Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41808
Docket No. MW-42136
14-3-NRAB-00003-130101

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it removed Mr. D. Lafountain, Jr. from service on October 24, 2011 without just cause and in violation of the Agreement (Carrier's File MW-12-04).

(2) As a consequence of the violation referred to in Part (1) above, Mr. D. Lafountain, Jr. shall be returned to work and be compensated for all lost wages and benefits as a result of the Carrier's improper discipline."

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 following provisions of the parties' Agreement are relevant to the arguments raised in this case:

"Article 12. Leave of Absence

12.5 Employees appointed to official positions with the Carrier or who accept a full-time Union position will be granted leaves of absence for the duration of the assignment.

Article 19. Retention of Seniority

19.1 Employees who, subsequent to the effective date of this Agreement, are appointed to supervisory or official positions not subject to the application or exercise of seniority under this Agreement shall retain all their seniority rights and shall continue to accumulate seniority provided they pay a fee no greater than the current dues and assessments being paid by the Carrier's employees covered by this Agreement.

Article 20. Displacements

20.4 Employees currently appointed to supervisory or official positions and employees so appointed subsequent to the effective date of this agreement who comply with the provisions of Article 19 of this Agreement who are removed from such positions by the Carrier (other than through dismissal for cause) may displace any employee with less seniority or may bid on a bulletined vacancy . . . .

Article 26. Discipline

26.1 No employee will be disciplined without a fair hearing . . . ."

The Claimant has 18 years of seniority under the Agreement, having been on a leave of absence to work full-time as a Carrier Official from January 1, 2006 through October 21, 2011, but continuing to accrue his seniority under the provision of Article 19 set forth above. As a result of an investigation conducted by the Carrier concerning theft of its property, a number of employees were removed from service, and it was discovered through the Claimant's admissions that he had

utilized Carrier equipment and employees to move personal items during down time at work, in accord with what he (and others) understood to be common practice. The Claimant was terminated from his position as Superintendent of Track-West on October 21, 2011 "for cause" – using employees and equipment on Carrier time to engage in personal concerns. Any allegation that he engaged in theft of the Carrier's property was dismissed (all charges were withdrawn) through the criminal court system.

The correspondence on the property contains numerous written statements from various Supervisors, Carrier Officials and employees who had knowledge of the relevant facts concerning the actions of the Claimant and what occurred when he was terminated. There is a conflict in evidence as to what the Claimant was informed when he was removed from service on October 21, 2011, with the Carrier's witness stating that the Claimant was told that he was considered dismissed in all capacities, whereas the Claimant asserts that he was never told that he could not exercise his BMWE seniority to return to the ranks, and other Supervisors present were informed that the Claimant was under investigation and it was believed that he would return to work shortly. The same day, the Claimant notified the Assistant General Chairman that he wished to return to work as a BMWE-represented employee and was told to notify Personnel Officer Bill Wallace who he intended to bump. Although there is a dispute in fact as to whether there was an attempt to contact Wallace on October 21 to notify him of the Claimant's intent to bump, it is undisputed that (1) the Claimant attempted to make a displacement on the work site on October 24, 2011, (2) was permitted to travel with the crew to the job site, and (3) he actually began to work after 6:00 A.M. until various Carrier Officials were contacted and the Claimant was directed to cease working. He was escorted back to headquarters and later that day was sent a certified letter informing him that his employment relationship had been terminated in all capacities effective October 21, 2011.

The Organization does not dispute the fact that the Carrier can terminate the Claimant from his supervisory position for the reasons stated. The issue raised by this claim is whether the Carrier can also terminate the Claimant's seniority and other contractual rights, including his right to displace a less senior BMWE-represented employee, without providing him a fair and impartial Hearing to determine if cause exists for such termination.

