

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF FACTS:

Nature of the Case

R. B. Young ("the Claimant") began his employment with the Carrier on July 7, 1998. On September 7, 2003, he was granted a leave of absence to accept a position as a Train Dispatcher with the same Carrier, CSX Transportation, but covered by another collective bargaining agreement. Pursuant to Rule 8 of the CSX/BMWE Agreement, the Claimant protected his BMWE seniority by continuing to maintain retention fees with BMWE. He was dismissed from his Dispatcher position on October 8, 2009, for disciplinary reasons and filed an appeal under the CSX/Dispatchers Agreement. The charged offense involved allegedly failing to determine that conflicting train movement had been authorized and allegedly failing to interact with another Dispatcher thereby causing two opposing passenger trains to occupy the same segment of track.

During the pendency of the appeal the Claimant applied to return to service in the BMWE bargaining unit pursuant to Rule 7 of the BMWE Agreement. At first the Carrier told him that he would be able to do so if he passed a medical examination. The Claimant passed the examination and was allowed to return to the BMWE unit. After one day on the job, however, the Carrier informed him that he had forfeited his seniority by failing to exercise it in a timely manner after being dismissed from the Dispatcher position. It thereafter dismissed him from employment with the Carrier. The Organization appealed his dismissal from the BMWE bargaining unit by letter to the Carrier dated April 8, 2010.

The Carrier denied the appeal. The parties agreed to submit the dispute to this Board for expedited determination.

Additional Facts

According to the Organization's appeal letter of April 8, 2010, "An appeals discussion took place in January 2010 at which time there was a proffer of reducing the discipline and returning him [the Claimant] to work as a dispatcher. Subsequently the proffer was withdrawn and the case continues through the Appeals process of the Dispatchers Agreement."

The April 8, 2010, letter from the Organization to the Carrier states that because the appeal procedure under the Dispatchers Agreement "is a lengthy procedure Mr. Young decided to utilize his BMW rights in accordance with Rule 7 paragraph (b) [sic] while waiting for the final determination." Rule 7 (c) of the CSX/BMW Agreement provides, "The employee may return to service prior to the full completion of the leave of absence upon giving one (1) days' advance notice to the Designated Officer."

Copies of email correspondence that are part of the record in this case, together with the April 8, 2010, appeal letter, show the following facts with regard to the Claimant's efforts to return to the BMW bargaining unit. In the beginning of March, 2010, the Claimant informed CSX Staff Engineer Chris Lorensen of his desire to exercise his seniority and displace to the Engineering department. A Carrier official (apparently from labor relations) sent a copy of the October, 2009, dismissal letter to the CSX law department on March 2, 2010, with the information that the Claimant had maintained seniority in the BMW Organization and intended to displace to the Engineering department. The Carrier official inquired of the law department, "Does Mr. Young have a displacement right for an Engineering position or is he dismissed from CSX

Transportation entirely?”

The Carrier official who submitted the inquiry notified Staff Engineer Lorensen by email dated March 11, 2010, that based on the response from the law department, “Mr. Young would be allowed to displace in to Engineering once he becomes medically qualified.” According to the April 8, 2010, appeal letter, and not disputed by the Carrier, Mr. Young had a physical examination on March 8, 2010, arranged by the Carrier, and was medically certified on March 12, 2010.

The appeal letter further asserts: “He [the Claimant] returned to work on March 17, 2010 and performed service on that day. On that night after work he was notified that he was being removed from service.” The record in this case contains no challenge by the Carrier to the Organization’s assertions that the Claimant returned to work on March 17, 2010, and performed service on that day. The assertions are supported by an email in the record dated March 17, 2010, from Chris Lorensen to two Carrier officials, stating, “Mr. Young has indeed made a bump into Selkirk; however his seniority needs to be restored on the BMWED rosters. Please advise.”

By letter dated March 22, 2010, the Director Labor Relations - Engineering notified Mr. Young that because he “failed to attempt any displacement or exercise a return to service in the BMWWE craft until March 17, 2010, more than five (5) months from the effective date of [his] release as a Dispatcher, it has been determined that the self executing provisions of Rule 4, Section 2 (b) . . . have resulted in the forfeiture of all BMWWE seniority rights, thus wholly terminating [his] relationship with the carrier.”

