

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39021
Docket No. MW-39291
08-3-NRAB-00003-060110
(06-3-110)

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference

PARTIES TO DISPUTE: (

(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. J. E. Travers to exercise his seniority rights beginning February 5, 2005 and continuing (System File D-05-03D/1420001).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. E. Travers shall now ‘. . . be compensated at the highest rate of pay he could have exercised thereto, (Eastern District-Track Inspector @ \$20.68 per hour), for all straight time wage loss suffered, commencing February 5, 2005, and continuing, until such time as Claimant is properly allowed to effect a displacement into the Maintenance of Way craft.”

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 began his service with the railroad on February 20, 1979. He had May 22, 1979, seniority as a Laborer, and seniority as of a later date in various other classifications including Foreman, Assistant Foreman, Sectionman, and Track Inspector. In the course of his employment he was promoted to a managerial position with the Carrier, but, in accordance with Rule 22 of the Agreement, he retained and continued to accumulate seniority by paying the appropriate monthly fee designated by the Organization.

By letter to him dated January 10, 2005, the Carrier terminated the Claimant's employment effective that date on the ground that its "investigation documentation and written record shows that your use of a VISA Procurement Card was found in violation of Company policies." His salary was continued until January 31, 2005. The letter continued:

"This action is being taken as a result of your improper use of the VISA procurement card entrusted to you for making Company purchases. Your conduct was in violation of Rule 1.6 of the Union Pacific Railroad Company's General Code of Operating Rules, Supply Department Guidelines governing Company purchases, and the Union Pacific Corporation Policy Concerning Business Conduct and Ethics.

'You are disqualified from returning to any agreement craft where you may retain seniority and will not be considered for any future employment with the Union Pacific Railroad Company or any related companies.'"

Rule 1.6 (Conduct) prohibits dishonest or immoral conduct, among other things, and states, "Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. . . ."

In April 2004, a Corporate Audit was requested by Railroad Police in connection with an investigation of purchases of chemical supplies by the Claimant in his capacity as Manager of Track Maintenance in Denver, Colorado. The Carrier was investigating allegations that a number of its employees, including the Claimant, were doing business with certain Florida companies who were not on the Carrier's list of authorized vendors. Purportedly these employees were buying products from those companies at inflated prices in exchange for gifts to the employees.

With regard to the Claimant, the auditors focused on 33 purchases by him totaling \$42,900 from a company called Goldstar Products, Inc. In an interview held on September 23, 2004, he acknowledged that he received gratuities consisting of four to six hats, two jerseys, one jacket, one golf bag, and two golf clubs. He also admitted that he did not follow procedures and compare the chemical products he was purchasing to products available from the Carrier's Supply Department or from authorized vendors. The Carrier's Supply Department Policies & Procedures prohibited employees from accepting gifts over \$25.00 from a supplier.

Section III, 2(iv) of the Carrier's Statement of Policy Concerning Business Conduct and Ethics forbade any conflict of interest and included among examples of a conflict of interest the following:

"Accepting from any customer or supplier or other person contracting with the Corporation, any gift, service, loan or other thing of value if acceptance would affect or give the appearance of affecting the employee's judgment in dealing with the customer, supplier or contractor, or others."

The Statement of Policy concluded with the following warning:

“Failure to comply with this statement of policy or any interpretations can have severe consequences for an employee. The Corporation will impose appropriate discipline for violations up to and including summary dismissal and loss of benefits or rights. In addition, violations of law may subject employees (and the Corporation) to civil and criminal penalties.”

As part of the review the audit staff examined documentation for 17 purchases initiated by the Claimant amounting to \$26,700. Based on prices of comparable products available from authorized company suppliers or other vendors, the auditors estimated that the Carrier had been overcharged \$16,200 on the \$26,700 of purchases.

After his dismissal, by letter dated January 31, 2005, to the Carrier and the General Chairman of the Organization, the Claimant stated, “Pursuant to Rule(s) 22(2)(c) paragraph 3, I, James E. Travers, have vacated an exempt position with the Carrier, and wish to exercise my seniority as an Agreement-covered employee.” The letter stated that the “notice given hereby satisfies the requirements of Rule 22(2)(c) paragraph 3, in that I am giving the Carrier and the Organization the required five (5) calendar days’ written notice before effecting a displacement as an Agreement-covered employee.”