The Carrier first argues that the Organization has no jurisdiction or standing to appeal the termination of an "at-will" employee. It contends that a Supervisor dismissed for cause is not covered by Article 26 and has no right to make an involuntary displacement under Article 20.4 after a dismissal for cause, citing Public Law Board No. 6145, Award 62. The Carrier asserts that the Claimant's own admission that he used employees and equipment on Carrier time to engage in personal concerns is sufficient to justify its decision to dismiss him "for cause." It also notes that the Claimant did not follow the displacement procedures set forth in Article 20.1, so his deceitful attempt to work on October 24 when he was not authorized to do so cannot be valid. Finally, the Carrier contends that the Claimant suffered no loss of earnings, because he obtained another job by the end of October, so no monetary relief would be justified in any case.

Conversely, the Organization contends that the Carrier violated Article 26 when it dismissed the Claimant without conducting a fair and impartial Hearing, relying on Third Division Awards 2941 and 6250, as well as Public Law Board No. 5454, Award 2. It asserts that the Carrier's defenses are without merit, noting that Article 20 does not state than an employee's seniority rights will be removed if he is dismissed for cause from an exempt position, and does not specify what constitutes dismissal for cause. The Organization reasons that the unfettered decision of a Carrier Official cannot be what was intended by "cause" under the parties' Agreement, especially when there is an established procedure for assuring that an employee does not lose his seniority without the benefit of a neutral and fair review of the facts underlying the basis for dismissal. It points out that the Claimant was working as an employee under the Agreement on October 24, after exercising his seniority, and he cannot be removed from service without an Article 26 Hearing. The Organization argues that there was no competent evidence presented to support any cause for the Claimant's termination, because it was established that he was operating in accordance with an established practice of moving scrap during down time and was not guilty of theft of property, relying on Public Law Board No. 7564, Award 1. It distinguishes Public Law Board No. 6145, Award 62 as one involving another craft agreement issued without reasoning or explanation for the result.

The thrust of this case involves an interpretation of the language of Article 20.4 with respect to the effect that a dismissal for cause of a supervisory employee has on his seniority being accrued under Article 19.1 during a leave of absence (LOA) under Article 12.5. This issue is distinguishable from that decided in Public Law Board No. 6145, Award 62. There is no dispute that the Organization cannot

challenge the Carrier's decision to dismiss the Claimant from his Superintendent's position. Article 20 covers displacements, and Article 20.4 deals specifically with the right of a supervisory employee to exercise his displacement rights when he is removed from such position. In the instant case, the Carrier takes the position that the Claimant was not entitled to displace a less senior employee because he was removed for cause, a specific exclusion set forth in that provision. Thus, it challenges the Organization's assertion that the Claimant had properly displaced onto an Agreement position on October 24 and could not be removed from it without an Article 26 Hearing.

Regardless of whether the Claimant followed the proper displacement procedures contained in Article 20.1, if the Board was to accept the Carrier's position that he was prevented from exercising his seniority to make a displacement or bid on a bulletined vacancy solely on the basis of its determination that his dismissal was "for cause," and that such determination was not subject to any independent review, there would be no means of protecting an Article 12.5 LOA employee's seniority rights actively being accrued under Article 19.1. The Board cannot believe that the parties intended such important seniority rights, which were specifically preserved through Articles 12.5 and 19.1, to be lost without any recourse by the addition of the phrase "(other than through dismissal for cause)" to Article 20.4's displacement provision. The scheme of these provisions, working in concert, is to provide an opportunity for employees to advance into supervisory ranks and for the Carrier to utilize its experienced and trusted workforce in a management capacity, without risking their BMWE Agreement rights if things do not work out for any number of reasons. While the determination that an exempt employee was dismissed for cause from his supervisory position is not subject to the provisions of Article 26, the denial of his right to utilize his accrued seniority under the parties' Agreement to make a displacement is subject to the safeguards of a fair and impartial Hearing set forth in Article 26.1. The Claimant's entitlement to a fair Hearing to determine whether there was "cause" is not dependent on whether he was actually removed from an Agreement-covered position after his displacement on October 24, or was prevented from effectively exercising his seniority displacement rights.

