

AWARD NO. 548

Case No. 548

Organization File No. DRA300221

Carrier File No. 21-88336

PUBLIC LAW BOARD NO. 7163

PARTIES) BROtherHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
) INTERNATIONAL BROtherHOOD OF TEAMSTERS
TO)
)
DISPUTE) CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier failed and refused to allow Mr. D. Hagen to exercise his seniority in the Maintenance of Way Department after returning from a supervisory position beginning on February 10, 2021 and instead dismissed him without written proper notification of a hearing, affording him a fair and impartial hearing, nor providing proper notification of his dismissal as required by Rule 25 (System File DRA 300221/21-88336 CSX).

2. As a consequence of the violation referred to in Part 1 above, ‘... the Carrier must clear all mention of the matter from Claimant’s personal record. This loss includes, but is not limited to, any straight time, overtime, double-time or other Carrier provided compensation lost as a consequence of the discipline. It also includes healthcare, credit rating, investment, banking, mortgage/rent or other financial loss suffered because of the discipline.’

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 20, 2008, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

The material facts in this case are substantially undisputed. Claimant entered service in the Maintenance of Way Department on August 2, 2010. He was subsequently promoted to a management position that is not covered by the parties' Agreement. While in that position, he continued to accrue seniority in the Maintenance of Way craft through his payment of Union dues. On February 1, 2021, the Carrier informed him that he was "dismissed in all capacities." On February 10, 2021, Claimant attempted to exercise his seniority to a covered position. The Carrier denied Claimant's displacement, precipitating the claim herein.

The Organization contends the Carrier's denial of Claimant's displacement request was a violation of Rule 25 of the Agreement, which governs discipline, hearings, and appeals. The Rule provides, in pertinent part, that "employees shall not be suspended nor dismissed without a fair and impartial hearing." Citing arbitral precedent, the Carrier argues that employees who are promoted to management positions become exempt employees and are no longer protected by the collective bargaining agreement even when they pay Union dues.

The Organization has cited Awards the Board finds to be persuasive. As early as 1945, the Third Division, NRAB found that an employee's dismissal from her excepted position did not affect her right to exercise her seniority and displace a junior employee under the Clerks' Agreement. (Award No. 2941, Ref. Edward F. Carter) In Award 6250, the Third Division enforced the right of a discharged supervisory employee to an investigation under the Conductor's Agreement prior to termination of his seniority rights under that Agreement. (Ref. Frank Elkouri) Public Law Board No. 5454 (UTU-Yardmasters and Burlington Northern, Ref. John C. Fletcher) held:

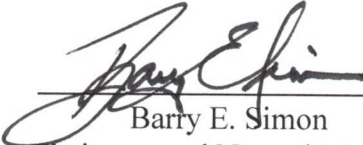
When Rule 15 is read in connection with Rule 22, the only conclusion that can be reached is that Carrier erred when it failed to allow Claimant the opportunity to exercise

seniority as a yardmaster and then proceeded to take away his seniority without an investigation. While Claimant was charged with a serious breach of Carrier employment standards while working as an exempt employee, and this breach may well have resulted in his termination as a yardmaster, as was the subsequently developed situation with his clerical status, this result cannot be presumed without affording him the entitlements provided by the Yardmaster's Agreement.


The Board finds these decisions to be persuasive. The Carrier has not denied Claimant had retained his craft seniority during his tenure in a management position by virtue of his continued payment of Union dues. Under Rule 25, that seniority can be taken from him only after "a fair and impartial hearing." Unless such a hearing had been conducted, Claimant was entitled to exercise his seniority. It is irrelevant to this dispute as to why the Carrier removed Claimant from his management position. If his offense was serious enough, the Carrier could have charged him under the Agreement and deferred his exercise of seniority pending the outcome of the hearing. It could not, however, deny him his right to a hearing under the Agreement.

We find that the Agreement was violated in this case. We will direct that Claimant be returned to service and made whole for all wages and benefits lost, subject to deduction for outside earnings.

AWARD: Claim sustained in accordance with the above Findings. Carrier is directed to comply with this Award within 45 days.


Barry E. Simon
Chairman and Neutral Member


Ross Glorioso
Employee Member


John Ingoldsby
Carrier Member

Dated: March 18, 2024
Arlington Heights, Illinois

**CARRIER MEMBER'S
DISSENT
To
PLB 7163 AWARD No. 548**

Brotherhood of Maintenance of Way Employees & CSX Transportation, Inc.

(Referee B.E. Simon)

A review of the Award issued by the Board indicates, without doubt, the Board erred in its decision when it asserted, incorrectly, that there was a violation by the Carrier of Agreement Rule 25-when it dismissed Claimant in all capacities while serving in an exempt position not covered by the parties' Agreement. Claimant's dismissal in all capacities thus severed any seniority rights maintained by Claimant and the Carrier properly denied Claimant the ability to return to a covered position.

The facts of the case are substantially undisputed. On August 2, 2010, the Carrier hired Claimant. On February 1, 2021, Claimant was dismissed in all capacities from his management position by the Carrier, which is not disputed as outlined in the record. The reason Claimant was dismissed in all capacities was because he falsified FRA documents. After Claimant was dismissed in all capacities, he attempted to make a displacement on February 10, 2021, which is not disputed as outlined above in the Organization's original claim.

The Organization relies on Article 25 related to hearings and dismissals for **covered employees**: *Except as provided in Section 2 of this Rule, employees shall not be suspended nor dismissed from service without a fair and impartial hearing nor will an unfavorable mark be placed upon their discipline record without written notice thereof.* It cannot be emphasized enough that the provision does not apply to those employees who are serving the Carrier in a capacity as an at-will employee, as here, in a managerial capacity. The payment of dues to the Organization while serving as a manager serves only to preserve an employee's seniority in the event the employee chooses to return to the craft while employed by the Carrier.

