

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
IBT RAIL CONFERENCE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY)**

Case No. 268

Award No. 244

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The agreement was violated when the Carrier refused to allow Mr. M.E. Lubbs to exercise his seniority rights beginning January 17, 2005 and continuing (System File 3KB-6879D/1418924 CNW).
2. As a consequence of the violation referred to in Part (1) above, Claimant M.E. Lubbs shall now be allowed to displace junior employee S.J. Osborn, be compensated for all lost time from January 17, 2005, until he is allowed to return to service and be made whole for all losses caused by the Carriers refusal to allow his exercise of seniority."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a Manager of Track Maintenance, a management non-Agreement position.

On January 7, 2004, while Claimant was working in the capacity of Manager of Track Maintenance, the Claimant was dismissed from the Carrier's service. The dismissal notice stated that the Claimant's dismissal was all-encompassing and that Claimant would not be allowed to exercise any seniority rights under any collective bargaining agreement. After his dismissal, the Claimant sought to exercise his seniority rights to displace Common Machine Operator S.J. Osborne. The Carrier then issued a

notice of investigation to the Claimant, held a hearing, and dismissed the Claimant under the Agreement. The Carrier refused to allow the Claimant to exercise any seniority rights because he had been discharged in all capacities. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's refusal to allow the Claimant to exercise seniority rights. The Carrier denied the claim.

The Organization initially contends that the Carrier attempted to unilaterally erase the seniority that Claimant had established in accordance with the Agreement and that he had maintained and continued to accumulate during his thirty-three years of service to the Carrier. The Organization emphasizes that seniority is not a gift of management, but a valuable property right earned through service under the collective bargaining agreement. The Organization asserts that because seniority cannot be unilaterally bestowed by management, it logically follows that management cannot unilaterally take it away.

The Organization points out that the Claimant was dismissed from his non-Agreement position and then was denied his right to exercise his seniority under the Maintenance of Way Agreement. The Organization argues that Rule 72 specifies that a covered employee who accepts an official or subordinate official position shall retain and continue to accumulate seniority in the district from which the employee was promoted; the employee also is carried on the appropriate seniority roster. The Organization contends that the Claimant continued to pay retention fees, so he retained and continued to accumulate seniority.

The Organization then asserts that Rule 72B provides that covered employees who return to service under the Agreement may exercise displacement rights by displacing

any junior employee in the class. The Organization insists that the Claimant was covered by the Maintenance of Way Agreement, so he should have been allowed, pursuant to Rule 72, to displace the junior common machine operator on January 17, 2005. The Organization argues that by failing to allow the Claimant to do so, the Carrier clearly violated Rule 72. The Organization references a prior Third Division Award holding that a supervisor in a non-agreement position who was dismissed from this Carrier's service should have been allowed to displace into an agreement position because the Claimant had complied with the provisions of the governing rule. The Organization maintains that because the rule in that case essentially is the same as Rule 72, the result in that other case should be followed here. The Organization responds to the Carrier's objection to the submission of this award, because the dissent was not attached, by arguing that dissent is merely a citation to another award that is non-precedential because it involves a different rule.

Addressing the Carrier's assertion that once the Claimant's employment was terminated, he was severed from the Carrier, the Organization maintains that the Carrier's right to discharge an at-will employee is abridged by the collective bargaining agreement and Rule 72 thereof, which allows for covered employees to return to service. The Organization further points out that the Board Awards cited by the Carrier on this point involve different crafts, different rules, different carriers, and different agreements, so they are not precedential.

The Organization then argues that there is no basis for the Carrier's assertion regarding the remedy. The Organization emphasizes that the Carrier's decision to

deprive the Claimant of his contractual right to displace clearly calls for the Claimant's reinstatement, as set forth in the claim.

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

The Carrier initially contends that there was no Agreement violation in connection with the Carrier's refusal to allow the Claimant to exercise the seniority rights he had maintained until his dismissal from the Carrier's service on January 7, 2005. The Carrier insists that there is no agreement language that gives the Claimant the right to displace after being dismissed. The Carrier maintains that Rule 72 confers displacement rights only on employees who still have seniority at the time of the proposed action. The Carrier points out that the Claimant did not have seniority rights on January 7, 2005.

The Carrier goes on to argue that a number of Board Awards hold that once an individual is justifiably dismissed from a non-agreement position, that individual is not privileged to exercise any seniority rights that he or she formerly may have held for a covered position. As was true in these other cases, the Claimant no longer was an employee of the Carrier at the time he tried to exercise seniority displacement rights. The Carrier therefore asserts that it has demonstrated that the Claimant did not have any seniority rights to exercise on January 17, 2005, because he had been dismissed on January 7, 2005. The Carrier maintains that the Claimant has not been treated differently than any of the other twenty former official or supervisory employees who were discharged for the same reason at the same time. The Carrier insists that the instant claim therefore should be denied.

The Carrier then contends that the Third Division Award referenced by the Organization does not support the instant claim because that case involved the fact that the carrier had not held a hearing. The Carrier emphasizes that in the Claimant's case, it did hold a hearing, as a result of which the Claimant was advised that he was dismissed from the Carrier's service. The Carrier additionally points out that the Organization failed to include the Carrier's dissent to that Third Division Award. The Carrier insists that the Organization has attempted to support its position with an Award that is not applicable.

The Carrier maintains that Rule 72 does not support the Organization's position, and the Organization has failed to meet its burden of proving a *bona fide* violation of the Agreement. The Carrier asserts that unsupported allegations or a mere listing of rules devoid of any pertinent contractual language do not constitute proof.

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 parties' agreement when it failed to allow the Claimant to exercise his seniority rights to displace a junior employee and be allowed to return to service and be made whole after he was dismissed from his position of Manager of Track Maintenance. In this case, the Claimant was not simply removed from his management position, nor was his position abolished or was the

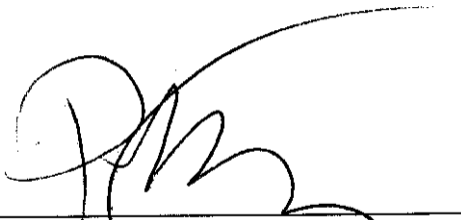
Claimant displaced. The Claimant in this case had been terminated from his management position for misusing the Carrier's credit cards and behaving in a dishonest fashion. In his letter of termination, he was told that he would not be allowed to exercise any seniority rights because of his dismissal.

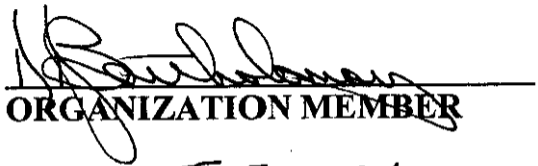
The Organization's reliance upon Rule 72 simply does not support the reinstatement of the Claimant. The Claimant had been terminated by the Carrier on January 7, 2005. An investigation was held into the Claimant's action after he petitioned to exercise his seniority. In that investigation, the Claimant was found guilty of misusing Carrier property. Therefore, there is no basis for this Board to reinstate the Claimant's seniority rights or to reinstate him to his position.

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

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER
DATED: 5-30-06

CARRIER MEMBER
DATED: 5-30-06