

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7357
AWARD NO. 14, (Case No. 14)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

**CP RAIL SYSTEM/DELAWARE AND HUDSON
RAILWAY COMPANY, INC.**

William R. Miller, Chairman and Neutral Member
Kevin D. Evanski, Employee Member
Anthony Stillittano, Carrier Member

Hearing Date: December 20, 2013

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement when it refused to allow Mr. D.Vermulen, Sr. to exercise his seniority on November 14, 2011 and when the Carrier removed Mr. Vermulen's Maintenance of Way seniority without just cause (Carrier's File 8-00830).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that Mr. Vermulen's seniority be reinstated and that he be compensated for all losses, including wages, benefits, seniority rights and any other losses as suffered due to the Carrier's removal of Claimant's seniority beginning November 14, 2011 and continuing."**

FINDINGS:

Public Law Board No. 7357, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The undisputed facts indicate that prior to November 8, 2011, the Claimant was working a position covered by the American Railway Supervisors Association (ARSA) Agreement. On November 8th the Carrier dismissed from his ARSA position. During the time Claimant was working the ARSA position he retained and accumulated seniority under the BMW Agreement pursuant to Rule 4.

On November 14, 2011, Claimant attempted to exercise and displace a junior employee under the BMW Agreement, but the Carrier denied Claimant's attempt to exercise his seniority which led to the instant claim.

It is the Organization's position that the Claimant maintained an employment relationship with the Carrier via his protected Maintenance of Way seniority and the Carrier could not terminate that relationship without first providing the Claimant a fair and impartial Investigation as required by Rule 25 and the fact that the Carrier provided the Claimant a Hearing under a separate Agreement does not negate Claimant's right of a Hearing under Rule 25. Additionally, it argued there are no provisions under the BMW Agreement that allow for the termination of BMW seniority because of alleged violations under a different Collective Bargaining Agreement. It concluded by requesting that the termination of the Claimant's seniority be rescinded and the claim sustained as presented.

It is the position of the Carrier that it properly terminated the Claimant from its service under the ARSA Agreement and because of that dismissal he no longer had a connection as an employee and he had no right to a Hearing under the BMW Agreement. It argued that the right of the Claimant to exercise his seniority rights under the BMW Agreement was dependent upon an employee-employer relationship between the Claimant and the Carrier and when that relationship was properly severed because of the Claimant's actions while working as ARSA Supervisor the right to request a Hearing under the BMW Agreement was extinguished with his dismissal. It closed by asking that the discipline not be disturbed and the claim remain denied.

There is no dispute between the parties that the Claimant was dismissed from service on November 8, 2011, while covered by the ARSA Collective Bargaining Agreement and despite that Organization's best efforts the dismissal was upheld. As previously stated the Organization contended that the Claimant had the right to exercise his retained seniority rights under the BMW Agreement and the Carrier did not have a contractual right to prevent him from exercising seniority whereas the Carrier took the position that having been dismissed from employment while protected under the ARSA Agreement the Claimant no longer had any right or standing to exercise seniority rights under the BMW Agreement.

The Organization has relied upon Third Division Awards 2941, 35868 and Second Division Award 13171 which it believes stands for the proposition that the Claimant was entitled to a formal Investigation under its Agreement before the Claimant could be denied the opportunity to exercise his BMW seniority. The two Third Division Awards share a commonality that being that the Claimants in each of those cases was dismissed from non-Agreement positions which is different than the instant dispute where the Claimant was dismissed from an Agreement covered position. However, Second Division Award 13171 is similar to the instant case as it involved a furloughed Sheet Metal Worker, who also held seniority as a

Lineman under the IBEW Agreement. While working as a Lineman the Claimant was brought up on charges that resulted in his dismissal after a formal Investigation. That dismissal was upheld by Public Law Board No. 5531, Award No. 1. Subsequently, Award 13171 determined that under the specific circumstances of the case that the Carrier impermissibly removed Claimant from the S.M.W. seniority list without holding an Investigation under the S.M.W. Agreement.

