

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36333
Docket No. CL-36466
02-3-00-3-733**

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12682) that:

- 1. Carrier violated the TCU Clerical Employees’ Agreement at the Transportation Department in Proctor on Wednesday, April 14, 1999, when it acted in an arbitrary, capricious and unjust manner by refusing to allow Mr. M. Cole Nelson his contractual right to displace to the Ore Sorter-1st Shift position at the Proctor Yard Office.**
- 2. Carrier shall now be required to:**
 - (a) Restore Mr. Nelson to Carrier’s service with all seniority, vacation and other rights unimpaired.**
 - (b) Pay Mr. Nelson for all time lost, at the rate of the Ore Sorter-1st Shift position, commencing April 14, 1999, and continuing each and everyday thereafter until he is restored to service.**
 - (c) Pay Mr. Nelson any amount incurred for medical or surgical expenses for himself or his dependents to the extent that such payments could have been paid by Blue Cross and Blue Shield as provided for in the Transtar Employee Benefit Plan and in the event of the death of Mr. Nelson, pay his estate the amount of life insurance provided for under said policies. Carrier must also reimburse Mr. Nelson for premium payments made on the purchase of health, welfare and life insurance. Carrier must also pay Mr. Nelson for any amount incurred for dental expenses for himself and dependents to the extent that such payments could have been paid by Blue Cross and Blue Shield as provided for in the Transtar Employee Benefit Plan.**

Carrier must also reimburse Mr. Nelson for the premium payments made in the purchase of suitable dental insurance. Carrier must also pay Mr. Nelson any amount incurred for vision care expenses for himself and dependents to the extent that such payments could have been paid by Blue Cross and Blue Shield as provided for in the Transtar Employee Benefit Plan. Carrier must also reimburse Mr. Nelson for the premium payments made in the purchase of suitable vision care insurance. Carrier must also pay Mr. Nelson any amount incurred for prescription drug expenses for himself and dependents to the extent that such payments could have been paid by the Prescription Drug Program Benefit Provider as provided for in the Transtar Employee Benefit Plan.

Further, Carrier must reimburse Mr. Nelson for the premium payments made in the purchase of suitable prescription drug insurance.”

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.

Of note, and pertinent to this dispute, the Claimant holds seniority under both the Clerical and Dispatcher Agreements. In February 1999, the Claimant was working for the Carrier as an Assistant Chief Train Dispatcher when he received the following directive:

“Arrange to be present for a formal investigation to be held in the Transportation Department Conference Room at 0845 Monday, March 8, 1999. You are charged with violation of Track and Time Rule 10.3.1 “Protection of Limits” of the General Code of Operating Rules, Third Edition. Specifically, you are charged with authorizing train movement

into the limits of Track and Time Permit 518 issued to Keenan Welders at 1349 February 23, 1999. This rule violation occurred while you were employed as Assistant Chief Train Dispatcher on the above date."

On March 23, 1999, the Carrier informed the Claimant that as the result of the Investigation, and "in consideration of your past record," he was being immediately dismissed from service.

Thereafter, on April 13, 1999 the Claimant sent Clerical Supervisor Fredericks the following request:

"This letter is to inform you of my request to displace the present incumbent, J. Plucinak from the day shift position of Ore-Sorter Proctor Yard effective immediately, therefore exercising my right of seniority that I have held in the clerical ranks since 5/13/80. Please inform me, in writing, as to when I can start to break in on this position."

The Carrier denied the Claimant's request reminding the Claimant that he had been "immediately dismissed from all service with the Duluth, Missabe and Iron Range Railway Company."

The Organization submitted a claim on behalf of the Claimant asserting that the Carrier had violated Rules 3, 7, and 19 of the Agreement when it denied the Claimant his "contractual right" to displace to the Ore-Sorter-1st Shift position after being "released" from his Assistant Train Dispatcher's position.

Specifically, the General Chairman stated that because the Claimant remained "a member in good standing" of the TCU, he continued to retain and accumulate the seniority he had under the Clerical Employees Agreement, and therefore, could not be disciplined or dismissed from the Clerical ranks until he received a fair and impartial Hearing. The General Chairman further argued that the Claimant had the right to return to his former position or exercise his seniority rights on any position bulletined during his "absence" when he was "relieved" of his Dispatcher's position. The General Chairman contended that the Rule violation for which the Claimant was dismissed as a Train Dispatcher had "absolutely nothing" to do with any clerical functions which the Claimant would be performing, nor did it have any bearing on his performance as a Clerk.

Finally, the General Chairman asserted that the Claimant was entitled, by Rules 3, 7, and 19 to be allowed his request to displace the Ore-Sorter 1st Shift position, and be made whole for the alleged loss of work opportunity.

The Carrier premised its denial upon the following:

"The Carrier was not arbitrary, capricious, or unjust in declining to assign Mr. Nelson to the Ore Sorter position at issue. As you correctly recognize, he was dismissed from all service after charges against Mr. Nelson were proven in an investigation. That investigation was held properly and in accordance with the Dispatcher's Agreement under which Mr. Nelson was employed. His dismissal ended his employment with the DM&IR, and along with it, any application of the rules in the Clerical Agreement. Accordingly, no rules of the Clerical Agreement were violated.

It is without prejudice to our position that Mr. Nelson was properly dismissed from all service with the DM&IR. The claim is excessive and there is no basis in our agreement or in practice for the remedies sought."

The Carrier further noted that Rule 19(f) defines the remedy as compensation lost, and does not allow payment of, or reimbursement for premiums of life insurance, dental insurance, medical insurance, vision care expenses, or any of the other benefits and liabilities the General Chairman outlined in the appeal.

On March 23, 1999, the Claimant was dismissed, in all capacities, from the Carrier's service. Thereafter, the BLE/ATDA submitted a claim on behalf of the Claimant, which was decided in Award 1, of Public Law Board No. 6306, dated December 16, 2000. In denying the claim, that Board stated, in pertinent part:

"Claimant's rule violation is among the most serious kinds of misconduct known in the railroad industry. Given the extremely serious nature of Claimant's current rule violation, when viewed against the disciplinary record of his recent past, we are unable to conclude that Carrier acted unreasonably in deciding to terminate his employment."

Meanwhile, TCU progressed a second reinstatement claim on the Claimant's behalf simultaneously with the BLE/ATDA claim. The Carrier denied the claim on grounds that the Claimant was dismissed and no longer an employee of the Carrier.

The Carrier asserts that there are two process defects in the Organization's case: 1) The Organization is attempting to obtain for the Claimant a second bite at the apple under the cover of a long discredited dual seniority argument; and, 2) The principle of res judicata holds that the Organization cannot relitigate the grievance that was settled by Public Law Board No. 6306, Award 1.

With respect to the Carrier's primary contention, prevailing precedent holds that the Carrier need not hold multiple Investigations in order to dismiss an employee who

has held seniority on multiple seniority lists. Therefore, Award 1 of Public Law Board No. 6306 must be considered dispositive of the Claimant's case.

Further, in these circumstances, the Organization's reliance upon Rules 3 and 7 of the Agreement is misplaced. The clear intent and purpose of Rules 3 and 7 are to allow an employee, who accepts the position of Dispatcher, to retain his right to return to the ranks of Clerk provided he remains an employee "in good standing." The record clearly demonstrates that the Claimant was not an employee "in good standing," but rather an employee who was "dismissed from all service."

AWARD

Claim denied.

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 26th day of December 2002.