Rule 22(2)(c) permits employees who have left the bargaining unit for a managerial or otherwise exempt position, and who have complied with the contractual provision for retaining seniority, to return to the bargaining unit. It states as follows in pertinent part:

* * *

“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. The seniority status and ranking of promoted personnel whose seniority has been frozen will be adjusted immediately prior to their exercise of seniority rights by the parties hereto.

Unless agreed to otherwise by Management and the General Chairman, the returning employee will 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, will be considered furloughed."

The Organization contends that the Claimant had the right to exercise his retained seniority rights pursuant to Rule 22(2)(c) to return to the bargaining unit and that the Carrier did not have a contractual right to disqualify or prevent him from exercising seniority. The Organization relies on Third Division Award 35868 between the same two parties issued on December 18, 2001, Carrier Members dissenting, in support of its position.

In that case the claimant, who had been promoted out of the bargaining unit to an exempt position, was dismissed from employment by the Carrier after he was involved in a vehicular accident where the associated police report noted the presence of a strong odor of alcohol on the claimant. The Carrier refused to allow the claimant to assert his retained seniority rights to return to the bargaining unit pursuant to Rule 22(2)(c). The majority in Award 35868 refused to draw "a sharp distinction between vacating the non-Agreement position voluntarily and being involuntarily dismissed from it" and rejected the Carrier's contention that "the dismissal entirely severed the employment relationship, including any rights under

Rule 22.” The majority opinion noted that none of the Awards relied on by the Carrier interpreted Rule 22 of the effective Agreement and asserted that “our review of the cited Awards reveals significant language differences.”

The Carrier takes the position that having been dismissed from employment, the Claimant no longer had any right or standing to exercise seniority rights pursuant to Rule 22(2)(c). In support of its position the Carrier relies on Award 27 of Public Law Board No. 4561 decided on May 13, 1993, between this same Carrier and the United Transportation Union. The Carrier also cites other similar precedents.

The Board is not persuaded by the reasoning of Award 35868. It is true that Rule 22(2)(c) permits employees who have accepted a position outside of the bargaining unit, and who vacate that position “for any reason,” to exercise their seniority to return to the bargaining unit. Seniority for employees returning to the bargaining unit, however, is not something different from seniority for employees who have never left the bargaining unit. Seniority was never a shield to protect an employee from dismissal when he has given just cause for such treatment. Seniority does not trump the right to discharge an employee for just cause. There are countless Awards on this Division and others which have upheld the right of a carrier to discharge employees with seniority for just cause.

The Agreement gives employees with seniority the right to a hearing before they may be discharged. Although Rule 22 cannot protect an employee from discharge where, by his conduct, he has given just cause for discharge, it does, in the Board’s opinion, entitle employees to a hearing before a discharge may be made final to the extent of extinguishing the employee’s retained or accumulated seniority rights pursuant to that Rule.

Award 27 of Public Law Board No. 4561 argues that an exempt employee who possesses seniority in a contractually covered craft cannot exercise that seniority when discharged for cause “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 accepts that argument so far as it applies to the exercise of seniority to claim

a bargaining unit job after being dismissed from a managerial or other exempt position.

But there is an equally valid argument to be made from the employee's and the Organization's point of view. Retained seniority entitles an employee to an Investigation or Hearing because otherwise the Carrier could discharge an employee for an arbitrary reason or on a trumped up charge and the employee would have no practical recourse to protect his seniority interest. It is important to protect the Carrier's interest in not being forced to retain in its employ perpetrators of egregious and reprehensible acts. It is equally important to protect employees from arbitrary or bad faith extinguishment of their contractual seniority rights. This is best accomplished by holding an Investigation to determine whether there is just cause to terminate the employee's seniority interest.