After careful review of the record, the Board is of the opinion that the Carrier violated the parties' Agreement by prohibiting the Claimant from exercising his BMWE seniority to effectuate a bump on October 24, 2011 and terminating him "in all capacities" without providing him a fair Hearing under

Article 26.1. With respect to the appropriate remedy, the Board does not deem it appropriate to determine, in the first instance, whether there was sufficient evidence in the correspondence exchanged on the property to support the Carrier's cause determination. There is a mechanism on the property for making such determination that has been agreed to by the parties. The Carrier is directed to reinstate the Claimant to its rolls as an employee with full seniority, and to make him whole for any losses he may have suffered as a result of the termination of his BMWE seniority, less interim earnings, but is permitted to timely issue him a Notice of Investigation under Article 26.1 from the date of his reinstatement onto the rolls, with respect to its determination of cause for denying him his right to displace on October 24, 2011 and terminating his seniority, if it so chooses.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of February 2014.

Carrier Members' Dissent

to

Third Division Award 41808; Docket MW-42136

(Referee Margo R. Newman)

This Award requires a dissenting opinion. First and foremost, the Majority's decision is based on an argument that was presented by the Organization for the first time during the Referee Hearing before the Board, in violation of Section 3, First (i) of the Railway Labor Act and the parties' Agreement. The Carrier Member pointed out this fact at arbitration and further reminded the Board that it was not at liberty to entertain a new theory that had not been proffered during the handling of the case on the property. Yet, the Majority based its findings on an analysis of this new theory.

To clarify and summarize the Organization's position in this dispute at the time the case was progressed on the property, the Organization, as well as the Claimant, not only alleged, but also extensively argued, that the Claimant had only been told that he was terminated as a Supervisor on October 21, 2011. Then, once he properly exercised his displacement rights and "bumped" onto a scope-covered position on October 24, 2011, and performed scope-covered work for approximately ten minutes, he became covered by the parties' Agreement as an Equipment Operator and was thereby protected by the parties' Discipline Rule (Article 26). As a consequence, the Carrier could not terminate the Claimant without the due process of a Hearing afforded by Article 26. The damages claimed were at the Equipment Operator's rate of pay commencing October 24, 2011.

The record of the case as developed on the property shows that the Organization went to great lengths to demonstrate that: (1) the Claimant was not told that he was terminated in all capacities on October 21, 2011, (2) he properly exercised his displacement rights on October 24, 2011, and (3) he performed scope-covered work subsequent to his termination as a Supervisor, but prior to his removal from service as an Equipment Operator. (In fact, in argument to the Board during the Referee Hearing, the Claimant personally stated that he went "above and beyond" the requirements necessary for properly exercising his "bump.") It was the Organization's, as well as the Claimant's, position throughout the handling of this dispute on the property that the Carrier was required to afford this scope-covered Equipment Operator a disciplinary Hearing due to the foregoing facts as asserted by the Organization. Any casual review of either the Organization's original claim, its appeal of the Carrier's denial of the claim, its response to that denial or its "STATEMENT OF CLAIM" as presented to the Board in its Notice of

Intent, demonstrates that the Award is based on a new theory of the case that was raised for the very first time in the Organization's Submission and then during oral argument at the scheduled Referee Hearing. Namely, the theory presented was that regardless of whether the Claimant actually exercised his seniority rights properly or even at all, the parties' Agreement automatically protects a terminated Supervisor if he has retained seniority in good standing with the Organization and thus, the Carrier must afford the Claimant a disciplinary Hearing pursuant to Article 26. Had this argument been raised on the property, the Carrier could have addressed and refuted it. The Carrier had no such opportunity. Responding to the Organization's belated theory of the case during arbitration for the first time, the Carrier Member pointed out that the extent to which the Organization went to substantiate its original theory of the case highlights the fact that the position belatedly advanced during the Referee Hearing was a brand new theory. The Carrier Member also made the case that both theories proffered by the Organization were supported only by self-serving statements and disproved assertions of fact, as opposed to existing contractual language.

