

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Railroad Company (formerly
(The Colorado and Southern Railway Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly terminated Trackman J. C. Lucero's employment without due process in violation of Rule 26 (System File C-88-02/DMWD 880314A).

(2) The Claimant shall be reinstated with seniority, all rights and benefits unimpaired and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

There is no dispute as to the facts underlying this Claim. Claimant was dismissed on May 27, 1987, "from the service of the Burlington Northern Railroad Company for [his] failure to comply with instructions from proper authority on April 16 and April 20, 1987, absenting [himself] from duty without proper authority on April 16 and April 20, 1987, and [his] quarrelsome and otherwise vicious conduct on April 20, 1987, as was evidenced by testimony at the investigation." The May 27, 1987 letter of dismissal further stated that the basis for Claimant's discharge was "'violation of Rules 563, 564, 570 and 576 of Burlington Northern Safety Rules....'"

At the time of the May 27, 1987 dismissal, Claimant had seniority in the Joint Texas Division Seniority District ("JTD") of the Burlington Northern Railroad Company. Claimant's May 27, 1987 dismissal was affirmed by the Public Law Board 4370, Award No. 14, Case No. 14.

Claimant had also previously established a seniority date on the Trinidad Seniority District ("TSD") under the Organization's schedule Agreement with the Colorado and Southern Railway Company ("C&S"), a predecessor Carrier for that seniority district. Claimant was then recalled to service on October 12, 1987 from a seniority list of the TSD. He was utilized as a trackman from that date until November 9, 1987. At that time, Claimant was removed from service by a Roadmaster. The November 9, 1987 letter stated as follows:

"Due to an error in clerical record keeping, you were recalled to the service of the Burlington Northern Railroad as a trackman on October 12, 1987.

Our letter of May 27, 1987 from R.G. Strong, General Roadmaster, Ft. Worth, Texas, indicating your dismissal from service for violation of Rules 563, 564, 570 and 576 of Burlington Northern Safety Rules for failure to comply with instructions, quarrelsome conduct and absence without proper authority, is still in effect.

Therefore, arrange to relinquish any and all company property you may have in your possession."

The Organization submits that Claimant was dismissed contrary to Rule 26(a) of the schedule Agreement of the C&S, because the November 9, 1987 action occurred without an Investigation. According to the Organization, Claimant's May 27, 1987 dismissal has no force and/or effect on the Claimant's seniority rights on the C&S. The Organization asserts that actions taken on the JTD cannot affect the seniority of Claimant under the C&S schedule Agreement.

It is the Carrier's position that Claimant was given a full, fair and impartial Hearing under Rule 26 of the JTD schedule Agreement, which led to his dismissal on May 27, 1987. The Carrier stresses that Claimant was dismissed on May 27, 1987 for violation of the Carrier's Safety Rules that applied to employees working under schedule Agreements of both the JTD and the C&S. The Carrier asserts that the May 27, 1987 decision was affirmed by the Award of Public Law Board 4370; that the dismissal explicitly and completely severed Claimant's employment with the Carrier; and that the dismissal terminated his seniority with the Carrier, including seniority under both the JTD and C&S schedule agreements.

This Board finds the Organization's assertions to be without merit. As the Carrier details in its submission to this Board, the C&S and the JTD were merged with the parent Burlington Northern Railroad Company in 1982 and 1983, respectively. Both former-subidiaries kept their separate schedule Agreements with the Organization. As the Carrier noted, those schedule

Agreements contained nearly identical work and seniority rules. In particular, Rule 26 is identical in both schedule Agreements. It is also uncontested that employees of both districts are governed by the Carrier's safety and operating rules of conduct, which were unilaterally implemented for all employees of the Carrier.

There is simply no dispute that Claimant was dismissed from the Burlington Northern Railroad Company for violation of the Carrier's company-wide Safety Rules. Claimant was discharged on May 27, 1987 "from the service of the Burlington Northern Railroad Company for [his conduct on April 16 and 20, 1987], as was evidenced by testimony at the investigation." (Emphasis added). In addition, the basis for that discharge was "'violation of Rules 563, 564, 570 and 576 of Burlington Northern Safety Rules....'" (Emphasis added).

Claimant's pivotal contention is that he continued to maintain his recall rights to a position under the C&S schedule Agreement, notwithstanding his dismissal "from the service" of the Burlington Northern Railroad Company." Public Law Board No. 4370 (which upheld Claimant's May 27, 1987 dismissal) rejected this line of argument in an award involving this same Carrier and Organization. That Public Law Board also upheld the discharge of another employee who also held seniority on two districts of this Carrier. As in the case of the instant Claimant, the employee in this earlier case was dismissed "from service" for violating a Carrier-wide rule; e.g. that requiring employees to absent themselves from duty only with proper authority. He was then recalled to the other district in which he held seniority.