The Board notes that in the Public Law Board No. 4561 case cited by the Carrier, the Carrier itself served the claimant with a Notice of Investigation when he attempted to exercise his seniority as a Trainman after he was dismissed for cause from his job as Manager of Yard and Industrial Operations after he allegedly misappropriated \$4,000.00 in rental payments for rented Carrier property. Quoting from Award 27:

"On October 5, 1992 Superintendent Riney served him a notice to attend an Investigation to develop the facts and place the responsibility, if any, in connection with the rental agreement he had made with Mr. Reyes whereby the Claimant had personally received \$4,000.00 in rental payments. The Notice of Investigation stated that the hearing would be conducted in conformity with Rule 74 of the UTU Agreement. The notice further stated that the Claimant would be withheld from service pending the results of the Investigation."

Public Law Board No. 4561 found that it was error for the Carrier to issue a Notice of Investigation and to convene a Hearing "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."

Public Law Board No. 4561, however, went on to say that "even if the Carrier convened a Rule 74 Investigation, it could still dismiss a covered employee who admitted he had improperly converted to his use money that belonged to the Carrier." The Board believes that the better approach is to convene an Investigation because, as explained above, employees would otherwise be open to the elimination of their contractual seniority rights for arbitrary or bad faith reasons without any practical recourse on their part.

The Board is not persuaded by the argument that it is error to hold an Investigation because the employer-employee relationship ceases to exist once the employee is dismissed from his exempt job, and the employee's seniority cannot revive that relationship. It is just as reasonable to say that the contractually retained seniority rights prevent a complete severance of the employer-employee relationship to the extent that severance does not become final pending the results of an Investigation. As noted, that appears to have been the approach of the Carrier in Award 27 before Public Law Board No. 4561, where a Notice of Investigation was served on the Claimant after he was dismissed from his exempt job. The Board believes it to have been the correct approach.

The only issue that has come before the Board in the processing of this claim is whether the Agreement was violated when the Carrier refused to allow the Claimant to exercise his seniority rights beginning February 5, 2005, to return to the bargaining unit. For the reasons stated above, it is found that the Claimant's seniority rights did not entitle him to return to a bargaining unit job.

When interviewed by representatives of Corporate Audit and Railroad Police, the Claimant acknowledged that he received gratuities from Goldstar Products, Inc. worth well in excess of \$25.00 and that he had not compared the chemical products purchased from Goldstar, an unauthorized vendor, to the products available from the Carrier's Supply Department or other authorized suppliers. He caused the Carrier to be overcharged thousands of dollars for the products he purchased from the unauthorized supplier. A manager who accepts personal gifts from a supplier in return for overpayments for products purchased for his employer acts dishonestly and creates a conflict of interest. The Claimant

was placed on notice by the General Code of Operating Rules and the Statement of Policy Concerning Business Conduct and Ethics that the conduct he was engaged in could lead to his summary dismissal from employment. There is no evidence of bad faith on the part of the Carrier. It has not acted arbitrarily. This is not a case of one or two isolated errors of judgment in making purchases. The Claimant, according to the evidence, made 33 unauthorized purchases over an extended period of time resulting in overpayments of more than \$42,000.00. Employees who act as the Claimant did in this case destroy the element of trust that is an essential part of the employer-employee relationship. The Carrier had sufficient cause to disqualify the Claimant from exercising his seniority rights.

The majority in Award 35868 stressed the fact that it was interpreting Rule 22 rather than the language of other agreements. It asserted, "Indeed, our review of the cited Awards reveals significant language differences." The Board notes, however, that Award 27 of Public Law Board No. 4561 did not turn on the language of the applicable Agreement. Public Law Board No. 4561 did not even cite any language from the applicable Agreement. Nor did the majority opinion in Award 35868 discuss Award 27 or its reasoning, although Award 27 predated Award 35868. Award 27 turned on the principle that when an exempt employee is dismissed for cause, his retained seniority rights are thereby diminished. The Board agrees with that determination. The Board is of the opinion, however, that the employee's rights are not diminished to the extent of depriving him even of the right to have a Hearing on the issue of whether he was properly disqualified from asserting his seniority. Pending such a determination the Carrier would have the right to remove the employee from service.

AWARD

Claim denied.

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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 22nd day of April 2008.