

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36560
Docket No. MW-33249
03-3-96-3-724**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad Company
(former St. Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier improperly terminated the seniority and employment relationship of Mr. R. F. VanVleck within a letter dated July 5, 1994 without the benefit of a fair and impartial hearing as required by Rule 91 (System File B-2539/MWC 94-08-25AA SLF).**
- 2. As a consequence of the violation referred to in Part (1) above, the Claimant shall ‘. . . be returned to service immediately with payment for all time lost, with all rights intact, and the charge be removed from his service records.’”**

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.

At the relevant time, the Claimant was an exempt employee holding a Roadmaster's position. According to the Organization, the Claimant had 23 years of service in various positions in the Maintenance of Way Department. According to the Carrier, the Claimant was promoted to an exempt position in or about 1991.

By letter dated July 5, 1994, the Claimant was advised by the Carrier that "... we have determined that you have exhibited behavior and judgment that are in direct conflict with Burlington Northern Policies and Procedures including our Code of Ethics Policy . . . [and] we are terminating your employment relationship with the company, effective July 5, 1994." The Claimant was also advised in that letter that disputes arising out of the termination of employment of exempt status employees shall be submitted for resolution exclusively by arbitration and only after all internal complaint resolution efforts have been exhausted.

By letter dated August 4, 1994, the Organization sought the Claimant's reinstatement and requested an Investigation under Rule 91 of the Agreement. By letter dated August 12, 1994, the Carrier denied the Organization's request for a Rule 91 Investigation, taking the position that at the time of his termination, the Claimant was an exempt employee and Rule 91 Investigations are only for employees in bargaining unit duties. The Carrier again offered the dispute resolution procedure it uses for exempt employees and advised the Claimant to contact the Carrier's Employment Relations Department should he wish to pursue that avenue.

Rule 91 provides, in pertinent part:

"Rule 91. Discipline Rule

- (a) **Employees disciplined or dismissed will be advised of the precise charge of such action, in writing if requested.**
- (b) **An employee who considers that he has been unfairly disciplined or dismissed, or who considers himself unjustly treated, shall be entitled to the following handling of his complaint:**

* * *

- (2) If a request for an investigation is made . . . the employe shall be afforded a fair and impartial investigation. . . .”

At the time of his termination, the Claimant was not “[a]n employe” covered by Rule 91. At that time, the Claimant was a Roadmaster - an exempt employee. Non-covered employees are not entitled to Rule 91 Investigations. See Fourth Division Award 4704 (“The Board does not have jurisdiction over any dispute involving Claimant’s dismissal while employed in a nonagreement supervisor capacity”); Public Law Board No. 4768, Award 63 (“In accepting an exempt position, the Claimant had placed himself at the discretion of the Carrier as to his continued employment . . . Claimant had no contractual protection against his employment termination in his status as an exempt employee”).

The Organization’s reliance upon Rule 88 does not change the result. That Rule provides, in pertinent part:

“Rule 88. Appointed Position With Carrier or Brotherhood.

* * *

- (b) Employees now filling or promoted to excepted or official positions, either with the Carrier or the Brotherhood of Maintenance of Way Employes, shall retain and continue to accumulate seniority in the seniority district from which promoted.

* * *

- (d) An employe returning to the ranks when relieved from such official or excepted position after an absence of in excess of six months may displace in accordance with agreement provisions any junior employe in the exercise of seniority rights within thirty days after his service terminates with the Brotherhood of Maintenance of Way employes or as an officer with the Carrier. . . .”

The Claimant was not exercising his retained seniority and “returning to the ranks” from his exempt position. The Claimant was terminated from employment while in an uncovered exempt position. See Public Law Board No. 3408, Award 111:

“The Organization also notes that the Claimant’s seniority retention as a Carman is ensured through Article VIII of the 1986 National Mediation Agreement.

The Board finds the Organization’s position is correct in instances where an employee leaves exempt status while still holding employment status with the Carrier. Here, however, the Claimant was terminated from employment for alleged cause. While the Carrier had the option (which in many cases is elected) simply to release the Claimant from his exempt status, it is not required to do so. Rather, the Carrier elected to terminate the Claimant.”

Under the relevant language, the Board does not have jurisdiction to consider the claim of a nonagreement exempt employee. The claim shall therefore 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 16th day of June 2003.