BEFORE PUBLIC LAW BOARD NO. 6915

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN – WISCONSIN CENTRAL RAILROAD

Case No. 36

STATEMENT OF CLAIM:

1. The Carrier violated Rule 6 of the Agreement when it refused to allow Machine Operator Dan Vandinter to report to his machine operator position on Valley Zone Surfacing Gang #3 beginning on March 24, 2008 through April 6, 2008 (System File C-40-05/WC-BMWED-2008-00005 WCR).

2. As a consequence of the violation referred to in Part 1 above, Mr. Vandinter shall be compensated eighty (80) hours straight time at the Machine Operator A rate of pay and also compensated for any and all overtime accrued by Valley Zone Surfacing Gang #3 from the period of March 24, 2008 through April 6, 2008.

FINDINGS:

The Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the controlling Agreement when it refused to transfer the Claimant to his new assigned position on Valley Zone Resurfacing Gang #3 until April 7, 2008, depriving the Claimant of ten days' work on that assigned position and the monetary benefits flowing therefrom. The Carrier denied the claim.

The Organization initially contends that the Carrier violated Rule 6D of the Agreement when it failed to transfer the Claimant to his Machine Operator A position on Valley Zone Resurfacing Gang #3 within fifteen days of being awarded that position. The Organization asserts that the fact that three other employees were transferred to and began working their positions on this same Gang on March 24, 2008, and the fact that this matter does not involve seasonal work, demonstrates that the sole exception to Rule

6D does not apply here. The Organization argues that the Carrier's violation of the Agreement is obvious and inescapable, so the instant claim must be sustained.

Addressing the Carrier's defense that the Claimant was vacating a management position as a Trainmaster and was transferring to a Machine Operator A position that paid a lower wage, the Organization maintains that the Claimant notified the Carrier in December 2007 that he was voluntarily resigning from his management position. The Organization points out that the Carrier had more than two months to replace the Claimant without disruption to that management position, but the Carrier chose not to do so.

The Organization argues that the Carrier does not have the unilateral right to extend the transfer date beyond the fifteen-day period set forth in the transfer rule. The Organization emphasizes that the parties negotiated and agreed to transferring an employee within fifteen days. Had the parties agreed otherwise, such language would have been included in the Agreement. The Organization submits that there is no dispute that the Claimant was a successful applicant, so Rule 6D applies to the instant dispute.

Pointing to prior Board Awards, the Organization asserts that mandatory language in a rule, such as applies to this matter, must be upheld to ensure the integrity of the Agreement and to protect the rights of the entire class of employees covered by it. The Organization insists that because there is no dispute that the Claimant was not transferred to his new position within fifteen days, it is evident that the Agreement was violated.

The Organization insists that there is no evidence to support the Carrier's position that the Claimant agreed to remain in the management position until a replacement was

available or that he voluntarily remained in that management position from December 2007 until April 7, 2008. Moreover, if there were such evidence, it should have been relatively easy for the Carrier to produce it. The Organization suggests that the absence of such evidence in the record invites application of the principle of negative inference, thereby defeating the Carrier's naked assertion.

The Organization goes on to contend that the Carrier is dead wrong in its assertions based on Rule 15C. The Organization insists that Rule 15C conveys rights to a returning employee depending upon the method of return. In the case of a voluntary resignation, as occurred here, the returning employee has the right to occupy any vacancy or new position pending advertisement and award, has the right to perform such extra work as entitled by seniority, and has the right to apply for any advertised position. The Organization submits that a returning employee having the right to apply for an advertised position also has the right to be assigned thereto in accordance with all the provisions of the Agreement.

The Organization emphasizes that Rule 4B specifies that employees may exercise their seniority to any position under the Agreement "consistent with the terms of the Agreement." The Claimant exercised his seniority "consistent with the terms of the Agreement" by bidding on a position pursuant to Rule 5 and consistent with Rule 15C. Also "consistent with the terms of the Agreement," the Claimant was awarded the machine operator position at issue, and the Carrier was obligated to transfer the Claimant to that position within fifteen days of the award. The Carrier's failure to do so is the only thing not "consistent with the terms of the Agreement" in this entire dispute.

Pointing to prior Board Awards, the Organization argues that it is well established that agreements must be applied as written. Had the Agreement been so applied in this matter, the Claimant would have been transferred to his new assignment within fifteen days. The Organization asserts that the Carrier's failure to do so requires a sustaining award.

The Organization then argues that the requested remedy is nothing more than the compensation that the Claimant would have earned had he been timely and properly transferred to his new position. The Organization contends that this is a typical make-whole remedy that consistently has been found appropriate for proven Agreement violations.

As for the Carrier's objection that the remedy is excessive, which is based on the Carrier's presumption that the Claimant suffered no loss of earnings, the Organization maintains that the Carrier is in error. The Organization asserts that the Claimant was entitled to work all of the straight-time and overtime hours claimed, and the fact that he was retained in a higher-rated position during the claim period does not lessen that entitlement. Moreover, the fact that the Claimant was retained in a higher-rated position does not mean that the Claimant was unavailable for any of the claimed work. The Organization insists that absent any proof that the Claimant was not available for the claimed work, it is clear that the Claimant suffered a loss of work opportunity and the monetary benefits flowing therefrom. The Organization emphasizes that the Claimant is entitled to the full remedy requested.