Remarkably, the Award does not speak to the Organization's on-property theory of the case at all. Likewise, it does not address the Carrier's position in response to the Organization's new theory. Without herein restating the Carrier's response to the Organization's initial theory, it should be noted, as it was during arbitration, that numerous Awards support the Carrier's position in this dispute. Among some of those many Awards are the following:

First Division Award 13322 – Referee Harold M. Gilden
Second Division Award 8974 – Referee Francis X. Quinn
Second Division Award 11701 – Referee John C. Fletcher
Third Division Award 12104 – Referee John H. Dorsey
Third Division Award 14346 – Referee Arnold Zack
Third Division Award 36333 – Referee Nancy F. Eischen
Third Division Award 36560 – Referee Edwin H. Benn
Public Law Board No. 2146 Award 6 – Referee A. Thomas VanWart
Public Law Board No. 4561, Award 27 – Referee Jacob Seidenberg
Public Law Board No. 5311, Award 2 – Referee Jacob Seidenberg

In contrast, the Organization cited three Awards (referred to in paragraph two on Page 4 of the Award) involving disputes on other Carriers, which fail to provide support for not only its original theory, but also its new theory of the case. As the Carrier Member pointed out during the Referee Hearing, the contract language at issue in those disputes directly stated that an employee was entitled to a disciplinary Hearing before being terminated in all capacities, whereas the contract

language before the Board in the instant case does not state anywhere that the employee has that right. The Carrier Member added that the Organization could seek such restrictive language through the Section 6 process of the Railway Labor Act, just as the parties' involved in the Awards cited by the Organization presumably had done, but the Board could not create such a right on behalf of the Claimant in the instant case, because it would be improper to do so under the Section 3 dispute resolution process of the RLA. Regrettably, in the instant case, the Majority not only granted un-bargained for rights to the Organization, it erroneously did so based on its analysis of a dispute that was never handled between the parties on the property.

More specifically, the last paragraph on Page 3 of the Award states: "*The issue raised by this claim is whether the Carrier can also terminate the Claimant's seniority and other contractual rights, including his right to displace a less senior BMWE-represented employee, without providing him a fair and impartial Hearing to determine if cause exists for such termination.*" The above-quoted "issue," as framed by the Majority, was not "the issue raised" during the handling of the instant claim on the property. Another reference to the Organization's new position includes the last paragraph on Page 4, wherein the Majority states: "*The thrust of this case involves an interpretation of the language of Article 20.4 with respect to the effect that a dismissal for cause of a supervisory employee has on his seniority being accrued under Article 19.1 during a leave of absence (LOA) under Article 12.5.*" Prior to the Referee Hearing before the Board, this was never even a theory of the case, let alone the "thrust" of the case.

Also of significant note, the first full paragraph on Page 5 states: "*Regardless of whether the Claimant followed the proper displacement procedures contained in Article 20.1, if the Board was to accept the Carrier's position that he was prevented from exercising his seniority to make a displacement or bid on a bulletined vacancy solely on the basis of its determination that his dismissal was 'for cause,' and that such determination was not subject to any independent review, there would be no means of protecting an Article 12.5 LOA employee's seniority rights actively being accrued under Article 19.1. The Board cannot believe that the parties intended such important seniority rights, which were specifically preserved through Articles 12.5 and 19.1, to be lost without any recourse by the addition of the phrase '(other than through dismissal for cause)' to Article 20.4's displacement provision.*" (Emphasis added.) Here, the Majority not only based its analysis of the case on the Organization's newly-minted contractual theory offered for the first time during the Referee Hearing, but more incredulously gives no import or meaning to actual contract language that exists in the parties' Agreement [i.e. "*(other than through dismissal for cause)*"], while at the same time finding merit in a theory that is based on language that is not actually