Award 13171 noted that the Carrier contended that once a dismissal is upheld, any employment relationship was severed, making the cited rules inapplicable and that to accept the Organization's argument was contrary to the decisions of Special Board of Adjustment No. 279, Award 636; Public Law Board No. 3201, Award 20; Public Law Board No. 5157, Award 8; Public Law Board No. 4561, Award 27; Public Law Board No. 5311, Award 2; Second Division Award 11701; Fourth Division Awards 4704, 4103 and 3652. Additionally, Award 13171 mentioned that the Carrier asserted that to permit the Organization to use seniority rules in dual seniority cases was an attempt to deprive the Carrier of its right to discipline, citing Public Law Board No. 1758, Award 6 as supporting its position.

Award No. 13171 did not distinguish itself as being different from the aforementioned Awards on the basis of factual circumstances and/or different Rules thus leaving the question unanswered as to why it reached a different conclusion than those Awards. Because no explanation and reasoning was offered the Board finds that Award No. 13171 offers the Organization negligible support in this instance.

The Carrier offered six Third Division Awards and one Second Division Award for consideration which it asserted took the opposite position as expressed by the Organization's Awards. Third Division Award 39021 relied upon by the Carrier concerned the dismissal of a non-Agreement employee and it determined that it was not persuaded by the reasoning of Award 35868 (one of the Awards relied upon by the Organization). Despite its disagreement with the aforementioned Award it concluded by stating:

"The Board is of the opinion, however, that the employee's rights are not diminished to the extent of depriving him even of the right to have a Hearing on the issue of whether he was properly disqualified from asserting his seniority. Pending such a determination the Carrier would have the right to remove the employee from service.

Award 39021 was a denial decision that offers some credence to the Organization's argument that a non-Agreement employee is entitled to a Hearing, but it is not on point with the instant case that involves the dismissal of a Agreement covered employee. Some of the other Awards offered by the Carrier determined that dismissal from a managerial position severed the

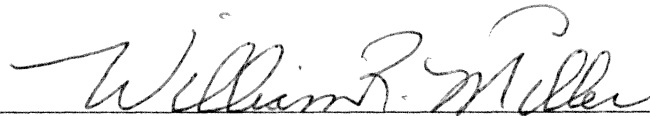
employee/employer relationship and that denied the employee any right to a formal Investigation. It is not unusual in this industry that the parties are able to present differing decisions on what appears to be the same issue, but often times that is attributable to the fact that the Rules on properties vary enough to lead to different conclusions. The Board believes that each case must be individually examined and resolved on its own particular merits.

Third Division Award 10348 offered by the Carrier is directly on point with the instant dispute as that case involved an employee who held seniority under the Order of Railroad Telegraphers and American Dispatchers and while working as an Extra Train Dispatcher he committed an offense that resulted in his dismissal. Claimant was represented by the American Dispatchers at a formal Investigation and that Organization was unable to secure the reinstatement of the Claimant after which the Telegraphers Organization argued that the Claimant had been improperly dismissed from its ranks without the benefit of a formal Investigation. The Board determined that there was no evidence that the Claimant was deprived of a "fair and impartial" Hearing under the Dispatcher's Agreement and it found no basis for requiring the Carrier to hold a second Investigation under the Telegrapher's Agreement.

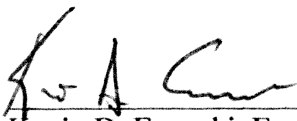
In the case at bar, the Claimant committed an infraction while working under the ARSA Agreement that resulted in the calling of a formal Investigation where he was represented by ARSA. The Carrier argued that the Claimant had a full, fair and impartial Hearing as is contemplated by the ARSA Agreement, that it was fairly conducted and Claimant was found to be at fault and the discipline was appropriate for the offense. The Carrier's argument was not effectively refuted. The Board is not persuaded in the instant dispute that the Carrier was required to hold another a Hearing or that it erred when it disallowed the Claimant's attempted displacement as his employee relationship with the Carrier had already been properly severed. The claim will remain denied.

