

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 95
)
) Award No. 98
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. K. Peitzmeier, Carrier Member

Hearing Date: August 8, 2006

STATEMENT OF CLAIM:

1. The Agreement was violated the when the Carrier refused to allow Mr. William D. Held to exercise his seniority rights after he had submitted an advance written notice of his desire to do so on January 27, 2005 (System File RJ-0521-202/1419299).
2. The Agreement was further violated when the Carriers highest designated officer failed to timely disallow the April 27, 2005 appeal letter in accordance with Rule 49(a)(1), (2) and (3).
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant William D. Held shall now be compensated for all lost wages at his respective rate of pay beginning January 27, 2005 and continuing until such time as he is allowed to exercise his seniority.

FINDINGS:

Public Law Board No. 6302, 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.

Claimant was employed as a Manager Track Maintenance, a position not covered by the Agreement. On January 5, 2005, Carrier dismissed Claimant from service. By letter dated January 21, 2005, Claimant advised Carrier that he had vacated an exempt position and wished to exercise his seniority as an Agreement-covered employee pursuant to Agreement Rule 22(c)(2).

By letter dated February 2, 2005, Carrier notified Claimant to appear for an investigation on February 10, 2005. The notice alleged that Claimant exhibited unethical and possibly dishonest behavior in using his position and his Visa Procurement Card for personal gain, by receiving gratuities which resulted in Carrier being overcharged for railroad material that in some cases Carrier did not receive during a period ending July 31, 2004. Claimant was advised that he was withheld from service pending investigation. On February 7, 2005, the Organization filed a claim alleging that Carrier had violated the Agreement by not allowing Claimant to exercise his seniority rights after he vacated a non-Agreement position. The hearing was held as scheduled on February 10, 2005. On February 15, 2004, Claimant was notified that he had been found guilty of the charges and dismissed from service. On April 20, 2005, the Organization filed a claim challenging Claimant's dismissal. This second claim is before this Board as Case No. 105.

The instant claim alleged that when Claimant was dismissed from his non-Agreement position, he had a right to exercise his seniority pursuant to Rule 22(c)(2). The Organization relies on Third Division Award 35868, which held that an employee dismissed from a non-Agreement position who also had seniority under the Agreement was entitled under Rule 22(c)(2) to exercise seniority to an Agreement position. However, in Award 35868, Carrier at no time moved to dismiss the claimant following the claimant's notice of his intent to exercise seniority to an Agreement position. Third Division Award 35868 simply does not control the instant case.

In reaction to Third Division Award 35868, Carrier, upon receiving notices from employees dismissed from non-Agreement positions of their intent to exercise seniority to Agreement positions, began notifying those employees to report for formal investigations and withholding them from service pending investigation. That is what Carrier did in the instant case, as well as in two prior cases decided by this Board. In Case No. 90, Award No. 87 and Case No. 91, Award No. 88, we held that "it was proper for Carrier to notice Claimant for an investigation following receipt of his letter advising of his desire to exercise seniority to an Agreement-covered position, [and] that the investigation could be based on misconduct during performance of the duties of an exempt position . . ." We reaffirm that holding. Assuming that Claimant had a right to exercise seniority under Rule 22(c)(2),¹ Carrier certainly had a right to notice him for a hearing concerning misconduct which, although committed while performing in a non-Agreement position, would subject him to discipline or dismissal under the Agreement, and to withhold him from service pending the hearing.

During handling on the property, the Organization further asserted that "Carrier is holding a hearing in this case simply as a formality. However, this was not a fair and impartial hearing. Obviously the Carrier simply went through the motions to make it appear that they afforded Claimant Held a fair and impartial hearing . . ."

¹We note that there are conflicting awards over whether an employee dismissed from a non-Agreement position has any subsequent rights to employment under the Agreement. As in Award Nos. 87 and 88, we see no need to resolve that conflict in authority, but instead assume that the dismissed employees still has rights under Rule 22.

The Organization's contention was rejected in Public Law Board 6402, Case No. 60, Award No. 39 and Case No. 61, Award No. 40. We note that PLB 6402 consisted of the Neutral Chair and Employee Member of this Board and the predecessor to the Carrier Member of this Board. The Board held:

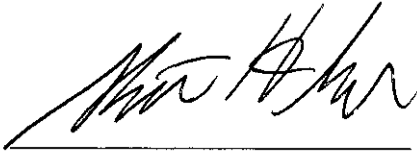
The Organization further argues that Carrier denied Claimant a fair and impartial hearing by pre-judging his guilt. We fail to see the logic of the Organization's argument. Claimant was dismissed from his position as an MTM. He was not entitled to a hearing prior to his dismissal. His entitlement to a hearing arose, if at all, when he advised Carrier of his desire to exercise his Agreement seniority. At that time, Carrier scheduled the hearing. We fail to see how Carrier could have acted differently. Indeed, we note that in [NRAB Second Division] Award 13171, the Board ordered that the claimant notify Carrier within fifteen days if he wished to exercise S.M.W. seniority and ordered Carrier upon receiving such notice to schedule a timely investigation. There is no suggestion in Award 13171 that holding such an investigation after having dismissed Claimant once for the offense that would form the basis for the investigation would amount to pre-judgment.

We adopt that holding from PLB 6402 and reject the Organization's argument.

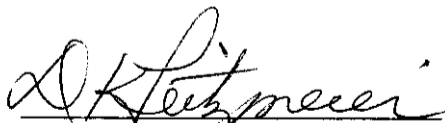
The Organization nevertheless contends that the claim must be sustained because Carrier failed to respond to the Organization's appeal of the Labor Relations Manager's denial of the claim. The Organization contends that the response from the Director Labor Relations No-Oops was actually a response to the claim before this Board in Case No. 105. We do not agree. The response referenced the file number of the instant claim. Substantively, it responded to the contentions in the appeal in the instant case as well as the appeal of Claimant's dismissal. We see no procedural basis for sustaining the claim.

AWARD

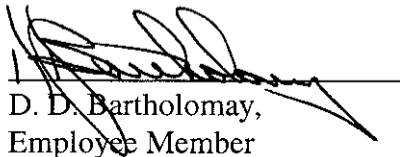
Claim denied.



Martin H. Malin, Chairman



D. K. Peitzmeier,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, December 18, 2006