contained in the parties' Agreement. In further response to the Majority's specific statement "*The Board cannot believe . . .*" (which is quoted in full above), the Board's obligation was to cite contract language and apply it to the respective positions of the parties and the particular facts of the case as developed during the on-property handling of the matter. Any so-called "belief" should be derived directly from such an analysis, wherein the Majority explains or demonstrates how it arrived at such a "belief" in favor of one party's position. Instead, here, there is simply no discernible explanation as to how the Majority arrived at its stated "belief" in the Organization's newly-crafted theory of the case, most likely because the parties' current Agreement does not actually contain any language to support such position. The Majority was caused to infer the presence of some invisible intrinsic right that exists in the Agreement, which serves to supersede or nullify existing contract language [i.e. *"(other than through dismissal for cause)"*].

Along these same lines, the first full paragraph on Page 5 of the Award states: "*. . . The scheme of these provisions, working in concert . . .*" The Organization did not make the argument that said provisions of the Agreement work in concert, at least not while disputing the matter on the property. In that same paragraph the Majority went on to state: "*. . . While the determination that an exempt employee was dismissed for cause from his supervisory position is not subject to the provisions of Article 26, the denial of his right to utilize his accrued seniority under the parties' Agreement to make a displacement is subject to the safeguards of a fair and impartial Hearing set forth in Article 26.1.*" Really? The Majority failed to explain from whence this divinely imparted knowledge of such safeguards was derived. Surely it did not come from the parties' Agreement or from evidence presented during the on-property handling of the dispute prior to arbitration. The Majority first inferred the right in order to then make the pronouncement that the Carrier cannot deny that newly created right. Yet, as for the existing language of the parties' Agreement *(i.e. "other than through dismissal for cause")* which need not be inferred, the Majority simply dismissed it by opining that the parties could not have intended such contract language to mean what it actually says. Later on in that same paragraph, the Award states: "*. . . The Claimant's entitlement to a fair Hearing to determine whether there was 'cause' is not dependent on whether he was actually removed from an Agreement-covered position after his displacement on October 24, or was prevented from effectively exercising his seniority displacement rights.*" (Emphasis added.) If one were to reduce the entire record of this case to just the Organization's Submission, perhaps the foregoing statement would constitute an accurate analysis of the Organization's position in this case. However, the record evidence of the case prior to the Organization's Notice of Intent to the Board reflects a dispute that was dependent on the Organization's assertion that the Claimant exercised his seniority.

Paragraph two on Page 4 of the Award states that the Organization took the position ". . . *that Article 20 does not state that an employee's seniority rights will be removed if he is dismissed for cause from an exempt position,* . . ." The fact of the matter is that Article 20 does not say that an employee's seniority rights will not be removed if he is dismissed for cause from an exempt position. More importantly, however, is the fact that Article 20.4 does state that an employee holding a supervisory position and also maintaining seniority may exercise a displacement, "unless the employee is dismissed for cause." In other words, language overtly placed in the Agreement provides clear guidance for assessing the rights that were contractually afforded to the Claimant and the Carrier with respect to this dispute.

It goes without saying that disputes progressed to the Board are adjudicated on an appellate review basis. Because the Award is clearly premised on a new contractual theory that was not advanced by the Organization prior to arbitration, the Award is fundamentally flawed based on this major issue standing alone. Unfortunately, the Award is palpably erroneous on several additional accounts.

The initial partial paragraph on Page 3 states: ". . . *The Claimant was terminated from his position as Superintendent of Track-West on October 21, 2011 'for cause' - using employees and equipment on Carrier time to engage in personal concerns.*" It was certainly the Claimant's alleged defense that he was only terminated as a Superintendent. However, he was terminated in all capacities, as attested to by three officers of the law and the Carrier's Director of Safety and Security. These four men and the Claimant were the only people present when the Claimant was interviewed and terminated. In this same paragraph of the Award, the Majority inappropriately makes reference to criminal charges, which had absolutely nothing to do with the case presented to the Board.

