

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 63

Carrier File No. 1MWB 92-03-02C

Organization File No. S-P-464-T

STATEMENT OF CLAIM

1. The Agreement was violated when, after having been dismissed on November 15, 1991 from an exempt position (Trainmaster), Mr. M. J. Forgey was precluded from exercising his Maintenance of Way seniority onto a track foreman position at Kettle Falls, on December 10, 1991.

2. The Agreement was further violated when the Carrier terminated the Maintenance of Way seniority of Mr. M. J. Forgey without affording him a fair and impartial investigation as required by Rule 40.

3. As a consequence of the violations referred to in Parts (1) and (2) above, Claimant M. J. Forgey shall be reinstated to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered beginning on December 10, 1991.

F I N D I N G S

The Claimant held seniority within several Maintenance of Way and Structures Department classes. Prior to November 15, 1991, he was promoted from a Maintenance of Way position to an exempt

supervisory position as Trainmaster. By letter dated November 20, 1991, he was advised in pertinent part as follows:

Effectively immediately you are relieved of your position as Trainmaster at Kettle Falls, Washington, and dismissed from the service of Burlington Northern Railroad. . . .

If you disagree with this decision, the company policy allows you to request an Internal Complaint Resolution procedure and/or Arbitration. . . .

The record shows the dismissal was for alleged cause. The Claimant thereafter sought placement under his seniority as a Section Foreman. To this, the Carrier replied in part as follows:

As a dismissed employee, your employment file has been closed and your name removed from all seniority rosters. Therefore, your letter of December 2, 1991 indicating your intent . . . to displace the Section Foreman at Kettle Falls . . . is respectfully declined.

The Organization contends that the Claimant's seniority rights survive his service in an exempt position and that he may not be removed from a Maintenance of Way position to which such seniority entitles him without an investigation under Rule 40. The Organization points to Rule 16, which states in part as follows:

C. An employe relieved from an official or supervisory position with the Company . . . may, within thirty (30) calendar days thereafter, exercise seniority over a junior employe in accordance with Rule 8 . . .

In this instance, the Claimant was not simply "relieved" from an exempt position. His employment with the Carrier was terminated, and he was offered certain appeal rights arising from such exempt status. In accepting an exempt position, the Claimant had placed himself at the discretion of the Carrier as to his continued

employment, subject to certain Carrier-initiated appeal rights. Despite holding certain seniority rights if and when, as an employee, he returned to the bargaining unit, the Claimant had no contractual protection against his employment termination in his status as an exempt employee.

Further, the concept set forth by the Organization that a Rule 40 investigation was required is not applicable. The Claimant's termination of employment involved his conduct as a Trainmaster. A Rule 40 investigation, concerned with alleged conduct of employees in bargaining unit duties, would hardly be appropriate.

Public Law Board 3408, Award No. 111 (Marx), as cited by the Carrier, is of relevance here. That Award stated:

The Board finds the Organization's position is correct in instances where an employee leaves exempt status while still holding employment status with the Carrier. Here, however, the Claimant was terminated from employment for alleged cause. While the Carrier has the option (which in many cases is elected) simply to release the [employee] from his exempt status, it is not required to do so. Rather, the Carrier elected to terminate the Claimant.

In support of this position, the Carrier cites Fourth Division Award No. 2511 (Bailer) as well as others following the same reasoning. Fourth Division Award No. 2511 states in pertinent part as follows:

In order for this Board to hold that Claimant's termination was improper it would be necessary to find that Carrier violated an enforceable limitation on its otherwise unrestricted right to terminate employees with or without cause. But there was no contractual limitation on Carrier's right to terminate Claimant, since his employment was not covered by any agreement.

A W A R D

Claim denied.

Herbert Marx, Jr.  
HERBERT L. MARX, Jr, Chairman and Neutral Member

Mark J. Schappaugh  
MARK J. SCHAPPAUGH, Employee Member

D. J. Merrell  
D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: July 16, 1993