

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42809
Docket No. MW-43251
17-3-NRAB-00003-150522**

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it removed Mr. J. Mandeville from service on August 3, 2014 without just cause and in violation of the Agreement (Carrier's File NEC-BMWE-SD-5336 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Mr. J. Mandeville shall be allowed ‘...to displace back into the BMWED craft and made whole for all time lost. This Claim commenced on August 3, 2014 and will continue until the date Mr. Mandeville is allowed to make his displacement back into the BMWED 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.

John Mandeville had established and held seniority with the Carrier's Maintenance of Way Department. The following circumstances gave rise to the instant dispute.

The record reflects that on July 22, 2014, the Claimant was employed as a non-agreement Assistant Division Engineer-Track East and, at approximately 10:53 A.M., he and five other employees were observed by a Federal Railroad Administration (FRA) Inspector in South Hampton Street Maintenance Yard, Boston, MA, fouling track number 2 with no Roadway Worker Protection established. The record reflects that the group of employees failed to prepare a job and on-track safety briefing prior to fouling the track in violation of Amtrak's Standards of Excellence, MW Safety Rules, RWP Regulations and NORAC Operating Rules. As a result of these violations, by letter dated August 1, 2015, the Claimant was notified by Division Engineer George Fitter that he was terminated effective immediately. On August 2, 2014, the Claimant attempted to exercise his seniority back to the ARASA craft and was not permitted to do so by the Carrier. Thereafter, on August 3, 2014, the Claimant then attempted to exercise his seniority back to a BMWE-covered position and, again, he was denied the opportunity to do so by the Carrier.

By letter dated August 12, 2014, the Organization submitted a claim on behalf of Mr. Mandeville alleging as follows: "Pursuant to Rule 12, Mr. Mandeville is seeking to displace back into the BMWED craft and made whole for all time lost." "This Claim commenced on August 3, 2014 and will continue until the date Mr. Mandeville is allowed to make displacement back into the BMWED craft". By letter dated September 16, 2014, the Division Engineer denied the claim, asserting that the Claimant was dismissed for cause from his position as Assistant Division Engineer and, therefore, is "ineligible to return to the BMWE craft based on the plain language of Rule 12".

The claim was appealed to Labor Relations Officer Madeleine Respler by letter dated November 7, 2014, alleging that the Claimant "was terminated from his official position of Assistant Division Engineer in the capacity of a Carrier Manager" and was not terminated in all capacities, therefore, the Organization contended he had the "flexibility to return to any position, which he held seniority on within the BMW" pursuant to Rule 12. By letter dated January 8, 2015, Ms. Respler denied the Organization's appeal, noting that inasmuch as the Claimant was dismissed for cause, "the language of Rule 12(e) is that the right to displace a less senior employee is not available". The Organization appealed the case to Senior Manager Sharon Jindal by letter dated March 25, 2015, stating that "While the Organization does not dismiss the severity of the actions 'allegedly' found to have been committed by the Claimant (without a fair and impartial Investigation where the Carrier has not met a reasonable burden of proof) and certainly does not take them lightly, the Carrier's failure to allow him to exercise seniority within the craft in which he retained seniority is in violation of Rule 12 regardless of the language of Rule 12(e) as the Carrier did not dismiss' Mr. Mandeville in "all capacities". The Organization requested that the Carrier reinstate the Claimant and make him "whole for the losses incurred to this point as result of being dismissed without opportunity to a fair hearing and the Carrier's subsequent denial to afford the claimant contractual right to exercise seniority until such time a hearing could be scheduled and the facts obtained in connection therewith." Ms. Jindal denied the Organization appeal by letter dated July 1, 2015, asserting that the Organization amended their initial claim and remedy sought on appeal as neither the initial appeal letter dated August 12, 2014 or subsequent appeal dated November 7, 2014 mentioned the Carrier's alleged failure to grant the Claimant the "opportunity to a fair hearing" and the Organization cannot now amend their claim to assert an argument which was not presented at the initial level of handling and such change is a fatal flaw and renders the claim procedurally invalid.

By letter dated August 26, 2015, the Organization then amended their appeal to the National Railroad Adjustment Board asserting that "The Carrier violated the Agreement when it removed Mr. J. Mandeville from service on August 3, 2014, without just cause and in violation of the Agreement." By letter dated September 1, 2015, the National Railroad Adjustment Board advised the Carrier that the Organization had filed a notice of intent to file a submission with the Third Division in connection with this case.

Subsequent to the filing of this claim with the NRAB, Third Division, a hearing was held between the Carrier and the American Railway Supervisors Association Transportation Communications Union/IAM ("ARASA"), [PLB 6062, Case No. 83], seeking the right of the Claimant to return to the ARASA craft and exercise his seniority. In denying this claim, Arbitrator Marty Zusman noted in relevant part as follows:

"The facts are that the Carrier did an investigation and found proof of a serious violation. The Board finds no Rule that the Carrier violated. The Organization points to Rule 2(e), but that Rule specifies the following:

Supervisors appointed to positions covered by this rule 2(e) who are subsequently removed from such positions by the company (other than through dismissal for cause) may displace any employee with less seniority or may bid on a bulletined vacancy on the seniority roster from which promoted providing they do so within thirty (30) calendar days after release from such positions.

The penultimate phrase is "other than through dismissal for cause" and in this instance, the Claimant was dismissed for cause. The Claimant was dismissed from his company position and therefore from the Carrier's service. As such, the Claimant no longer had employment and was not within the purview of the ARASA-MW contract. Nor did the Claimant have subsequent seniority rights to return to an employee status within a contract or Agreement, as he no longer had employment or employment rights after his termination.

There is a long arbitral authority on this property (Public Law Board 6139, Award No. 7) and across many properties (Public Law Board 7090, Award No. 3) holding that where the language is clear and the Organization fails in its burden to prove otherwise, dismissal, for cause ends the dispute; as the Claimant has no employment to activate rights of seniority (Public Law Board 5311, Award No. 2; Public Law Board No, 4561, Award No. 27). As that is the case at bar, the Board has no authority

to provide either leniency, or to find that the Claimant has thereafter seniority rights. Rule 2(e) has not been violated. The Claim must be denied.

To the Board, the foregoing decision by PLB 6062 precludes the identical issue from being relitigated. “Res judicata”, literally, “a thing decided”, and its companion, “collateral estoppel” are rooted in public policy favoring stability of judgments. The policy not only protects the legal system from a waste of limited judicial resources caused by duplicative litigation, but also litigants against the trouble and expense of prosecuting or defending the same matters multiple times, and helps to provide stability in workplace decisions. These rules are rules of preclusion, and when applied, prohibit re-litigation of matters previously decided. Accordingly, having read the decision of PLB 6062, this Board has no choice but to give res judicata effect to the Board’s decision in PLB 6062. As a result, the instant claim will be denied.

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 28th day of November 2017.