

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36075
Docket No. MW-36377
02-3-00-3-568**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe (formerly The Atchison
(Topeka and Santa Fe Railway)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent dismissal imposed on Mr. R. Sanchez for alleged violation of Rules 1.6 (Conduct), 1.13 (Reporting and Complying with Instructions), 1.19 (Care of Property), 1.25 (Credit or Property) and 1.26 (Gratuities) of the Maintenance of Way Operating Rules in effect January 31, 1999 in connection with allegations of unauthorized sale of Company property and conflict of interest in the use of a BNSF contract vendor for personal use was extreme, unwarranted, on the basis of unproven charges and in violation of the Agreement (System File 190-13C4-991/1499-0173 ATS).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. R. Sanchez shall now be reinstated ' . . . with seniority, vacation, all rights unimpaired, and pay for all wage loss commencing July 23, 1999, continuing forward and/or otherwise made whole.'"**

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 entered the Carrier's service on June 29, 1969 and established seniority as a Laborer. He was subsequently promoted and worked as a Roadmaster until July 22, 1999, when he was dismissed as an exempt employee. The next day, the Claimant requested to exercise his seniority rights and displace back into a scheduled position. Because his employment had been severed a day earlier, the Carrier denied his request to return to work in the Maintenance of Way Department as a rank and file employee.

On August 16, 1999, the Carrier sent the Claimant a letter requesting his attendance at a formal Investigation on August 27, 1999 "concerning your unauthorized sale of company property for personal gain and conflict of interest in the use of a BNSF contract vendor for personal use . . . in possible violation of Rules 1.6 (Conduct), 1.13 (Reporting and Complying with instructions), 1.19 (Care of Property), 1.25 (Credit or Property) and 1.26 (Gratuities) of the Maintenance of Way Operating Rules in effect January 31, 1999." The Investigation was postponed twice at the request of the Organization and was held on September 21, 1999. The Claimant was subsequently notified of his dismissal.

The Organizations contends that the dismissal is improper on both procedural and substantive grounds. It argues that the Claimant was withheld from service beginning July 23, 1999 and the Carrier did not schedule the initial Investigation until August 27, 1999, well beyond the 30-day time limit provided in Rule 13(b). In addition to its untimeliness objection, the Organization maintains that the outcome in this case was predetermined because the Superintendent had already dismissed the Claimant as an exempt employee. The Organization further argues that the Carrier failed to meet its burden of proof because the Carrier did not produce any direct evidence to substantiate its allegations. Finally, the Organization takes the position that the penalty of dismissal is overly harsh and unwarranted when the Claimant's exemplary record and length of service are considered.

The Carrier takes the position that the evidence fully substantiates the charges directed against the Claimant. The Carrier argues that it has every right to dismiss an employee from service who sells its property for his own gain. Insofar as the Organization's procedural objections are concerned, the Carrier contends that they are without merit. The time limits for scheduling the Hearing, set forth in Rule 13 of the Agreement, did not apply in this case because the Claimant did not have an employment

relationship with the Carrier on a position covered under the scope of the Agreement. Moreover, even if the time limits were applicable, there has been no showing that the Claimant's rights were prejudiced thereby.

Based upon numerous Awards cited by the Carrier dealing with these same issues, we find that the instant claim must be dismissed for lack of jurisdiction. In Fourth Division Award 2511, the Board held with respect to an exempt employee:

"In order for this Board to hold that claimant's termination was improper it would be necessary to find that Carrier violated an enforceable limitation on its otherwise unrestricted right to terminate employees with or without cause. But there was no contractual limitation on Carrier's right to terminate claimant, since his employment was not covered by any agreement. Moreover, the Railway Labor Act, which is the source of the Board's authority, does not contain any restriction on Carrier's right to hire or discharge employees. The Board is without authority to establish such a restriction by its own independent action. The claim therefore must be dismissed."

A similar conclusion was reached in Public Law Board No. 4561, Award 27, where an exempt employee received a large lease payment from a customer of the carrier and used the money to pay a gambling debt. After his dismissal as an exempt employee, he attempted to mark up for work. As in this case, the carrier did not allow him to mark up but did afford him an Investigation. The Board stated:

"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 member 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 that 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. . . ."

See also, Fourth Division Award 4667 and Public Law Board No. 4768, Award 63.

Consistent with the foregoing, we conclude that the Claimant did not have displacement rights which survived his termination as an exempt employee. The Claimant was no longer an employee after his employment with the Carrier was severed on July 22, 1999 and he had no seniority to exercise. Notwithstanding the Organization's argument to the contrary, the majority of the Awards cited fully support that conclusion.

It follows, then, that there was no requirement on the part of the Carrier to provide the Claimant with an Investigation. By initiating an Investigation, the Carrier erred. Nevertheless, that error does not provide a basis for the Claimant to assert rights which do not otherwise contractually exist. Accordingly, the claim must be dismissed.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 18th day of June, 2002.