While it is a reasonable question to address whether the right to a hearing prior to dismissal of a non-covered employee exists, this is not a case of first impression. Therein lies the issue. On this very Board between the parties are three recent Awards which specifically produce the opposite result than the instant case. Included in the list below are the cases which support the Carrier's position. The Awards cited by the Board in the Award involve different crafts or groups of employees not involved here including clerks, conductors and yardmasters. Those Awards also involve other Carriers including Southern Pacific, Pullman, Burlington Northern and Springfield Terminal. None of these parties are included in the current dispute. However, the Board has failed to reference and consider those Awards on this Board which clearly support the position of the Carrier here. The holding in PLB 7163 Award No. 496, clearly articulated the dispute repeated here, yet the current Board failed to consider the holding. Additionally, PLB 7163 Awards 541 & 545, which had been presented, but not finalized by the time of the hearing for this case, also clearly support the Carrier's decision to act as described. The Carrier has a right to make business decisions with reliance on applicable Awards.

The Board has erred when it has implied, without evidence of language or practice, that the Article 25 provision requiring a hearing prior to dismissal somehow survives when every other provision of the Agreement is inapplicable while an employee is serving in an exempt position. There may be times when an employee opts to return to the craft when it is determined by either the Carrier or the employee, or perhaps both, that the employee is unsuited for the exempt position, or merely that the employee prefers

working in the craft and not performing exempt position functions. For that reason alone, is an employee permitted to maintain seniority in a craft position while serving as an exempt or at-will employee. In exchange for surrender of agreement protections, the employee is compensated at a commensurate rate while serving in an exempt capacity.

With incorporation by reference to the Carrier submission in the case, it must be noted Claimant, notably, engaged in egregious conduct, *to wit*-falsification of records, which would predictably result in a similar disciplinary result of dismissal for any other exempt employee. There is no basis or language in Article 25 to provide a special exemption for an employee on leave from an agreement position. The right of the Carrier to discharge an at-will, or exempt, employee from service in all capacities is established through long-standing practice on this and other Carriers and has been supported by a long list of arbitral precedent including three recent Awards resulting from this very Public Law Board.

A number of the Awards which uphold the Carrier's position that an exempt employee may be dismissed in all capacities, and thus extinguishing any seniority rights without Notice and a hearing are referenced as follows:

- PLB 7163 Award No. 545
- PLB 7163 Award No. 541
- PLB 7163 Award No. 496
- PLB 7584 Award No. 90
- PLB 7584 Award No. 99
- NRAB Third Division Award 36075
- NRAB Third Division Award 36560
- NRAB First Division Award 26725
- NRAB Fourth Division Award 4704
- PLB 6330 Award No. 4
- PLB 7345 Award No. 9
- PLB 7626 Award No. 1

Based on the plain meaning of Rule 25 and under the authority on this issue, Claimant is not protected by Rule 25 of the agreement when he is dismissed in all capacities as a management employee. Also, as noted in the Carrier submission, the Organization routinely argues in pay claims that managers cannot perform scope covered work because they are not protected by the Agreement. Under that same logic, managers are also not protected by the Agreement when they are dismissed in all capacities. To rule that Rule 25 affords Claimant protection not afforded other at-will or exempt employees serving in similar or identical roles, would effectively add language to the contract which the Board has no authority to do.

The position of the Carrier was recently affirmed in PLB Awards 545 and 541 (Charles) which established and reiterated that the carrier is not obligated to provide an exempt employee a hearing before dismissal and severing of any previously maintained seniority rights:

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. The Board finds substantial evidence in the record to uphold the Carrier's position. As an employee working in a supervisory capacity, Claimant was not subject to the collective bargaining agreement Rule 25 pre-dismissal protections at the time of his dismissal. The Board's finding is also supported by arbitration precedent. See, NRAB Third Division Award 36560 (Benn); NRAB First Division Award 26725 (Clauss); NRAB Third Division Award 36075 (Kenis).

Notably, this Board has previously held that a non-bargaining unit employee who is dismissed no longer holds employment status with the Carrier. Such an employee should not be considered attempting to exercise seniority rights to return to a covered position. See, PLB 7163 Award No. 496 (Zimmerman). Here, the Claimant's status was as an exempt employee at the time of termination, which did not afford him seniority protections under the collective bargaining agreement. The Board lacks jurisdiction over a dispute concerning an exempt employee's dismissal. Therefore, for the foregoing reasons, the claim must be dismissed.

Such is the case here, and the Carrier is under no obligation to provide an employee who has engaged in egregious conduct the opportunity for a hearing while serving in an exempt position. There is no language in Article 25, or anywhere in the record, to establish agreement rights extend to an employee serving in an exempt position as an at-will employee.

A plain language reading of the Agreement in relation to past-practice would produce a declination of the instant claim, which would be consistent with previous awards on this Board. The reliance on prior awards is essential for consistency and an equal application of equitable administration. To produce such a contrary and unfounded Award, the Board has created a negative reliance on precedent and produced an inconsistent result. Both the Carrier and the Organization rely on consistent awards in the industry and the Carrier in this circumstance relied on Board decisions to make managerial decisions. To produce such a contrary result results in unanticipated costs to the Carrier as it properly relied on prior awards in its decision making process. The Carrier will implement the decision of this Board even though it is in contradiction of prior decisions on this issue.

The Board is limited to determine issues authorized by the RLA, including the requirement that the Organization establish a violation of the Agreement actually occurred, which the Carrier maintains the Organization has failed to do. As the Board has clearly erred in its analysis and conclusion, the Carrier dissents and asserts this Award should carry no weight in future disputes of like kind.



John K. Ingoldsby
Carrier Member

March 13, 2024