AWARD

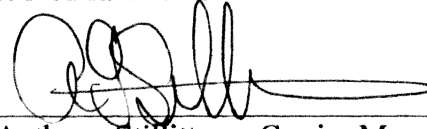
Claim denied.



William R. Miller, Chairman & Neutral Member



Kevin D. Evanski, Employee Member



Anthony Stillittano, Carrier Member

Award Date: Feb 13, 2014

written Dissent to Follow

LABOR MEMBER'S DISSENT
TO
AWARD 14 OF PUBLIC LAW BOARD NO. 7357
(Referee Miller)

A dissent is required in this case because the Majority erred when it concluded that the Claimant was not entitled to exercise his Maintenance of Way seniority rights and when it failed to enforce Rule 25.1 of the Maintenance of Way Agreement that requires a fair and impartial hearing be provided to employees prior to the issuance of any discipline. While the damage is done in this case, no future Board should make the same mistake and follow the Majority's findings in this dispute.

Initially, it is noted that the findings in the instant case attributes an argument to the Organization that was never made by the Organization or addressed by the Carrier. Yet, the Majority dedicated a majority of its findings on this issue. The pertinent part of Award 14 of PLB No. 7357 reads:

“Award 39021 was a denial decision that offers some credence to the Organization's argument that a non-Agreement employee is entitled to a Hearing ***”

The Claimant in this case was an agreement covered employee paying retention fees under the Maintenance of Way agreement and not a non-agreement employee paying retention fees under the Maintenance of Way agreement. Nowhere in this dispute did the Organization take the position that a non-agreement employee working as a supervisor is entitled to a hearing because it has nothing to do with this case. But the Majority focused on a distinction between Agreement employees retaining seniority under the Maintenance of Way Agreement and non-agreement employees retaining seniority under the Maintenance of Way Agreement. It is perplexing that the Majority embarked down this path when the Carrier's primary position was that the Claimant had his employment relationship severed once he was terminated as an ARSA employee and the Organization took the position that the Claimant's Maintenance of Way seniority could not be taken away without a fair and impartial hearing under the Maintenance of Way Agreement. Despite the Parties' arguments, the Majority focused its findings on a distinction between employees retaining seniority and working under an agreement and those retaining seniority and not working under an agreement.

The Majority's distinction is wrong because the seniority retention rule makes no such distinction but applies equally to all Maintenance of Way employees who are allowed to leave the Maintenance of Way craft and retain Maintenance of Way seniority. No group of employees are given superior seniority rights. Rule 4.9 reads:

“4.9 All employees promoted on or subsequent to the effective date of this Agreement to official, supervisory, or excepted positions from crafts or classes represented by BMWED shall be required to pay an appropriate

“monthly fee, not to exceed monthly union dues, **in order to retain and continue to accumulate seniority.** An employee occupying an official, supervisory or accepted position 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.” (Emphasis Added)

Not only does the Agreement rule support the Organization's position, but the Organization's position was supported by the awards cited in the Organization's submission. Even if the distinction discussed above was a controlling determination, the Organization provided precedent addressing a dispute involving an agreement employee retaining seniority while working under a separate agreement. Yet the Majority dismissed it as only providing negligible support. The findings, in pertinent part, read:

“*** However, Second Division Award 13171 is similar to the instant case as it involved a furloughed Sheet Metal Worker, who also held seniority as a Lineman under the IBEW Agreement. ***

* * *

Award No. 13171 did not distinguish itself as being different from the aforementioned Awards on the basis of factual circumstances and/or different Rules thus leaving the question unanswered as to why it reached a different conclusion than those Awards. Because no explanation and reasoning was offered the Board finds that Award No. 13171 offers the Organization negligible support in this instance.”

