NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Form 1

Award No. 24258
Docket No. 43924
93-1-93-1-E-1269

The First Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
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(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM:

"Claim of Engineer J. R. Thompson for: (1) Reinstatement to service with seniority rights unimpaired and compensation of an equal amount to what he could have earned, including but not limited to daily wages, overtime and holiday pay, had he not been held from service and had discipline not been assessed. (2) Carrier to expunge the charges and discipline from the Claimant's record. (3) Carrier to reimburse the Claimant for any amounts paid by Claimant for medical, surgical or dental expenses to the extent that such payments would have been payable under the current insurance provided by the Carrier."

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 employe 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.

On December 23, 1988, Claimant reported to the Gary, Indiana Police Department that his pick-up truck had been stolen from the parking lot of one of Carrier's customers. Two years after the report was filed, on December 5, 1990, Claimant was arrested and charged with mail fraud, in that he had prearranged the theft of his vehicle. On March 4, 1991, Claimant entered into a plea bargain, in Federal Court in West Virginia, and was placed on three

years probation. Sixteen months later, on July 8, 1992, the pre-arranged theft, the arrest and the plea bargain conviction came to the attention of Carrier's Police Department when a local newspaper article chronicled the events and named Claimant as a participant in the fraud scheme. Two days later, on July 10, 1992, Carrier cited Claimant to attend an Investigation on allegations that his conduct was in violation of Rule Q and the second paragraph of Rule 700.

Rule Q reads:

> "The conduct of any employee leading to conviction of any felony, or of any misdemeanor involving the unlawful use, possession, transportation, or distribution of narcotics or dangerous drugs, or of any misdemeanor involving moral turpitude is prohibited."

The second paragraph of Rule 700 reads:

> "Employees who are insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious or who are careless of the safety of themselves or others, or who are negligent in the performance of their duties, or who do not have or fail to exercise good judgment will not be retained in the service."

Following an Investigation, which was conducted on July 24, 1992, Claimant was notified that he was dismissed. The Organization appeals the dismissal on the grounds that the hearing was flawed in at least three areas; first, Carrier failed to have present material witnesses requested by Claimant, second, an adequate nexus between Claimant's employment with Carrier and his arrest and plea bargain does not exist, and, three, it was pre judgment to remove Claimant from service pending the Investigation.

On the matter of witnesses, Carrier acknowledges that the Organization requested that two Carrier officials be present at the Investigation to testify on behalf of Claimant. Carrier determined that they would not be called because "they would have nothing of relevance to present." In the circumstances of this case, the failure to call two witnesses because they would have nothing of relevance to present, gives the appearance of prejudgment. For example, two days after Carrier learned about Claimant's plea bargain conviction, it cited him for an Investigation. This timing most certainly suggests that it was the conviction and nothing else

that mattered to Carrier. Ignored, it seems, is that Claimant performed his job for sixteen months after the conviction without problem. Ignored, it seems is that Claimant performed his job for nineteen months after his arrest without remarkable incident. The purpose of having two of Claimant's supervisors testify was, purportedly, to demonstrate these points. When Carrier refused to have them available on the grounds that there testimony would not be relevant it in effect seems to be saying that Claimant's character and employment history are not relevant, all that is relevant is the conviction.

Rule Q and 700 cannot be applied as requiring automatic discharge in each and every case where an employee is convicted of a felony. If it is to be applied in such a fashion, then there would be no need for an Investigation. Presentation of a conviction record on any felony would all that would be necessary, and the charged employee automatically loses his job. Rules Q and 700 must be administered in a manner that demonstrates some sort of nexus between the charged offense and the employee's job. To this end Rules Q and 700 must be applied in a manner that encompasses the entire aspect of the charged individuals employment relationship. (The Board will comment in more detail on this below.) This would include his performance on the job. What better measure of the individual's performance would be testimony from Carrier officials who had the opportunity to observe his day to day activity. When Carrier refused to allow two Carrier officials, called by Claimant to testify, this refusal denied him the fair and impartial Investigation he was entitled to under the Agreement. The ensuing discipline is fatally flawed thereby.

On the matter of the nexus between the plea bargain conviction and Claimants job, in order to support discipline of discharge, it generally must be shown that the conviction had a discernible effect upon Carrier and its business purposes. In determining if a discernible effect upon Carrier's business purposes is present, at lease one of four tests must be satisfied:

1) Did the conviction (or the conduct leading up to the conviction) harm Carrier's reputation, business or bring discredit to the enterprise or its employees?

2) Did the conviction (or the conduct leading up to the conviction) render the employee unable to appear at work or otherwise satisfactorily perform his job?

3) Did the conviction (or the conduct leading up to the conviction) cause other employees to reasonably fear or refuse to work with the employee.

4) Did the conviction (or the conduct leading up to the conviction) demonstrably render the employee unfit to deal with Carrier's customers or enter their places of business?

There is absolutely no evidence in this record that the conviction harmed Carrier's reputation or otherwise brought discredit upon the enterprise. Second, there is absolutely no evidence in this record that the conviction rendered Claimant unavailable or unfit to do his job. To the contrary, the fact that Claimant continued to work for an extended period of time after the conviction, without remarkable incident, can be accepted as factual that the conviction did not render him unavailable or unfit for duty. Third, there is no evidence in the record to suggest that Claimant's fellow workers feared or refused to work with him at any time. And Fourth, it has not been suggested, indeed not been hinted, that Claimant's conviction rendered him unfit to deal with Carrier's customers or enter their places of business, even though the prearranged theft occurred in the parking lot of one of these customers.

Accordingly, because Carrier failed to make two officials available as witnesses when requested to do so, and failed to establish an adequate nexus between Claimant's plea bargain conviction and his job, the discipline of dismissal cannot stand. The claim will be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 1st day of November 1993.