prohibited..."

The Claimant's dismissal will not be disturbed. The Board finds no Carrier violation of the Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1992.

DISSENT OF THE LABOR MEMBERS

TO

AWARD NO. 24155, DOCKET NO. 43840

(Referee Marty E. Zusman)

The Majority has disregarded many well-founded principles and standards in disciplinary discharge cases upon which the instant case should have turned in order to impose its own brand of industrial justice.

In denying the subject claim, the Majority wrongly condoned a formal investigation the carrier flawed by its refusal to summon a critical material witness, claimant's supervising officer. The charge carrier preferred stemmed from claimant's acceptance of a plea-bargained sentence related to an off-duty sexual misconduct charge. The claimant, who professed innocence, entered his plea only after discussing the effect the plea and sentence might have upon his employment with his supervisor and believing, as a result, that his employment would not be jeopardized. Claimant continued to work nearly three months after his sentencing until a subsequent supervisor finally brought the charge (leading to his dismissal) of an "alleged plea of no contest. . ." That claimant's original supervisor was <u>crucial</u> to the development of the facts surrounding (and mitigating) the charge was obvious. Further evidence of the supervisor's materiality was the entering of a written

statement into the record which the supervisor authored. Objection was made. Clearly claimant was not accorded the fair and impartial investigation contemplated by the Agreement and prerequisite to assessment of discipline.

The Majority also ignored the evidence of record that claimant's conduct had absolutely no impact on the carrier's business. The Majority disregarded a plethora of cited arbitral authority holding that some nexus must exist between an employee's off-duty conduct and an adverse effect on the carrier's business mission before discipline for that conduct may be administered. So much for the value of precedent.

The Majority also ignored the evidence presented during and after claimant's investigation that two of claimant's co-workers, assigned to the same location as claimant, had previously been prosecuted for the very same offense for which claimant had been charged, yet carrier never disciplined either of them, notwithstanding the incarceration of one of them. Further, none of this was ever refuted on the record of the case. We cannot fathom the Majority's rejection of our disparate and excessive discipline arguments in the totality of the circumstances of this case.

Perhaps the words of Dissenting Justice Oliver Wendell Holmes in Northern Securities v. U.S. (193 U.S. 197) offer some explanation of the Majority's errors:

> "Great cases like hard cases make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend."

R. K. Radek

W. E. Biedenharn, Jr.

G. R. DeBolt

L. W. Swert