While the Majority acknowledged that National Railroad Adjustment Board (NRAB) Second Division Award 13171 is “similar” to the instant case, it incorrectly ignored its precedential value because it allegedly offered “no explanation” of its reasoning or why it disagreed with other awards. However, a review of NRAB Second Division Award 13171 demonstrates it clearly described its reasoning as follows:

“Although this is a rules case, there is no dispute that Claimant maintained his seniority as a furloughed S.M.W. while he was working as a lineman under the I.B.E.W. Agreement. Under the instant Agreement, that seniority entitled him to certain rights, including the right to an Investigation prior to having his seniority taken away. That right appears to this Board to be independent of any similar right he may have had under the I.B.E.W. Agreement. **While there is no doubt that**

“Carrier must be permitted to rely upon Claimant’s conduct while in its employ to discipline him, regardless of which craft he is working in, and that theft has been held to be an offense meriting dismissal, Claimant has a right to an investigation under this Agreement which includes consideration of his S.M.W. seniority, prior to losing that seniority.” (Emphasis Added)

The Majority acknowledged that the Organization cited an award which was “similar” to the case involved herein but the Majority gave NRAB Second Division Award 13171 “negligible” precedential value for failing to explain its reasoning and its alleged disagreement with awards that were not cited as controlling by either party. Instead, those awards were string cited in the Carrier argument section of NRAB Second Division Award 13171, a majority of these awards this Labor member could not even locate. Moreover, because none of these awards were provided by either party it is not known if they were contrary to NRAB Second Division Award 13171 or if they considered similar facts and Agreement rules. The Majority’s finding is wrong and the reasoning of NRAB Second Division Award 13171 is clear and strong and should have been applied to the instant case.

Unfortunately, this was not the extent of the Majority’s error in this case. The Majority went on to find that: *“*** The Carrier argued that the Claimant had a full, fair and impartial Hearing as is contemplated by the ARSA Agreement, that it was fairly conducted and Claimant was found to be at fault and the discipline was appropriate for the offense. The Carrier’s argument was not effectively refuted. ***”* (Award 14 of PLB No. 7357, Page 4). This finding is wrong for at least two (2) reasons. First, at no time during the handling on the property did the Carrier supply the Organization with any information about a hearing held under the ARSA agreement, but instead supplied all of the information for the first time in its submission to the Board. Thus, the Organization had no opportunity to address the investigation held under that Agreement, which is exceedingly unfair to the Claimant and not in compliance with the well established practice of rejecting argument and evidence not provided during the on-property handling. Additionally, the Organization maintained at all times that the Carrier could not remove the Claimant’s Maintenance of Way seniority without a formal investigation provided under the Maintenance of Way Agreement. This necessarily includes the argument that a hearing under the ARSA agreement does not meet compliance under the Maintenance of Way Agreement.

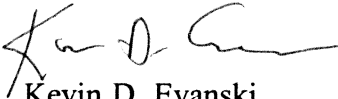
Second, and more significantly, a hearing under the ARSA Agreement cannot effectively remove the Claimant’s seniority rights under the Maintenance of Way Agreement and the Board had no jurisdiction to make such a finding. It is noted that its common knowledge that there are different agreement and operating rules as well as different responsibilities and duties between the two (2) crafts. Thus, alleged wrongdoing in one craft does not automatically equate to wrongdoing in another class.

NRAB Third Division Award 41808, which was adopted by the Third Division on February 27, 2014 [two (2) weeks after the instant award was adopted] was also on point with this case and supported the Organization's position. The pertinent part of that award held:

“*** 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 BMW 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.” (Emphasis Added)

NRAB Third Division Award 41808 correctly held that an employee’s Maintenance of Way seniority cannot be terminated without the Carrier’s compliance with the fair and impartial hearing provision of that Agreement. Accordingly, in the case at bar, the Carrier could not terminate the Claimant’s seniority rights without providing the Claimant a formal investigation under Rule 25 of the Agreement. The Majority’s findings are mis-conceived and based on a distinction not supported by the terms of the seniority retention rule of the controlling agreement. Moreover, the Board exceeded its jurisdiction because it applied actions that occurred under the terms of the ARSA agreement to the Claimant’s rights under the Maintenance of Way Agreement. For all the reasons stated herein, this award is fundamentally flawed and has zero precedential value. Therefore, I emphatically dissent.

Respectfully submitted,



Kevin D. Evanski
Employee Member