Carrier’s March 22, 2010, Termination Letter and June 1, 2010, Appeal Response

The Carrier’s March 22, 2010, termination letter and June 1, 2010, answer to the Claimant’s appeal set forth the contractual basis for the Carrier’s action in denying the

Claimant the right to exercise seniority in March, 2010, to return to the BMW bargaining unit and for the subsequent denial of his appeal. The Carrier's reasoning will here be summarized.

Once the Claimant was terminated as a Dispatcher, he had an obligation to exercise his rights back to the Maintenance of Way craft or risk forfeiture of his seniority. Rule 5 deals with the return to work from a leave of absence. If during a leave of absence an employee's position is abolished, Rule 5 (b) gives the employee the right to exercise seniority under Rule 4, Section 2.

The specific position to which the Claimant was assigned at the time he began his leave of absence was abolished on December 26, 2008. He was therefore required to exercise his rights in accordance with Rule 5 (b) and Rule 4, Section 2. Rule 4, Section 2 (b) states that "An employee entitled to exercise seniority must exercise seniority within ten (10) days after the date affected" and further provides that "Failure to exercise seniority to any fixed headquartered position not requiring a change in residence shall result in forfeiture of seniority." With respect to the Claimant, the "date affected" was his dismissal from the Dispatcher's position on October 8, 2009. Within the ten-day period, he could have exercised seniority to a Trackman's position on 5Q37 headquartered in Selkirk Yard, Selkirk, New York, which is approximately 7.83 miles from his residence and which would not have required a change of residence. By waiting until March, 2010, to exercise seniority – a period of more than five months after his dismissal as a Dispatcher – the self-executing provisions of Rule 4, Section 2 (b) effected the forfeiture of all of the Claimant's BMW seniority rights and terminated his employment with the Carrier.

The Carrier's Position

In its submission to this Board the Carrier asserts that the Claimant's dismissal as a Train Dispatcher effectively terminated his leave of absence. Rule 5 (b) and Rule 4, Section 2 therefore came into play, the Carrier contends, and required the Claimant to exercise seniority "within ten (10) days after the date affected." The "date affected", according to the Carrier, was the date of the Claimant's termination as a Dispatcher, which was also the date that his leave of absence ended. By failing to exercise seniority to displace into a Trackman position which was available within the ten-day period approximately 7.83 miles from the Claimant's home, as he was required to do under Rule 4, Section 2 (b) to avoid the forfeiture of his seniority, the Carrier argues, the Claimant thereby lost his seniority. In support of its position the Carrier cites several awards which, it asserts, establish that "when a rule contains a self-executing provision, and the employee fails to make the required exercise of seniority, that employee has forfeited their seniority."

The Carrier concludes that since Claimant Young did not have a legitimate excuse for not making a seniority move at the time that his leave of absence ended, it is clear that the self-executing provisions of Rule 4 were triggered and that he relinquished all seniority in the Engineering department. He could not, consistent with the applicable Rules of the Agreement, the Carrier contends, wait five months to make a displacement or seniority move to return to the Maintenance of Way craft. The Carrier urges the Board to deny the Organization's claim in its entirety.

The Organization's Position

The Organization contends that Rules 4, 5, 7, and 8 did not permit the Carrier to

terminate the Claimant's seniority in the BMW bargaining unit and that he had the contractual right to exercise his seniority to return to the unit in March, 2010, when he requested to do so. The Organization argues that the Claimant was on a leave of absence when he expressed his intention to exercise his seniority to return to the BMW unit; that the Carrier never took exception with the fact that he was on a leave of absence; and that "the Carrier definitely cannot ignore the leave of absence rules and manufacture a triggering event out of whole cloth."

The Organization attaches great weight to the fact that the Claimant originally was permitted to exercise seniority to return to the BMW unit from leave of absence status, after a review of the issue by the Carrier's law department, and that only after he was allowed to exercise seniority to return from the leave with the concurrence of the law and labor relations departments, did Engineering take the position that he had forfeited his seniority by failing to exercise it sooner. The Organization contends that Claimant was properly permitted to return to service by the Carrier's law department on the condition that he was medically qualified and that the Carrier acted arbitrarily in terminating his seniority after he met the medical qualifications and returned to work. The Organization argues that "the Carrier's contention that Claimant should have displaced on an earlier date is not supported by probative evidence, nor in concert with a full reading of the applicable rules and the aforementioned e-mails."

