

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44851
Docket No. MW-46441
23-3-NRAB-00003-210259

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference

PARTIES TO DISPUTE: (

(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. T. Lancaster to return to service in the Maintenance of Way Department beginning on April 5, 2019 and continuing but instead terminated all of his Maintenance of Way Department seniority in connection with a letter dated April 1, 2019 (System File C-39-19-290-01/2020-00012299 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 T. Lancaster shall be reinstated to service “*** seniority unimpaired and for all lost wages, including but not limited to all straight time, overtime, paid and non-paid allowances, 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 Lancaster to return to service in the Maintenance of Way Department effective April 5, 2019, 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.

On April 29, 2011 the Carrier promoted the Claimant to a management position. At the time of his promotion, the Claimant maintained seniority in the Maintenance of Way (MOW) Department in a position represented by the Organization and covered by a collective bargaining agreement (CBA). Upon accepting the promotion, the Claimant requested and was granted a leave of absence from his bargaining-unit position but continued to maintain and accumulate seniority.

Up to and including April 1, 2019 the Claimant performed duties in the exempt position. On that date Chief Engineer Paradise notified the Claimant by letter that he was dismissed from his "at-will" employment effective April 1, 2019 "based on your failure to take appropriate action after being notified of high water conditions on March 29, 2019" resulting in a mainline track wash out. Specifically, the Claimant did not check a culvert during flash flooding.

On April 2, 2019 the Claimant contacted Human Resources (HR) - - Business Partner Beaulne - - to exercise his seniority under Rule 17 - Leave of Absence and return to a MOW-represented position. Rule 17 states, in relevant part, as follows:

- (b) An employe 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 . . . will be granted a leave of absence upon request and, will retain his seniority service 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 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.

- (c) **In returning to the service 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.**

On April 5, 2019 HR Business Partner Beaulne notified the Claimant that as of April 1, 2019 (effective date of his dismissal) he was no longer employed with the Carrier which precluded him from exercising his seniority to return to MOW.

On June 4, 2019 the Organization appealed the dismissal stating that the Carrier extinguished the Claimant's seniority rights without affording him a fair and impartial hearing in violation of Rule 1 - Scope, Rule 2 - Seniority Datum, Rule 3 - Consideration for Positions, Rule 4 -Department Limits, Rule 5 - Seniority Limits, Rule 10 - Non-Exercise of Seniority, Rule 17 - Leave of Absence and Rule 18 - Discipline and Grievances.

On July 29, 2019 the Carrier denied the appeal labeling it invalid since Rule 1 (Milwaukee Agreement) and Rule 1 (SOO Agreement) exclude "supervisory forces above the rank of foreman" from the CBA. Since the rules do not apply to the Claimant as he occupied a position "above the rank of foreman" his seniority rights terminated contemporaneously with his at-will employment on April 1, 2019.

Whether the Claimant's seniority rights are separate and distinct from the Carrier's at-will personnel decision was addressed on-property up to and including the Carrier's highest appellate officer and continued in conference on April 29, 2020. With no resolution attained at conference, the Organization filed a claim dated December 17, 2019 which is before the Board for final adjudication. The Board is fully informed of

the on-property record and each party's position and argument in its submission including awards submitted in support thereof.

In summary manner the Carrier's position is that Rule 1 excludes the Claimant from the rules in the CBA as he served in an at-will position and other rules advanced by the Organization do not apply to the Claimant such as a hearing under Rule 18. Aside from the Organization ignoring the exclusionary wording in Rule 1, it provides no support for the alleged violations of Rules 2, 3, 4, and 5 (seniority, consideration for positions, department limits, seniority limits). Numerous awards support the Carrier's position that the Board is without jurisdiction over this matter as it involves the Claimant's dismissal when he was employed in a non-agreement, managerial position. For example, First Division Award 26725 states:

Under the jurisdictional analysis, the inquiry is into whether the employee was a covered employee under the BLE Agreement. At the time of termination the Claimant was not an 'employee' covered by Article 51 of the BLE Agreement. He was a manager and, therefore, an exempt employee. While he retained his seniority by taking a leave, this does not change his status as an exempt management employee. Exempt employees are not entitled to investigation under Article 51 and the Board lacks jurisdiction over any dispute involving the Claimant's dismissal from an exempt managerial position.

The Claimant was terminated from his exempt position and [was] no longer an employee. Therefore, he no longer held employment status. The Claimant was not exercising his seniority rights to return to work as a Locomotive Engineer from his exempt position. Rather, he was terminated and the employment relationship ended.