The first full paragraph on Page 3 states that there were ". . . *numerous written statements from various Supervisors, Carrier Officials and employees who had knowledge of the relevant facts concerning the actions of the Claimant and what occurred when he was terminated.*" (Emphasis added.) This is not true. Again, the record unequivocally shows that only four individuals - aside from the Claimant - were in the room when he was interviewed and terminated. Statements provided by individuals present at the time of his termination all affirm that the Claimant was informed that he was terminated in all capacities. Moreover, even the Claimant's own subsequent written admissions confirm that he was asked to surrender his Carrier I.D. and keys. All other written statements are irrelevant and do not establish any facts pertaining to the Claimant's termination, because none of the individuals offering those statements was present. The first full paragraph on Page

3 goes on to state that: ". . . *There is a conflict in evidence as to what the Claimant was informed* . . . ." Out of the five people who were present at the time of his termination, only the Claimant's self-serving story is different. The Award goes on to state in the same paragraph that: ". . . *Although there is a dispute in fact as to whether there was an attempt to contact Wallace on October 21* . . . ." There is no dispute. While it was the Claimant's alleged defense that he attempted to contact Personnel Officer Bill Wallace, there is absolutely no evidence in the record to support such assertion. None. We find it amazing that the Majority concluded that there was a dispute in this regard when the Organization's contention was supported by no evidence whatsoever.

Paragraph one on Page 4 of the Award erroneously states that the Carrier took the position that ". . . *a Supervisor dismissed for cause is not covered by Article 26 and has no right to make an involuntary displacement under Article 20.4 after a dismissal for cause, citing PLB 6145, Award 62.*" In support of its position, the Carrier cited the language of the parties' Agreement, particularly Article 20.4 - not Public Law Board No. 6145, Award 62. PLB 6145, Award 62 was merely submitted as additional evidence to demonstrate to the Board in the instant case the manner in which the Carrier handled a similar case under similar language on its property in the past. There exists no record evidence in the instant case to show that any Supervisor on this Carrier's property has <u>ever</u> been given a Hearing under these circumstances. In any event, the Majority did not explain why the language of Article 20.4 does not mean what it says. The Majority merely proclaims in the first full paragraph on Page 5 that: ". . . *The Board cannot believe that the parties intended such important seniority rights, which were specifically preserved through Articles 12.5 and 19.1, to be lost without any recourse by the addition of the phrase '(other than through dismissal for cause)' to Article 20.4's displacement provision.*" Perhaps the Majority could explain just what the addition of the phrase *"(other than through dismissal for cause)"* was intended to do?

Paragraph two on Page 4 of the Award goes on to cite the Organization's consternation with the Carrier being able to determine what was intended by the term "cause" under the Agreement, ". . . *especially when there is an established procedure* . . . ." A review of the case record developed on the property shows that this issue was never a topic of debate. This paragraph of the Award also speaks to the Claimant's defenses of "*established practice*" and "*down time*" which were only supported by clearly self-serving statements from the Claimant, as well as other contractual employees who resigned from the Carrier's service prior to participating in scheduled Hearings involving their own alleged misconduct.

Of further significance, based on the Claimant's own written statements contained in the on-property handling of the dispute, the Claimant allegedly had employees perform personal business on Carrier time and Carrier business on rest days. The Majority failed to address this issue in the Award. The Majority also ignored the fact that based on any objective reading of his own written statement, the Claimant admitted to all of the misconduct for which he was terminated. Statements provided by his co-workers at his request further confirm his responsibility. Consequently, it should seem to be an exercise in futility to require the Carrier to conduct a formal Hearing, because the relevant facts and evidence demonstrating the Claimant's responsibility for conduct that warranted his dismissal had already been established by none other than the Claimant himself.

In conclusion, this Award, when viewed in the context of the Board's statutory responsibilities, must be taken as a singularly unsound and defective decision, not worthy of citation as precedent, or as persuasive authority in any future dispute on the Carrier's property or in the railroad industry.