Public Law Board No. 4370 in Award 17, held that "[t]he Carrier is on firm ground in determining its right to take disciplinary action as to the Claimant's overall relationship with the Carrier, based on a rule in effect at the point he was working (and, incidentally, in other divisions as well)." (Emphasis added). That Board concluded that "[w]hile separate working agreements apply for the Carrier's various divisions (formerly separate railroads), many rules are enforced in common throughout the Carrier's system [including Rule 570 on which that employee's initial dismissal was based] ... The Carrier correctly viewed this extended unexcused absence of the same gravity as if there had been no coincidental recall to another division." (Emphasis added). That award applies to the instant dispute under the principles of collateral estoppel.

The Carrier has drawn this Board's attention to other awards, as well, which hold that dismissal from the parent Carrier is effective for all divisions of that Carrier, even if those divisions have separate seniority lists and schedule Agreements, when, as here, the initial dismissal is for conduct that is prohibited on a carrier-wide basis. Third Division Awards 12104, 14346, 10348, and 9974.

Under these Awards and that of Public Law Board No. 4370, cited above, Claimant was not entitled to a separate Investigation under Rule 26, before the Carrier released him on November 9, 1987, from his mistakenly-granted recall. The November 9 action of the Carrier was not a separate disciplinary action, since the earlier dismissal was still in effect. No

new Investigation was required; indeed, as the Carrier stresses, Claimant received the due process protection of Article 26 during the Investigation of the May 27, 1987 dismissal.

The Organization has not provided evidence to challenge the Carrier's assertion on November 9, 1987 that Claimant was recalled "[d]ue to an error in clerical record keeping." This Board has concluded that the clear intent of the May 27, 1987 dismissal was that Claimant should not be re-employed by any of the Carrier's operations, except by a conscious, deliberate decision to re-hire Claimant, made by management officials fully aware of that discharge. As the Carrier notes, that October 12, 1987 error in the TSD was made 500 to 600 miles from the situs of the May 27, 1987 dismissal in the JTD. The mistake was understandable, and was promptly corrected by the Carrier. It allowed the Claimant to earn almost one (1) month of additional wages. However, the Carrier did not lose its ability to correct that mistake. A contrary ruling by this Board would allow Claimant a windfall which the applicable Agreements did not intend.

This Board agrees with the Carrier that the cases on which Claimant relies are distinguishable. In the Award by Public Law Board No. 4370, Award No. 8, Case No. 6, an employee of this Carrier was recalled by one division after being discharged by another division for submitting a falsified injury report. The Public Law Board denied the employee's Claim that he could not be released from the second division without an Investigation, within 60 days of his employment. In so doing, that Board stated that the employee's "seniority standing on the [initial] seniority district remained unimpaired." However, in Award No. 2, Case No. 3, that same Board had rescinded the initial discharge, concluding that the Carrier did not carry its burden of proving that the employee falsified the disputed injury report.

As is apparent, a critical fact difference distinguished these two Awards from the instant case. Here, the Public Law Board affirmed the initial dismissal, which severed Claimant's employment relationship with the Carrier. In the cases cited by the Organization, however, that same Board reversed the initial discharge, thus leading that Board to conclude that the employee still had his seniority in the initial division. There is no indication that Public Law Board No. 4370 would have ruled any differently than this Board, had the employee in the cases before that Board also lost his appeal of the initial dismissal.

Third Division Award 25597, cited by the Organization, is also distinguishable. An employee of a welding plant owned and operated by this Carrier, but subject to the C&S schedule Agreement, was laid off from the welding plant and then recalled by the Carrier itself. His service with the Carrier was then terminated when he did not respond to a recall notice after having laid off from that second position. This Board held that he still retained his seniority at the welding plant under the C&S working Agreement, and that he should have been recalled under that Agreement. However, this Board was careful to stress that the Carrier failed to recall the employee before the C&S was merged with the Burlington Northern Railroad Company. That

result does not conflict with the holding in the instant case, where both the May 27, 1987 dismissal, and the November 9, 1987 reaffirmation of that action, occurred after that merger.

First Division Awards 12890 and 14497, cited by the Organization, are also distinguishable from the instant case, since the employees in both awards were employed by two separate Carriers, and not by the same Carrier, as in this case. In First Division Award 5024, on which the Organization also relies, that Board held that the employee still retained his seniority with the parent Carrier, when he was discharged from subsequent temporary employment with a subsidiary of that Carrier. However, the First Division Award emphasized that there was no evidence that the employment relationship with the parent Carrier had been terminated. In the instant case, however, the Claimant's employment with the Carrier ended on May 27, 1987.

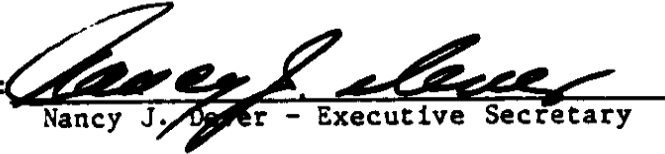
As a result, this Board has concluded that Claimant's employment with the Carrier was in fact terminated on May 27, 1987, and that it was not revived by the clerical error issuing him a recall on October 12, 1987. The Carrier thus did not violate Article 26 of the applicable schedule Agreement by reaffirming the initial dismissal on November 9, 1987 without an Investigation, since that dismissal was still in effect on that later date. No further Investigation was required by Rule 26, since no separate discipline was assessed.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deaver - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.