Rule 17 - Leave of Absence does not support the Organization's position to exercise his seniority and return to MOW or that the Claimant's dismissal is subject to a hearing. On-property Third Division Award 42842 addressed Rule 17 in a situation identical to the situation in this claim.

The Board finds no ambiguity in the phrase 'failure to satisfactorily 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.

According to the Carrier the Organization seeks to gain a bargaining rule through the grievance process that affords a managerial employee dismissed from service with the right to a hearing. This matter is subject to collective negotiations should the Organization seek a provision as other organizations have. That is, the right for managers to appeal dismissal through a hearing. Any attempt to use Rule 18 - Discipline and Grievances - - request hearing within twenty (20) days from date of incident - - fails because the Organization never requested a hearing and Rule 1 is clear - - the rules do not apply to an exempt official.

The following, in summary manner, is the Organization's response to the Carrier's position. During the time the Claimant occupied an exempt position he maintained and accumulated seniority pursuant to Rule 10 - Non-Exercise of Seniority and Rule 17 - Leave of Absence. A straightforward reading of Rule 17(b) shows that the Claimant is due an unquestioned and immediate ability to exercise his seniority under the CBA and return to a position in MOW. Undisputed is the Claimant's physical fitness for service in MOW notwithstanding his unsatisfactory fill in the exempt position. Even if the Claimant is not allowed to exercise his seniority in the craft, he retained seniority which is subject to extinguishment only after a fair and impartial hearing under Rule 18. The Carrier has improperly withheld the Claimant from service and dismissed him without regard to Rule 17 and Rule 18.

Third Division Awards 2941 and 6250, among others, support the Organization's position that a supervisor's craft seniority rights, established and maintained in accordance with the CBA, are not affected by the Carrier's decision to discipline or dismiss the employee while serving as a supervisor/exempt or non-schedule employee. Third Division Award 41808 shows a carrier failing to provide a fair and impartial hearing to determine any just cause for extinguishing the claimant's rights under an agreement constitutes an arbitrary, capricious and unreasonable deprivation of those rights.

The Claimant's seniority and employment within MOW is an express employment contract and part of the CBA. The Carrier terminated the Claimant from the at-will exempt position but the dismissal did not terminate the Claimant's employment under the CBA with Soo Line Railroad Company d/b/a CP. The Carrier recognized this situation when it advised the Claimant on April 1, 2019 to contact HR to return to his craft.

This claim is not about the Carrier's ability to terminate the Claimant from an at-will supervisory position but whether the Carrier can terminate the Claimant's seniority and other rights he maintains under the CBA without a hearing. The Claimant's seniority and MOW employment is not at-will but subject to the CBA. The Carrier's interpretation of Rule 17 renders Rule 18 meaningless. Invoking a leave of absence under Rule 17 does not mean the employee forfeits rights under Rule 18 or other rules.

The Board's adjudication of this claim involves an interpretation of Rule 1 - Scope where positions "above the rank of foreman" are not covered by the Agreement's provisions and rules and Rule 17 - Leave of Absence applied to the Claimant's dismissal and simultaneous severance of seniority rights. In carrying out its function, the Board considers the Agreement as a whole and gives effect to the provisions thereunder. In this regard, on-property Third Division Award 42842 (Award) is precedent addressing Rule 1 and Rule 17 involving the same circumstances arising under the same CBA.

It is noted . . . that all the provisions cited in support of the parties' contentions have a common thread. Rights and benefits flow to employees. Rule 1 Seniority . . . Rule 2 Seniority Datum . . . Rule 3 Consideration for Position Rights . . . Rule 4 Department Limits . . . Rule 10 Non-Exercise of Seniority . . . Rule 17 Leave of Absence . . . Rule 18 Discipline and Grievances[.]

Award 42842 concluded that once the employee was dismissed from his exempt position, he was no longer an employee with the Carrier and not covered by the Agreement and its provisions for seniority and hearing. This Board reaches the same conclusion, that is, the Carrier dismissed the Claimant on April 1, 2019 from an exempt position because he did not satisfactorily fill the position. As of April 1, 2019 the Claimant was no longer an employee with the Carrier. Without employment status, he was no longer covered by the CBA including seniority and hearing rules.

Argument presented by the Organization in this claim includes the argument in the Labor Member's dissent to Award 42842. Aside from disagreeing with the interpretation and application of Rule 17 in Award 42842, there is no reference, explicitly or implicitly, to the award as "clearly wrong on its face" or "palpably erroneous" - - the criterion in the applied by railroad referees when rendering a decision deviating from established on-property precedent. This Board will not deviate from the on-property precedent in Award 42842 as the Board finds no basis for doing so in the record of this proceeding.

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 March 2023.