

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35868
Docket No. MW-35550
01-3-99-3-471

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) *The Agreement was violated when the Carrier refused to allow Mr. L. E. Rich to exercise his seniority rights beginning on February 27, 1998 and continuing (System File R-9821-102/1135878).*
- (2) *As a consequence of the violation referred to in Part (1) above, Claimant L. E. Rich shall now be compensated for all lost wages at his respective rate of pay beginning February 27, 1998 and continuing until such time as he is allowed to exercise his seniority.”*

FINDINGS:

The Third 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.

The Claimant initially established seniority under the Agreement in 1971. Additional classification seniority was established in 1973 and 1974. In 1977, the Claimant was promoted to the non-Agreement position of Manager of Track Maintenance. It is undisputed that the Claimant thereafter paid the applicable fee to the Organization that was required for him to continue to retain and accumulate seniority pursuant to Rule 22.

On January 5, 1998, the Carrier dismissed the Claimant as a result of his involvement in and reporting of a vehicular accident wherein the associated police report noted the presence of a strong odor of alcohol. The right of the Carrier to dismiss the Claimant from the non-Agreement position for cause is not in question.

By letter dated January 20, 1998, the Claimant gave the Carrier the five-day written notice of his intention to return to an Agreement covered position per Rule 22.

On February 27, 1998, the Carrier refused to allow the Claimant to exercise any seniority rights to return-to-service in an Agreement covered position. This claim followed shortly thereafter.

The issue in this dispute is straightforward. The Organization maintains that the Claimant is entitled to return-to-service under the Agreement per Rule 22 and nothing associated with his dismissal from a non-Agreement position deprived him of such return rights. The Carrier, on the other hand, draws a sharp distinction between vacating the non-Agreement position voluntarily and being involuntarily dismissed from it. In the Carrier's view, the dismissal entirely severed the employment relationship, including any rights under Rule 22. In other words, the Claimant did not vacate a position within the meaning of Rule 22. The Carrier cited a number of decisions for the existence of supporting precedent on its property as well as elsewhere.

As was noted in Third Division Award 22598, which was cited by the Carrier, "... this Board is not a court of equity. Its function is to interpret rules and agreements as made by and between the various Carriers and employees through their representative organizations." As such, our role is to interpret and apply the applicable Agreement as these parties have written it. This role remains paramount notwithstanding that other Awards involving other organizations and other Agreement language may have made different interpretations. In this regard, we must note at the outset that none of the Awards cited by the Carrier construed Rule 22 of the effective Agreement. Indeed, our review of the cited Awards reveals significant language differences.

Rule 22 reads, in pertinent part, as follows:

"RULE 22 - RETENTION OF SENIORITY

* * *

(c) Employees promoted to official, supervisory or excepted positions, whether with the Company or the Brotherhood, shall retain and continue to accumulate seniority rights, except has hereinafter provided:

- (1) Employees promoted to such positions with the Company prior to October 17, 1986, shall retain their current seniority, but shall be required to pay an

appropriate monthly fee, as designated by the Brotherhood, not to exceed monthly union dues, in order to continue to accumulate seniority. Such personnel who elect not to pay the monthly fee shall have their seniority frozen as of October 31, 1986. Promoted personnel who elect to pay the monthly fee whose payments become delinquent shall be given written notice by the General Chairman of the amount due and ninety (90) calendar days from the date of receipt of such notice to eliminate the delinquency in order to avoid having their seniority frozen.

- (2) Employees promoted to such positions with the Company on or subsequent to October 31, 1986, shall be required to pay an appropriate monthly fee, as designated by the Brotherhood, not to exceed the monthly union dues, in order to retain and continue to accumulate seniority. Such promoted personnel whose payments become delinquent shall be given written notice by the General Chairman of the amount due and ninety (90) calendar days from the date of receipt of such notice to eliminate the delinquency in order to avoid the forfeiture of seniority.

Employees retaining seniority who vacate an official, supervisory or excepted position for any reason, whether with the Company or the Brotherhood, may return to their former position or may exercise rights over any junior employee who is holding a position that has been bulletined during their absence, except that if the employee's former position has been abolished or has been acquired by a senior employee through the exercise of displacement rights, the returning employee may then exercise seniority rights over junior employees as provided in Rule 21. Employees desiring to return from official, supervisory or excepted positions must give management and the General Chairman five (5) calendar days' advance written notice before returning. * * *

Unless agreed to otherwise by Management and the General Chairman, the returning employee shall have no more than sixty (60) calendar days after being released to get affairs in order and return as specified herein. Returning employees who fail to return to

service within said time limit or who are unable to do so, shall be considered furloughed.”

* * *

Although the Carrier distinguishes between vacating a position voluntarily versus involuntarily, Rule 22 does not support this view. Indeed, the dictionary definition of the word “vacate,” expressed on page 14 of the Carrier’s Submission, draws no distinction based on voluntariness. It reads merely, “To cease to occupy or hold.” Moreover, Rule 22 explicitly states as follows:

“Employees retaining seniority who vacate an official, supervisory or excepted position for any reason, whether with the Company or the Brotherhood, may return to their former position or exercise rights * * *”
(Emphasis added)

As written, therefore, Rule 22 makes no distinction based on the manner in which a position is vacated. This conclusion is confirmed by other explicit language in the Rule. Subparagraph (c) mandates that employees “... shall retain and continue to accumulate seniority rights, except as hereinafter provided”: (Emphasis added) Rule 22 thereafter provides no exception for dismissal for cause.

The record in this dispute shows that the Claimant timely complied with all of the procedural steps required by Rule 22 as conditions for his exercise of seniority. Under the circumstances, we are compelled to sustain the claim.

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 Third Division

Dated at Chicago, Illinois, this 18th day of December, 2001.

**CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 35868
DOCKET MW-35550
(Referee Gerald E. Wallin)**

The Majority's decision in this dispute is directly contrary to that of Award 27 of Public Law Board No. 4561 on this Carrier's property, decided by the renowned arbitrator Jacob Seidenberg. In that Award, he wrote:

"The Board concludes that if the Carrier has terminated a non-covered employee for cause, and did this unilaterally, this employee, even if he possesses seniority in a contractually covered craft, may not then seek to invoke the contractual protection that inheres to members of his craft. This is so because when the Carrier permanently terminated the non-bargaining unit employee from service for cause, the Carrier severed the employment relationship permanently, albeit unilaterally, and this employee although he retained seniority in a covered craft, cannot invoke the contractual protection of the craft, because at this time he was no longer an employee. The employment relationship having been irrevocably ended for cause, there is no longer any valid basis upon which the employee's seniority can operate. The Board is led to this conclusion for otherwise an employer could not discharge a non-covered employee for cause no matter how egregious and reprehensible his offense, because this employee continued to hold seniority in a covered craft.

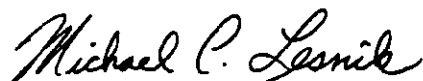
The Board finds that it was error for the Carrier to issue a Notice of Investigation and to convene a hearing to the Claimant, because at the time the Carrier issued the Notice of Investigation, the Claimant was no longer an employee as the employee-employer relationship had ceased to exist and the Claimant's seniority could not revive this relationship."

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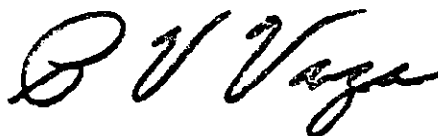
The overwhelming number of Awards have been in accord with the decision of Referee Seidenberg and we have full confidence that future Awards will as well. This Award is palpably erroneous and will not be considered as precedent.



Martin W. Fingerhut



Michael C. Lesnik



Paul V. Varga