The Organization asserts that the Claimant maintained his seniority pursuant to Rules 7 and 8 and that he was never notified of any forfeiture. The argument that he forfeited his seniority is belied, the Organization contends, by the language in Rule 7 (d) that states, "An employee given a leave of absence will retain and accumulate seniority during the period of such leave of absence." He properly exercised his right to return to

the BMW unit, the Organization maintains, pursuant to Rule 7 (c), which states, “The employee may return to service prior to the full completion of the leave of absence upon giving one (1) days’ advance notice to the Designated Officer.”

The Organization disputes the Carrier position that the Claimant’s dismissal from the Dispatcher position was a “triggering event” that terminated his leave of absence. It contends that the fact that the Carrier’s law and labor relations departments approved the Claimant’s exercise of seniority to return to the BMW unit is inconsistent with the Carrier’s position that the Claimant’s October, 2009, dismissal from his Dispatcher position ended his leave of absence. “The fact that the Carrier attempted to raise this alleged October 2009 triggering event for the first time in March of 2010 and only after the Claimant was properly allowed to return to service,” the Organization argues, “also shows the Carrier’s actions were arbitrary.” The Organization requests the Board to sustain the claim and to order that the Claimant be “compensated for all losses suffered because of Carrier’s improper termination of his seniority.”

Analysis and Conclusions

The Board will first reproduce the contractual provisions relied on by the parties in support of their respective positions:

RULE 4 - SENIORITY

* * *

Section 2. Exercise of seniority.

(a) Except as otherwise provided, an employee may exercise seniority to a position for which he is qualified:

* * *

6. when returning from leave of absence, sickness, jury duty, disability, special duty, vacation or suspension and his former position has been abolished or filled in the exercise

of seniority;

* * *

(b) An employee entitled to exercise seniority must exercise seniority within ten (10) days after the date affected. Failure to exercise seniority to any fixed headquartered position not requiring a change in residence shall result in forfeiture of seniority. If he presents evidence to his supervisor that extenuating circumstances prevented the exercise of seniority, the ten (10) days specified above shall be extended proportionately to the extent of his absence on account of such circumstances. . . .

* * *

**RULE 5 - RETURN TO DUTY AFTER LEAVE OF ABSENCE, SICKNESS, ETC.
- EXERCISE OF SENIORITY**

(a) With the exception of Rule 4 Section 4, and Rule 8 of this Agreement, an employee returning to duty after leave of absence, vacation sickness, jury duty, disability, or suspension shall return to his former position and may, within five (5) days after his return to his former position, exercise displacement to any position in any classification advertised during his absence or may displace any junior employee promoted during his absence, subject to Rule 3, Section 1. However, if the position no longer exists or is filled by a senior employee before he is able to exercise the displacement, within thirty (30) days of his return, he shall make a written request to the Designated Officer requesting the same seniority date (one rank ahead) of the junior employee promoted subject to Section 1 of Rule 3.

(b) If, during such absence, his former position is abolished or filled by another employee in the exercise of seniority, he may exercise seniority as outlined in Rule 4, Section 2 or may displace any junior employee in any class promoted during his absence, subject to Rule 3, Section 1.

* * *

RULE 7 - LEAVE OF ABSENCE

(a) When requirements of the service will permit and if satisfactory reason is given therefor, employees, upon written request, shall be granted leave of absence for a limited time, without loss of seniority. If for thirty (30) days or less, request must be made to the employee's supervisor. If more than thirty (30) days, request must be made to the Designated Officer, in writing, with a copy to the designated union representative. Leave of absence in excess of ninety (90) days shall not be granted unless agreed to between carrier's Highest Designated Labor Relations Officer and the General Chairman. Employees failing to return when leave of absence expires will forfeit seniority unless proper extension has been obtained.

* * *

(c) The employee may return to service prior to the full completion of the leave of absence upon giving one (1) days' [sic] advance notice to the Designated Officer.

(d) An employee given a leave of absence will retain and accumulate seniority during the

period of such leave of absence.

* * *

RULE 8 - ACCEPTING POSITIONS UNDER OTHER AGREEMENTS

An active employee may be granted a leave of absence to make application for or accept a position coming within the scope of any other craft agreement. Such employee will have his seniority protected in the BMWWE provided he continues to maintain retention fees with the BMWWE. If he fails to maintain his monthly fees during the time on leave, he will forfeit all BMWWE seniority. The carrier will advise him/her of such forfeiture by Certified Mail within ten (10) days of receipt of such notice from the Organization.

