

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39336
Docket No. MW-40080
08-3-NRAB-00003-070351
(07-3-351)

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Grand Trunk Western Railroad

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier refused to grant Mr. J. Balderas a leave of absence request pursuant to Rule 7 (Carrier’s File GTW-134-106-021).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Balderas shall “*** be compensated all potential lost wages, benefits, credits, seniority rights and job protection, commencing October 13, 2006 (date leave was rejected- Snacker/Gibbins) and continuing, until this case is brought to resolution.””

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 instant dispute is essentially a companion of the dispute leading to Third Division Award 39335. The operative facts do not establish any significant differences.

As in the companion case, this claim involves the interaction of two separate Collective Bargaining Agreements. The Claimant was hired to work under the Agreement with the Organization covering the Detroit, Toledo & Ironton Railroad Company (DTI) and established seniority working as a Trackman. He was furloughed under that Agreement on December 19, 2005. While furloughed, he applied and was hired for a Track Department position covered by the Grand Trunk Western Railroad (GTW) Collective Bargaining Agreement with the Organization. During the relevant time frame, both the GTW and the DTI were wholly owned subsidiaries of Canadian National (CN).

By letter dated August 16, 2006, the Claimant was recalled to his Trackman position under the DTI Agreement. The recall letter went on to advise that his DTI seniority would be forfeited if he failed to return to duty as instructed. The Claimant wanted to return to work for the DTI, but did not want to forfeit his seniority under the GTW Agreement. The General Chairman for the GTW requested that the Claimant be granted a leave of absence pursuant to Rule 7 of the GTW Agreement so that the Claimant could return to the DTI and preserve his GTW seniority. The Carrier denied the request. The Claimant reported for duty with the DTI on August 22, 2006. On October 13, 2006 the Carrier notified the Claimant that his GTW seniority and employment rights under the GTW Agreement were forfeited pursuant to Rule 8(a) of the Agreement. By letter dated November 14, 2006, the General Chairman filed the instant claim alleging a violation of Rule 7 of the GTW Agreement.

The only factual difference in this dispute from that of the companion case is that the instant Claimant chose to return to service with the DTI instead of

remaining with the GTW. Indeed, much of the later correspondence in the on-property record consists of letters pertaining jointly to both cases. In all other respects, the two claims present identical facts and contentions.

The practical basis of the Organization's position is that the two separate Agreements should be ignored because both the GTW and the DTI exist under the overall CN umbrella. However, this approach directly conflicts with the separateness position taken by the Organization in Third Division Award 29723. According to the text of that Award, the Organization took "... pains to point out the Maintenance of Way forces of the three previously separate Carriers each retain their own Agreements with the Carrier." The third Carrier in that dispute, in addition to the GTW and the DTI, was the Detroit & Toledo Shore Line (D&TSL).

It was also unrefuted in the record that both the GTW and the DTI remain separate Carriers for purposes of the Railway Labor Act.

Rule 7 – LEAVE OF ABSENCE of the GTW Agreement reads, in pertinent part, as follows:

- "(a) When requirements of the service will permit and if satisfactory reason is given therefor, employees, upon written request, shall be granted leave of absence for a limited time, without loss of seniority. * * * Leave of absence in excess of ninety (90) days shall not be granted unless agreed to by the Director, Human Resources and the General Chairman. * * *
- (b) An employee on leave of absence who engages in outside employment, will forfeit his seniority and all employment rights unless authorized by agreement between the Director, Human Resources and the General Chairman."

It is clear that two pre-conditions must be satisfied before a leave of absence need be granted under Rule 7(a). First, requirements of the service must permit the leave. Second, a satisfactory reason must be given for the requested leave. In the absence of Agreement language that dictates how the requirements of the service

must be determined and whether a reason is satisfactory (and no such language has been cited in this record) Carriers generally have discretion as a retained right to make such judgments. That judgment resulted in a denial of the leave request.

Distilled to its essence, the instant claim contends that the Claimant should be given a leave of absence that he has not requested himself in accordance with Rule 7(a) from his GTW position, where his services are needed, so that he can go to work for some other Carrier under a separate Agreement. This contention, however, flies in the face of Rule 7(b) which rather clearly imposes a forfeiture of the Claimant's GTW seniority if he engages in work for the DTI while on a leave of absence from the GTW.

The proper operation of the Rule 7(b) forfeiture provision is confirmed by Rule 8(a) of the Agreement, which reads as follows:

“(a) Except as provided in Rule 4, Section 4, an active employee who accepts a position coming within the scope of any other agreement without having his seniority protected by an agreement between the Director, Human Resources and General Chairman, will forfeit all seniority and employment rights under this Agreement.”

The instant dispute does not fall within the scope of the exception created by Rule 4, Section 4. That exception applies only to supervisory positions with the Carrier or positions with the Organization.

In addition to refuting all material assertions made by the Organization during the claim handling on the property, the Carrier produced evidence showing that some 26 other employees had been in similar employment situations with one of the three Carriers (DTI, D&TSL, and GTW) while on furloughed status from one of the other two. Upon being recalled to active employment, each of the employees had to choose between forfeiture of seniority from their current employer or their former employer who recalled them. Two prior employees were in situations identical to the instant dispute. They were furloughed from the DTI and were working on the GTW. When recalled to the DTI, they chose to return and forfeited

their GTW seniority. Seven additional employees in the same situation at the time of recall chose to remain with the GTW. Those seven forfeited their DTI seniority. The evidence reflected a ten year history and did not depict any exceptions to the applicable forfeiture provisions.

Given the foregoing considerations, on the record before the Board, we must find that the Organization failed to prove that the GTW Agreement was violated as alleged.

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 29th day of September 2008.