For all of the foregoing reasons, we vigorously dissent.

Anthony Lomanto
Anthony Lomanto

Michael C. Lesnik
Michael C. Lesnik

February 27, 2014

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 41808, DOCKET MW-42136
Referee Newman

The Carrier Members' Dissent is not worth the paper it is printed on nor the postage to send it out. This is true for a myriad of reasons. To understand just how wrongheaded and disingenuous is the Carrier Members' Dissent, it is helpful to review the history of the handling of this dispute. The undisputed facts are that on October 24, 2011, the Carrier notified the Claimant in writing that he was being "terminated in all capacities" as allegedly explained to him in a previous meeting with various members of the Carrier's management. As a result, by letter dated November 23, 2011, the Organization filed a claim which, in pertinent part, reads:

> "... the Carrier violated the entire agreement by disallowing Mr. Lafountain his fundamental right to work in accordance to the CBA. Although we cite the entire agreement as being violated, we bring particular attention to Article 26. Discipline, when the Carrier removed Mr. Lafountain from service on October 24, 2011, without just cause. The Carrier neglected to serve any required notice, apprising Mr. Lafountain or the Organization to show cause. We can only view this as unjust discipline with no regard to Mr. Lafountain's contractual rights." (Employes' Exhibit "A-2")

The Organization could hardly have been more clear. The Carrier dismissed the Claimant from his employment under the BMWED Agreement and deprived him of the valuable rights conferred by his holding of seniority thereunder without having been afforded the right under Article 26.1 which provides that "No employee will be disciplined without a fair hearing. The notice of hearing will be mailed to the employee within 14 days of the Carrier's first knowledge of the act or occurrence. ***" The Organization clearly identified the contractual basis for its claim within its initial letter: The Carrier had removed the Claimant from service without serving any notice and without affording him a fair hearing. Such dismissal was a clear violation of the rights retained under the Agreement by virtue of his seniority. Moreover, contrary to the Carrier Members' contentions, reference to the Organization's Statement of Claim clearly shows that the claim before the Board was: "Claim of the System Committee of the Brotherhood that [t]he Carrier violated the Agreement when it removed Mr. D. Lafountain, Jr. from service on October 24, 2011 without just cause and in violation of the Agreement." As a consequence, the reader can readily see that the Carrier Members' allegations that the Majority based its findings "... on an argument that was presented by the Organization for the first time during the Referee Hearing ***" is plainly contrary to the actual record that was before the Board.

While the Carrier Members spent significant space exploring and expounding upon one line of disagreement between the parties, it must be noted that it is not unusual for this Board to

examine disputes wherein the parties engage in extensive heated digressions that ultimately are not determinative of the final disposition of the dispute. In this case, it is true, as the Carrier Members note, that the parties argued extensively whether the Claimant was informed that he was [allegedly] terminated in all capacities on October 11, 2011; whether he properly exercised his displacement rights on October 24, 2011; and whether he performed Maintenance of Way work as an equipment operator subsequent to his termination as a supervisor. But those issues were not dispositive. In the end, the Board found it appropriate to decide the case on the merits of the Organization's essential claim that the Carrier violated Article 26. Discipline, which prohibits the Carrier from assessing discipline to an employe without first providing a fair hearing. Thus, the Carrier Members' extensive argument concerning allegedly "new issues" simply constitutes a complaint that the Board determined not to be sidetracked by issues that were ultimately irrelevant.

Having disposed of the Carrier Members' unsupportable position concerning the allegedly "new issues", we now turn to the merits of the case. In this regard, the Carrier Members are equally wrong. As is made clear within the award, Article 19.1 provides for a promoted employe to retain seniority and Article 20.4 provides that such employes who are removed from such positions, other than through dismissal for cause, may exercise their seniority through displacement or by bidding on a bulletined vacancy. The reference to "dismissal for cause" presupposes a method for determination whether an employe's dismissal was "for cause". Certainly in order to have force and effect, a standard must apply that would be outside of the Carrier's exclusive and arbitrary control. After all, "dismissal for cause" is not dismissal by complete and unchecked Carrier caprice. Fortunately, the parties have agreed on that procedure within Article 26: to afford the employe a fair hearing at which evidence is presented in any case where a disciplinary action against any employe possessing Maintenance of Way seniority is contemplated.