The Carrier contends that the Claimant forfeited his seniority because he was entitled to exercise seniority pursuant to Rule 4, Section 2 (a) 6 and thereafter failed to do so within ten days "after the date affected" as required by Rule 4 (b). The "date affected," the Carrier asserts, was the date he was terminated from his Train Dispatcher position, October 8, 2009. On that date, in the Carrier's interpretation of the Agreement, the Claimant's leave of absence terminated.

The parties are not in agreement that the Claimant's leave of absence from the BMWWE bargaining unit terminated when he was terminated from his Dispatcher position. Even, however, if, for the sake of argument, we accept that his leave of absence terminated at that time, that would not bring the Claimant's situation within the coverage of Rule 4, Section 2 (a) 6. Subsection 6 of Rule 4, Section 2 (a), so far as here applicable, covers the circumstance of someone "returning from leave of absence." Claimant Young did not return from leave of absence on October 8, 2009. He made no effort to return until on or about March 1, 2010, and actually returned on March 17, 2010, after he passed a medical examination. One might argue that the Claimant should have returned on that date, but clearly he did not. Termination of a leave of absence and returning from a leave of absence are not synonymous. The Board finds that Claimant Young did not return to the BMWWE bargaining unit from a leave of absence on October 8, 2009, and that therefore Rule 4, Section 2 (a) 6 did not apply to his situation as of that date.

The Carrier also relies on Rule 5 on the basis of which it argues that the Claimant could

have exercised seniority in October, 2009, to displace someone into a Trackman position headquartered in Selkirk yard, Selkirk, New York. The same observation, however, applies to Rule 5 as to Rule 4, Section 2 (a) 6 : Rule 5 covers someone who is actually returning to duty after a leave of absence, not to someone who could have returned had he wanted to. Claimant Young did not return to duty in October, 2009. Rule 5 is therefore not applicable to his claim. Moreover Rule 5 begins with the phrase, “With the exception of Rule 4 Section 4, and Rule 8 of this Agreement” (emphasis added). It is therefore questionable whether Rule 5 even applies to a Rule 8 situation. This Board does not pass on that question.

The Board will now address the question of whether Claimant Young was required to exercise seniority to return to the BMW bargaining unit when he was dismissed from his Dispatcher position. The Board believes that the most pertinent contract language on that issue is the last sentence of Rule 7 (a): “Employees failing to return when leave of absence expires will forfeit seniority unless proper extension has been obtained.” The quoted sentence raises two questions. Did Mr. Young’s leave of absence expire with his dismissal from his Dispatcher position? If it did, did the Carrier grant him an extension of the leave?

It should be noted that the fact that Mr. Young may have continued to pay monthly fees to the Organization would not by itself serve to extend his leave of absence. This is so because Rule 8 contains the sentence, “If he fails to maintain his monthly fees during the time on leave, he will forfeit all BMW seniority.” Thus seniority is maintained by paying monthly fees while on leave. The critical question here therefore is whether the employee was on leave, not whether he paid his fees. Paying one’s fees while not on leave and otherwise unemployed by the Carrier will not serve to maintain one’s seniority. The employee must both be on leave and pay his fees.

To be considered on leave, an employee must maintain some connection with the Carrier. The connection which the Claimant retained with the Carrier in the present case after his dismissal from the Dispatcher position was that he still had the right of appeal of his dismissal. In fact, he did file an appeal , which was denied by the Carrier. He has also appealed the

Carrier's denial of his internal appeal, and that appeal is before this Board. The question which arises is whether a leave of absence to accept a position within the scope of another craft agreement is to be construed as also covering the necessary time to appeal a contested dismissal from the other craft position. If so, should the extension apply only to the internal appeal or both to the internal and the external appeal?

The Board believes that it need not answer those questions in this case because the Carrier has waived any claim it might have had of forfeiture of seniority by permitting the Claimant to return to work in the BMW unit on March 17, 2010. The concept of waiver is explained in E. Allan Farnsworth, Contracts (1982) §8.5:

§8.5 Excuse of Condition by Waiver. . . . A common ground for excuse of a condition is that, after the contract was made, the obligor promised to perform his duty despite the nonoccurrence of the condition or despite a delay in its occurrence. An owner whose duty to make progress payments is conditional on the contractor's furnishing architect's certificates may excuse that condition by promising to make payments without certificates. The promise may be made either before or after expiration of the time during which the condition must occur. The obligor's promise to perform is not effective unless he knows or at least has reason to know of the essential facts, but his knowledge of his legal situation and of the legal effect of his promise is immaterial.

