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NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

Award No. 25386

Docket No. 45115

02-1-01-1-U-2268

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 Conductor T. A. Zylstra, hereinafter referred to as claimant, 388-50-4558, Union Pacific Railroad, Northern Region, that claimant be reinstated to service with full seniority and vacation benefits compensated for any and all lost time and miles, including time spent at the investigation, reimbursed for any and all medical expenses incurred while claimant was dismissed from service, that claimant be removed from the Union Pacific Upgrade Discipline and that this incident be expunged from claimant's personal record when claimant was investigated on the following charge:

'allegedly engaging in conduct unbecoming an employee of the Union Pacific Railroad by allegedly being convicted of two felony forgery charges, one felony substantial battery charge and one felony bail-jumping charge in Milwaukee, Wisconsin.'

Claim premised upon UTU Schedule Rule 83."

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.

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This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was first hired by the Carrier on August 3, 1998. By notice dated July 20, 2000, the Claimant was directed to attend a formal Investigation the following day in connection with:

"Allegedly engaging in conduct unbecoming an employee of the Union Pacific Railroad by allegedly being convicted of two felony forgery charges, one felony substantial battery charge and one felony bail-jumping charge in Milwaukee, Wisconsin."

At the request of the Claimant's representative, this Investigation was postponed until August 31, 2000. By letter dated September 6, 2000, the Claimant was advised that the charge, as stated above, was found to have been sustained, and that he was dismissed from service. The notice indicated the incident was a Level 5 offense under the Carrier's UPGRADE Progressive Discipline Policy. A Level 5 offense, under that Policy, carries the penalty of dismissal. The record shows that the Claimant entered guilty pleas in connection with the four felony charges, and was, consequently, convicted.

The Carrier's Submission explains that the Claimant was dismissed for failing to comply with the provision of Rule 1.6.2 of the General Code of Operating Rules dealing with employees being required to report felony convictions. The entire Rule reads as follows:

"The conduct of any employee leading to conviction of any felony is prohibited. Any employee convicted of a felony must notify his or her supervisor of that fact not later than the end of the first business day immediately following the day the employee received notice of the conviction."

Notwithstanding the Carrier's Submission, it is evident that the Claimant was not dismissed for failing to make a timely report. That offense was not mentioned in either the charge or the discipline notice. Therefore, the Board will not consider that

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to be an aspect of this case. In the Hearing before the Board, the Carrier affirmed that the Claimant was dismissed because of the felony convictions.

The record shows that the four offenses for which the Claimant was convicted occurred between February 23, 1998, and May 28, 1998. These events, therefore, were all before the Claimant was hired by the Carrier. Under the Carrier's Rule, it is the conduct leading to the conviction that is prohibited, rather than the conviction itself. As the Claimant engaged in this conduct prior to his employment with the Carrier, he was not subject to its Rules at the time. The Carrier may not reach back and discipline an employee for conduct occurring prior to his employment. This is not a case where the Carrier has alleged the Claimant falsified his employment application by failing to disclose such information.

The Board finds that the Carrier did not have proper cause to discipline the Claimant. The claim, therefore, must be sustained.

AWARD

Claim sustained.

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 5th day of September 2002.

CARRIER MEMBER'S DISSSENT  
AWARD No. 25386 - DOCKET NO. 45115  
Referee Barry Simon

The Claimant was convicted of punching another individual repeatedly in the face and body slamming him into a glass table, which broke causing severe cuts. He was also convicted of cheating an 81 year old lady by convincing her he was soliciting for charity, then cashing checks obtained from her without her permission and cashing them for over \$5000.

The acts occurred prior to his employment with the Carrier, but the convictions occurred afterward. The Referee states it is improper to discipline for acts occurring prior to employment. Carrier disagrees when the acts are of such a nature as these.

A handwritten signature in black ink, appearing to read "J G Albano", with a long horizontal flourish extending to the right.


James Albano  
Carrier Member

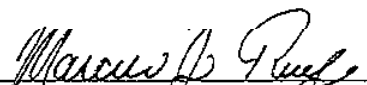
**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

**CONCURRENCE OF LABOR MEMBERS  
&  
RESPONSE TO CARRIER MEMBER'S DISSENT**

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Referee Barry Simon

The Dissenter to this Award objects to the Majority's construction of the Carrier's conduct rule prohibiting employee conduct leading to a felony conviction. In this Docket, the conduct complained of occurred prior to the Claimant's employment by the Carrier. The Majority correctly concluded that such did not constitute a violation of the rule, because the Claimant was not an employee subject to the Carrier's rules when the conduct occurred. The logic and soundness of this decision is not at all diminished by the Carrier's dissatisfaction therewith.

  
Richard K. Radek, Labor Member

  
Marcus J. Ruef, Labor Member