Unfortunately, the Carrier determined to bypass the procedure, all the while insisting that "cause" was shown. However, it has not established cause for dismissal of Claimant, especially since a necessary precondition of establishing this cause is a fair and impartial investigation. Of course, the whole reason Article 26 was negotiated by the Organization on behalf of the employes was to protect employes precisely from this sort of arbitrary disciplinary treatment, where the Carrier is not bound to treat an employe fairly and truly prove a case backed by evidence which has been tried by Organizational testing and, if necessary, proved up to a neutral fact finder and/or independent member of a board of arbitration. "For cause", in short, like "just cause" language, necessarily implies a standard, with independent checks at some point thereof – precisely what the Carrier is sought to deny in this case, despite the inclusion of such language in the Agreement and the retention of Agreement rights by promoted employes. The Carrier's interpretation in this case would render those rights meaningless. However, it is well established that agreement language is presumed to be intentional and meaningful, and must be interpreted in a manner so as to give effect to the entire agreement, as the Board has correctly done in this instance.

Finally, the Carrier Members enter their version of the facts and attempt to show that the Carrier may have had cause to dismiss the Claimant. Of course, the time to have done so would have been at the fair and impartial hearing it was required to afford the Claimant pursuant to Article 26. Inasmuch as the Carrier chose to bypass the required hearing, there was no evidence properly in the record for the Board to review to determine whether the Carrier had adduced sufficient evidence to support its decision to terminate the Claimant from his Maintenance of Way employment.

Indeed, even the evidence that was offered belatedly by the Carrier reveals why that Article 26 process is needed before an employe could lose all of his rights under the Agreement. As the dueling personal statements entered into the record show, the heart of the matter herein – viz., whether Claimant was guilty of "theft" or merely operating in accordance with established practice – is in issue and not resolvable short of a "fair hearing" where the evidence could have been subjected to cross-examination, further examination and neutral fact-finding. As Claimant and several employes maintain, such actions on the part of Claimant were entirely in keeping with long-established and customary practices on the property, which the Carrier knew full well of and acquiesced concerning, never having disciplined an exempt employe for this same activity. The Carrier weakly countered this with scant contrary assertions. But the place to try all of this at was in an Article 26 "fair" hearing, before an impartial fact-finder and, if need be, an independent arbitral board of adjustment. "For cause" means little or nothing if it does not mean at least that and it is not contemplated that employes forfeit these Article 26 rights (or any other rights guaranteed under the Agreement, for that matter) when they are promoted while retaining contractual rights under the Agreement by virtue of their seniority as retained and accumulated under the specific provisions of Article 19.

For all the foregoing reasons, the Majority was correct in determining that the Carrier violated the Agreement when it terminated the Claimant's Maintenance of Way employment without affording him a fair and impartial hearing and the attendant due process that surely flows therefrom. The Agreement provides that time to hold said hearing is "within 30 days of the Carrier's first knowledge of the act or occurrence." Thus, it is now, more than two (2) years hence, an impossibility for the Carrier to "timely issue him a Notice of Investigation under Article 26.1" as ordered by the Board.

In conclusion, contrary to the Carrier Members' Dissent, the decision in this case did not rely on argument or evidence presented for the first time before the Board. Moreover, the Board was correct in its determination that the Claimant retained certain rights under the Agreement in accordance with his seniority and was correct in granting the Claimant full reinstatement as a

remedy to the Carrier's violation of the Agreement. Consequently, the award will stand as precedent for the proposition that seniority rights under the Agreement cannot be diminished nor extinguished except through procedures provided therein.

Respectfully submitted,

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Labor Member