



Sun, Oct 23, 2016 at 7:32 PM

BROTHERS

VERY IMPORTANT PLEASE READ AND DISTRIBUTE ACCORDINGLY

The SMART TD General Chairmen met with carrier representatives late August to update us on the state of the railroad. During our discussion CMC AVP Mark Mayo advised the organization his department would be implementing a program in late October that would change the handling of CAPS Displacement Points, which CMC has been manually handling once negotiations for the EBS System on the B&O NMAD territory were discontinued May 9th, 2012, based on our office not being able to accept the carriers final low ball offer they made for us to agree to the EBR System. Crew Management has been manually assessing CAPS points for our memberships delayed mark up beyond the twelve (12) hour and one (1) minute period of time from displacement based on their policy. Just this week CMC has implemented an Automated System to track our memberships displacement time and assess CAPS Points to our members remaining in Displaced Status for more than twelve (12) hours and one (1) minute, (WHICH WE KNOW IS THEIR CONTRACTUAL RIGHT) based on the Kohn Displacement Awards and the carriers CAPS Policy limit of Twelve (12) hours and one (1) minute.

There is no interpretation *per se* due to the fact everyone, including the carrier, agrees our agreement (Article 12 of 1996 National Agreement) permits an employee to make wait to make a seniority move up to forty-eight (48) hours for the reason for preference purposes (See Rule 64). However, the dispute surrounds around the disagreement with the carrier's belief that they have a managerial right to implement an availability policy that labels an employee as "unavailable" after twelve (12) hours and one (1) minute of being notified of displacement. Although the agreement specifically defines the consequences for not making the seniority move within the forty-eight (48) hour window (forced to an open turn), the carriers unilateral policy restriction is forcing employees to make premature seniority moves; otherwise, face

discipline (CAPS Points). We have additional Displacement Cases listed for the First Division and went through the Arbitrator Strike List this past Wednesday to select arbitrators to preside over the next group of cases; this displacement is far from over.

Please notify your membership of this automated tracking of displacement time being implemented and inform/instruct them if they do not want CAPS Points being assessed against them for remaining in displaced status for more than the carrier policy limit of the twelve (12) hour and one (1) minute timeframe, they should mark up within this timeframe to not be assessed points under the carriers CAPS Policy. If they are not concerned about receiving the CAPS Points for remaining in displaced status based on the language of the agreement of up to 48 hours, kindly inform/instruct them they will be required to dispute these CAPD Points through you, their Local Chairman handling this as a violation of Agreement Rule 64 until we receive a favorable award through the Arbitration process.

Additionally, SMART TD General Counsel filed Thursday in the United States District Court of Northern Ohio (<http://www.ohnd.uscourts.gov>) on our behalf, the attached Petition to Review the Kohn Awards and Exhibit A, to vacate these awards based on Neutral Kohn overstepping her authority as an arbitrator based on her own previous award and her irrationally reversed course. In NRAB First Division Award No. 27153, Neutral Kohn correctly places the onus on the Carrier as the moving party in a disciplinary case to illustrate that the Claimant was intentionally trying to avoid work by holding onto his displacement. In the proposed Awards, Neutral Kohn does a 180 degree turn, basically abandoning the requirement that the Carrier bear such burden of proof that ill intent was contemplated by the claimant when he held his displacement. She accepts the premise that because junior employees were working while the Claimant held his displacement, the Carrier had met their burden (without considering that the claimant may have been holding displacement for preference reasons... co-worker, rest day, etc.) One of the oft-stated purposes of arbitration is to provide consistency in the work place so as to promote harmonious labor/management relations. To ignore and/or cast aside arbitral precedent that has clearly and unmistakably recognized that carrier policies must harmonize with the provisions of the collective bargaining agreement calls great harm on that principle. Without a doubt, Neutral Kohn's determination that the availability policy can supersede the provisions within the collective bargaining agreement are improper and invalid, and cannot be considered as precedent in any future cases.

We have been assigned Judge Boyko, and our assigned case number is (Case 1:16-CV-02554). If you have any further questions regarding this ongoing Displacement Issue please call or write the office.

Fraternally,

Steve Mavity

General Chairman - SMARD TD - B&O General Committee

4 attachments



image001.jpg
7K

 **Kohn Petition.pdf**
195K

 **Exhibit A.PDF**
409K

 **Kohn award dissent 4 25 16 (FINAL WITH ALL EDITS)48103-1.REVISED.PDF**
594K