

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42842
Docket No. MW-42663
18-3-NRAB-00003-140375**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(Soo Line Railroad Company, former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow Mr. K. Shisler to return to service in the Maintenance of Way Department beginning on February 12, 2013 but instead terminated all of his Maintenance of Way Department seniority in connection with a letter dated February 7, 2013 (System File C-02-13-290-01 CMP).**
- (2) The Agreement was further violated when the Carrier failed to afford the Claimant a fair and impartial hearing as required by Rule 18.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant K. Shisler shall be reinstated to service ‘... with seniority unimpaired and for all lost wages, including but not limited to all straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, February 7, 1965 protection and any and all other benefits to which entitled, but lost as a result of Carrier’s failure to allow claimant Shisler to return to service in the Maintenance of Way Department effective February 12, 2013 and continuing until such time as this claim is resolved.’”**

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 Carrier issued a Letter of Dismissal dated February 7, 2013, which stated in pertinent part:

“This letter will confirm that effective today you are dismissed from your at-will employment with Canadian Pacific. Specifically, you are being dismissed for failure to adhere to Business Expense Reimbursement Policy 6309.”

The Organization appealed the Carrier’s dismissal by letter dated March 11, 2013. The Carrier denied the Organization’s appeal on April 29, 2013. A formal conference was held on December 11, 2013. The claim was appealed and now is before this Board for a final resolution of the claim.

On June 1, 2011, the Claimant was promoted to an official position by the Carrier and was granted a leave of absence in accordance with Schedule Rule 17(b). The Claimant performed work on this official position up to and including, February 7, 2013. On February 7, 2013, the Carrier issued Claimant a dismissal letter which alleged that the Claimant committed 18 acts of expense fraud over a 12 month period. On February 11, 2013, the Claimant contacted Carrier’s Staffing Services Department to effectuate his return to services in the Maintenance of Way Department in accordance with Rule 17 of the Schedule of Rules Agreement. The Carrier advised the Claimant that he could not return to the position and/or exercise the seniority within

the Maintenance of Way Department because the Company had terminated his employment in its entirety.

The Carrier contends that this Board lacks jurisdiction over this dispute because Claimant's employment relationship with the Company terminated on February 7, 2017 while he was working in the capacity as a manager, and any residual agreement rights covering the Claimant while on a leave of absence were severed at the time of termination. The Carrier cites several awards to support this contention.

The Carrier contends that the phrase "failure to satisfactory fill the position" refers to performance and/or technical matters that have a direct bearing upon an individual's ability to satisfactorily fill the position then occupied. The Carrier asserts that the Claimant's attempt to defraud the Company has no connection with his ability to satisfactory perform the duties of the specific managerial position he occupied.

The Carrier contends the Agreement does not apply to managers, and that Claimant does not have a fundamental right to an investigation based on his actions and conduct as a manager. The Carrier asserts that the Claimant retains his seniority while working as a manager but once the Claimant was terminated, he was no longer an employee and no longer on a leave of absence.

The Organization contends that seniority rights established and maintained in accordance with a Collective Bargaining Agreement are not affected by the Carrier's decision to discipline or dismiss employee as a supervisor/exempt or non-schedule employee. The Organization asserts that the Claimant had paid his fees under Rule 10 of the Agreement while on Rule 17 leave from his craft, in order to retain his accumulating seniority and the Claimant was fit for services when he was found to not have been satisfactorily filled an exempt position as a Carrier official.

The Organization contends that the dispute is not about the Claimant's dismissal while in a non-agreement official capacity. Instead, the Organization argues, this dispute is about the Claimant's return to the service from which he was promoted under the Agreement, Rule 17(b). According the Organization, nothing associated with his dismissal from a non-agreement official capacity deprived him of such return rights. The Organization cites several cases which support this contention.

