

****CORRECTED****

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25295
Docket No. 45040
02-1-01-1-U-2228

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

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

STATEMENT OF CLAIM:

"Claim in behalf of Engineer S. F. Bauer, SS No. 394-60-1072, Union Pacific Railroad, Northern Region, Chicago Service Unit, for reinstatement to service with vacation and seniority rights unimpaired, be compensated for any and all medical expenses incurred during his dismissal, be compensated for all time and miles lost, including time spent at the investigation, that he be removed from the Union Pacific Discipline System known as Upgrade Policy and that any and all reference to this incident be expunged from claimant's record when he was investigated on May 4, 2000 on the following charge:

'You were allegedly convicted of a Class 3 Felony on January 11, 2000. This indicates a possible violation of Rule 1.6.2 of the Union Pacific, General Code of Operating Rules, Third Edition, effective April 10, 1994.'"

FINDINGS:

The First 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.

On or about January 12, 2000, the Claimant sent a letter to the General Superintendent advising that he had been "convicted of possession of Internet pornography, which is a Class 3 Felony." The Claimant was thereupon directed to attend an Investigation at which he was charged with being convicted of a felony. Following the Investigation, he was dismissed from service.

There is no dispute that the Claimant was, in fact, convicted of a Class 3 Felony for the possession of Internet pornography. There is also no evidence that this felony was committed while the Claimant was either on duty or on the Carrier's property. The Organization objects to the disciplinary action on the basis there is no nexus between the Claimant's conduct and the Carrier's business.

In Award 24258, the Division discussed the need for such a nexus, rejecting the idea that any felony conviction constitutes a per se violation of the Carrier's Rules, mandating dismissal. In that case, the Board held:

"On the matter of the nexus between the plea bargain conviction and Claimant's 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 least 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?"

Our review of the transcript of the Investigation shows the Carrier's only witness was asked if the Claimant's conduct affected his ability to do his job efficiently and safely, and he responded that he did not know. He further testified that he did not know if the news of the Claimant's conviction was broadcast or published in the media, or if it caused the Carrier any loss of good will. There is no indication in the record that any of the above four questions could be answered in the affirmative in this case. We conclude, therefore, that the Claimant's dismissal was without just cause, and we will direct that it be rescinded. The Claimant shall be entitled to reinstatement with pay for time lost, except for any period of incarceration. If, when the Claimant is notified to return to work by the Carrier, he is unable to do so due to incarceration, his dismissal shall be affirmed.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 17th day of January, 2002.