The Organization ultimately contends that the instant claim should be sustained in

its entirety.

The Carrier initially contends that the Organization has not made, and cannot make, the necessary showings that the clear language of the Agreement contemplates a management employee, that the Agreement has been violated, or that a "management" employee falls within the scope of the Agreement while that employee is not working a position or is not furloughed from a position within the scope of the Agreement. The Carrier asserts that the Organization has not and cannot show that it "represents" the Claimant and therefore has the right to submit a claim on the Claimant's behalf. The Carrier argues that the Organization also has failed to show that the Claimant has been harmed in any way or that the Agreement was violated.

The Carrier maintains that the instant claim is frivolous. The Carrier emphasizes that whether is was right or wrong to accept the Claimant's bid for a bargaining unit position while he was a manager, this was done solely because the Claimant had caused the Carrier to believe that he would actually and legitimately be within the maintenance of way ranks at the time the gang start-up was anticipated. The Claimant was not, however, and the fact that he was not is not a matter to be remedied under the Agreement.

The Carrier points out that Rule 6 and virtually every other rule in the Agreement, save one, is applicable only to "employees" who actively are working in the craft and class on positions governed by that Agreement and specifically identified by the Agreement's Scope Rule. The Carrier insists that these Agreement Rules do not apply to Carrier managers. The Carrier submits that the only reason that it considered the Claimant's bid was that the Claimant informed the Carrier that he was going to relinquish

his management position and be back within the craft by the time the gangs were going to start up. In fact, the Claimant did not return to the craft until on or about April 7, 2008.

The Carrier insists that there is no proof supporting the Organization's allegations that the Claimant was "held" to his management position against his will. These allegations are neither facts nor probative evidence, and the Carrier submits that these assertions have no relevance to the instant matter. The Carrier points out that any understanding between the Claimant and his supervisor(s) while he was a manager are completely outside the scope of the Agreement or the Organization's jurisdiction. The Carrier contends that the Organization cannot be granted the means to affect acceptance into, or voluntary/involuntary exit from, management positions that presently are exempt from the terms of the collective bargaining agreement.

As for the Organization's reliance on Rule 15 to support its claim, the Carrier agrees that Rule 15 does have some application to the Claimant. In fact, Rule 15 is the only Agreement rule that can be proven to apply to the Claimant's situation. The Carrier asserts, however, that Rule 15 applies only to the means of how the Claimant must exercise his seniority after, and only after, the Claimant has severed his management relationship with the Carrier and re-entered his covered position within the collective bargaining agreement.

The Carrier submits that the Claimant accepted a management position by his own choosing. When the Claimant became a manager, Rule 15 was the only Agreement rule that could be applied to him, and Paragraph C thereof applied only if the Claimant exercised his seniority to actually return to the bargaining unit. The Carrier insists that

Rule 6, Rule 15, and the other Agreement rules do not apply to the Claimant while he occupied a management position.

The Carrier contends that the Organization has failed to meet its burden of proving that any Agreement provision has been violated, or even is relevant to this dispute. The Carrier asserts that between March 14 and April 7, 2008, the Agreement did not apply to the Claimant because he was a management employee. On and after April 7, 2008, when the Claimant re-entered the Agreement-covered service, the Claimant worked the position he had bid and had been awarded, and the Claimant was compensated at the applicable rate of pay. The Carrier submits that under these circumstances, there has been no violation of the Agreement.

The Carrier suggests that to sustain the Organization's position here would establish a contractual link between non-agreement management employees and agreement employees that does not now exist. Such a decision would be akin to adding the word "management" to the Agreement's Scope Rule. The Carrier maintains that doing either would exceed the Board's authority and encroach upon the plenary authority of the National Mediation Board.

The Carrier goes on to assert that the Organization's requested remedy is excessive. The Carrier points out that the Claimant retained his management position until April 6, 2008, and this position carries an hourly rate of pay that is higher than the machine operator position to which the Claimant alleges he should have been assigned. The Carrier therefore emphasizes that the Claimant suffered no loss in earnings. Even if the Organization's positions were correct, no compensation is due.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the record in this case, and we find that the Organization has failed to meet its burden of proof that the Carrier violated the Agreement when it failed to transfer the Claimant to his newly assigned position on March 24, 2008. Therefore, the claim must be denied.

The record reveals that the Claimant was working in a management position and earning approximately twelve dollars an hour more than the non-management position that he had bid for. The record reveals that the Claimant decided when he would go back to his non-management position. The Carrier did not prevent him or violate his rights in any fashion. The record is clear that the time of the change in job was within the control of the Claimant. The Carrier did not hold him in the management position against his will. In addition, in that management position, the Claimant was paid more money than he eventually earned in his new position.

For all the above reasons, the claim must be denied.

AWARD:

The claim is denied.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: Sept 17, 2010

CARRIER MEMBER

DATED: Sept 17, 2010