A promise of this kind is generally termed a *waiver*, a word that has provoked much discussion. Although it has often been said that a waiver is "the intentional relinquishment of a known right," this is a misleading definition. What is involved is not the relinquishment of a right and the termination of the reciprocal duty but the excuse of the nonoccurrence or of a delay in the occurrence of a condition of a duty. The owner who leads the builder to believe that progress payments will be made without architect's certificates "waives" the condition, since the owner's duty to pay is no longer conditional

on certificates. . . . (footnotes omitted).

A waiver is by no means limited to architect's certificates. For example, the Farnsworth treatise cites the case of Schultz v. Los Angeles Dons, 107 Cal. App. 2d 718, 238 P.2d 73 (1951), where "professional football player's failure to give written notice of injury as condition of club's duty to pay full season's salary was waived when head coach and trainer supervised examination and treatment after oral notice." The treatise also cites Clark v. West, 193 N.Y. 349, 86 N.E. 1 (1908) in which "author's abstinence from liquor while writing book as condition of publisher's duty to pay additional sum was waived when publisher with 'full knowledge of the . . . non-observance of that stipulation . . . not only accepted the completed manuscript without objection but repeatedly avowed and represented . . . that he . . . would receive said royalty payments'"

In the present case the Carrier set up a medical examination for Claimant Young that was necessary for him to pass in order to be eligible to return to work, and actually allowed him to return to work in the BMW unit, with full knowledge that he had been dismissed from his Dispatcher's position five months earlier and had not requested an extension of his leave of absence. That the Claimant actually returned to a job in the BMW unit is clear from Staff Engineer Lorensen's email of March 17, 2010, which states, "Mr. Young has indeed made a bump into Selkirk. . . ." The Carrier thereby waived the condition that the Claimant receive an extension of his leave of absence, assuming that the condition applied under the facts of the present case.

The Claimant is entitled to reinstatement to employment in the BMW unit without loss of seniority as the result of his dismissal on March 22, 2010, from employment with the Carrier and to be made whole for all lost wages and benefits as a result of that dismissal. The Carrier is entitled to a reduction from back wages otherwise due for earnings by the Claimant from other employment during the period of said dismissal and to any other deductions that may be appropriate in accordance with the practice of the parties.

It should be noted that this is not a case where the Claimant was dismissed from his

position in the other craft's bargaining unit for some heinous offense that would have made him unfit to hold any job with the Carrier. On the contrary, the Carrier's argument in this case concedes that the Claimant would have been permitted to exercise seniority to return to the BMW unit had he only requested to do so on a timely basis.

Further, it should be noted that the doctrine of waiver has limited application. Thus the Farnsworth treatise states:

The concept of waiver . . . has been responsible for substantial erosion of the rule of strict compliance generally applicable to conditions. To keep this erosion in check, the concept of waiver is restricted to conditions that are relatively minor. An owner who has made an option contract to sell his land on condition that he is paid \$100,000 cannot waive this condition. Nor can an obligor waive a condition that is material to the likelihood of his having to render his own performance. An insurance company that has promised to pay a homeowner \$100,000 on condition that his house is destroyed by fire cannot waive that condition. Parties can most easily waive conditions that are essentially procedural or technical, such as the furnishing of architect's certificates. Waiver is often invoked to excuse delay in the occurrence of a condition, and courts have been especially receptive to claims that an insurer has waived the insured's delay in giving notice of loss. Farnsworth, supra, §8.5 at 565. (footnotes omitted).

In the present case the condition which the Board has found to have been waived, namely, obtaining an extension of the leave of absence upon its expiration, is essentially procedural.

Finally the Board notes that it has read all of the awards cited by the Carrier. None of them involved a waiver or a claim of waiver. They are therefore inapposite to the present case.

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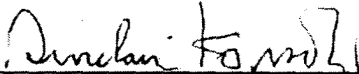
Award No. 89
Case No. 89

A W A R D

Claim sustained.

O R D E R

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



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
April 10, 2011