The Organization contends that the language of Rule 17, “in the event of failure to satisfactorily fill the position,” is clear and unambiguous, and there is no distinction on the manner in which the position is not satisfactorily filled. The additional language, “he may do so,” reinforces the Organization’s position that the Claimant should be reinstated. By dismissing the Claimant, the Carrier has determined that the Claimant failed to satisfactorily fill the position to which he was promoted. Yet, the Carrier failed to allow him to return to his prior position in violation of the Agreement.

The Organization contends that Carrier violated the Agreement when it terminated the seniority rights of the Claimant without providing him a fair and impartial Hearing. The Organization maintains to strip away the Claimant’s seniority from him without a fair and impartial hearing and without being proven guilty by substantial evidence under Rule 18 is arbitrary, capricious and unreasonable. Relevant Provisions of the Agreement:

“Rule 1 Scope:

The rules contained herein shall govern the hours of services, working conditions, and rates of pay of the employees in the Maintenance of Way & Structures Department represented by the Brotherhood of Maintenance of Way Employees but do not apply to the supervisory forces above the rank of foreman. These rules do not apply to employees covered by other agreements.

Rule 10 Non-Exercise of Seniority

(b) Effective October 17, 1986, all employees promoted subsequent thereto to official, supervisory, or excepted positions from crafts or classes represented by BMWE shall be required to pay an appropriate monthly fee, not to exceed monthly union dues, in order to retain and continue to accumulate seniority. A supervisor whose payments are delinquent shall be given a written notice by the appropriate General Chairman of the amount owed and ninety (90) days from the date of such notice to cure the delinquency in order to avoid seniority forfeiture.

Rule 17 Leave of Absence:

(b) An employee covered by this Agreement who is promoted to an official position (not subject to the terms of a collective bargaining agreement with another Organization) by the Railroad Company or employee as a salaried officer by the Brotherhood of Maintenance of Way Employees, or any other position by the Brotherhood, will be granted a leave of absence upon request and will retain his seniority services rights and his name will be continued on the seniority roster. Requests will be made as far in advance as possible.

In event of failure to satisfactorily fill the position or a desire to return to the services from which promoted, he may do so provided he meets the physical requirements of the service. Upon his return such employee's years of services while on leave of absence shall be considered for purposes of calculation of benefits due under this schedule.

(c) In returning to the services from a leave of absence, an employee may return to the position he occupied at the time granted a leave of absence unless that position is not in existence or is then regularly assigned to a senior employee, in which event he will then exercise his seniority to displace a junior employee in the same class, or lower class, in which he holds seniority. All employees affected by his return will do likewise.

Rule 18 Discipline and Grievances

(a) An employee who has been in the service of the Soo Line for sixty (60) days or more, and whose application has been approved will not be disciplined or dismissed without a fair and impartial hearing and shall be advised in writing of the specific charges. This will not preclude an employee being held out of services pending a hearing for serious rules violations. An employee who considers himself unjustly treated shall be given a fair and impartial hearing provided that the request for a hearing is made in writing to the Regional/Divisional Engineer within twenty (20) days from the date of the incident.

Other relevant provisions:

Rule 2: Seniority Datum

Rule 3: Consideration for Positions

Rule 4: Department Limits

Rule 5: Seniority Limits

CP Policy 6309 reads in pertinent part:

Failure to comply with the Business Expense Policy and its related procedure may result in disciplinary action, up to and including dismissal. For example, submission of a fraudulent claim is considered a serious offense and is subject to discipline, up to and including dismissal and criminal charges if warranted.”

The Board has reviewed the record developed by the parties during their handling of the claim on the property and the relevant provisions of the Collective Bargaining Agreement. A careful reading of the provisions draws attention to the bargaining efforts of both the Carrier and the Organization to provide for career advancement for tenured employees as well as a hiring pool for the Carrier. It is apparent that the negotiations between the parties recognize that too often people are promoted to a level of incompetence without a safety net. Article 17 is the safety net for the Organization’s membership. If an employee advances into an exempt position, and cannot fulfill the duties and responsibilities of said position, the employee can return to their prior position. If an employee advances into an exempt position, and simply does not like the position or it did not meet their expectations, the employee can return to their prior position. Of course, this is contingent upon payment of Rule 10 fees.

The Board finds no ambiguity in the phrase “failure to satisfactory fill the position” from its reading of the Agreement. The Board is persuaded that the phrase refers to performance and/or technical matters that have a direct bearing upon an individual’s ability to satisfactorily fill the position then occupied, and the phrase does not create a safe haven for an exempt employee who is charged with serious misconduct.

It is noted by the Board that all the provisions cited in support of the parties' contentions have a common thread. Rights and benefits flow to employees. Rule 1 Scope: *The rules contained herein shall govern the hours of services, working conditions, and rates of pay of the employees...* Rule 2: Seniority Datum (a) *Except as otherwise provided for in these rules, new employees' seniority...* Rule 3 Consideration for Positions Rights *accruing to employees under their seniority...* Rule 4 Department Limits *Except as otherwise provided, the seniority rights of employees...* Rule 5 Seniority Limits *The seniority limits of all employees....* Rule 10 Non-Exercise of Seniority: (b) *Effective October 17, 1986, all employees promoted...* Rule 17 Leave of Absence: (b) *An employee covered by this Agreement who is promoted to an official position...* Rule 18 Discipline and Grievances (a) *An employee who has been in the service of the Soo Line...*

On February 7, 2013, the Carrier issued claimant a dismissal letter which alleged that the Claimant committed 18 acts of expense fraud over a 12 month period. As of February 7, 2013, the Claimant was no longer an employee. The Claimant had no employment status, and was no longer covered by the scope of the parties' collective bargaining agreement. The seniority rights of the Claimant terminated as of February 7, 2013.

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 10th day of January 2018.

LABOR MEMBER'S DISSENT
TO
AWARD 42842, DOCKET MW-42663
(Referee Meeta A. Bass)

In this instance, the Majority ignored the clear language of the Agreement and held that an employee dismissed from an exempt position can also have his Maintenance of Way seniority terminated. It is undisputed that the Claimant was dismissed from his exempt position. This dismissal triggered Rule 17(b) of the Agreement which, reads as follows:

“In event of failure to satisfactorily fill the position or a desire to return to the service from which promoted, he may do so provided he meets the physical requirements of the service. Upon his return such employee’s years of service while on leave of absence shall be considered for purposes of calculation of benefits due under this Schedule.”

It should be noted that the awards cited by the Carrier contain Agreement language with an exception for termination “for cause”. Said exception is not present in this Agreement. In this case, it is undisputed that the Claimant failed to satisfactorily fill his exempt position. In such event, the Parties agreed to the only exception upon which an employee could not return to work, which is failure to meet the physical requirements. This case is virtually identical to Third Division Award 35868, wherein, the Agreement did not contain language providing for an exception in the event of a “for cause” termination. Specifically, Award 35868, in pertinent part, held:

“Although the Carrier distinguishes between vacating a position voluntarily versus involuntarily, Rule 22 does not support this view. Indeed, the dictionary definition of the word ‘vacate,’ expressed on page 14 of the Carrier’s Submission, draws no distinction based on voluntariness. It reads merely, ‘To cease to occupy or hold.’ Moreover, Rule 22 explicitly states as follows:


‘Employees retaining seniority who vacate an official, supervisory or excepted position for any reason, whether with the Company or the Brotherhood, may return to their former position or exercise rights * *

* (Emphasis added)

As written, therefore, Rule 22 makes no distinction based on the manner in which a position is vacated. This conclusion is confirmed by other explicit language in the Rule. Subparagraph (c) mandates that employees ‘ . . . shall retain and continue to accumulate seniority rights, except as hereinafter provided’: (Emphasis added) Rule 22 thereafter provides no exception for dismissal for cause.” (Emphasis in original)

The language of Rule 17 clearly provides that the Claimant should have been allowed to return to service so long as he met the physical requirements. Therefore, I respectfully dissent.

Respectfully submitted,


Zachary C. Voegel
Labor Member