

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5454**

John C. FLETCHER, Chairman & Neutral Member
John W. CALLAN, Employee Member
Jerry N. LOCKLIN, Carrier Member

**UNITED TRANSPORTATION UNION
YARDMASTER DEPARTMENT**

and

**BURLINGTON NORTHERN RAILROAD
COMPANY**

**Award No. 2
Case No. 2**

*Hearing Date - December 15 1993
Date of Decision - May 20, 1994*

STATEMENT OF CLAIM:

Claim of W. McGuire, Cicero, Illinois that he be allowed to exercise seniority as a yardmaster and that he be allowed a days pay at yardmaster rate starting on August 15, 1992, and continuing each day thereafter.

FINDINGS:

Public Law Board No. 5454, upon the whole record and all of the evidence finds and holds that the Employee(s) and Carrier(s) are employee and carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute(s) herein, and that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

Claimant was initially employed in the Clerical Craft. Subsequently he acquired seniority as a yardmaster. On January 10, 1990, Claimant was promoted to a management position, not subject to the provisions of any labor agreement. On August 10, 1992, Claimant was relieved of his management position. On August 14, 1992, Claimant attempted to exercise seniority in the Yardmaster Craft. He was not allowed to do so. Instead, on August 17, 1992, Carrier, notified him that an investigation had been scheduled (under the Yardmaster's Agreement) for August 21, 1992, to determine his responsibility in connection with his failure to comply with requirements of its EAP program, while working the exempt position. Two days later, Claimant was notified that because he had been dismissed as an exempt employee his seniority as a yardmaster had also been terminated, and that his employee file had been closed. The investigation scheduled for August 21, 1992, was

canceled.—The same letter, though, advised Claimant that he had thirty days to exercise his clerical seniority, but if he did so, an investigation would be scheduled under the Clerks' Agreement. On August 25, 1992, Claimant was given an investigation notice under the Clerks' Agreement. Following that investigation he was terminated as a Clerk, which termination was subsequently upheld by Award 187 of the Clerks' - BN Appendix K Board. The claim before this Board concerns Carrier's failure to permit Claimant to exercise his yardmaster seniority.

Carrier argues that when Claimant was relieved of his exempt position his employment was terminated. Because of this he could not exercise his seniority as a yardmaster. It notes that special rules exist in the Clerical Agreement, thus, Claimant could not be terminated as a clerk without an investigation. This termination has been upheld by Award 187, and it has been established that Claimant was terminated for cause. Carrier notes that Claimant was given numerous opportunities to correct his chemical dependency problem, and his final termination should not now be disturbed.

The Organization argues that removal of Claimant from his exempt position does not affect his rights as a yardmaster, and that Carrier was in error when it denied Claimant the opportunity to work as a yardmaster without benefit of an investigation, as provided by the Agreement.

Before citing the operative rules of the Yardmaster's Agreement, the Board must note that Carrier's arguments on distinctions as to why it permitted Claimant to exercise his seniority as a clerk and then hold an investigation and why it did not do the same with regard to his status as a yardmaster, is simply not persuasive. While the clerks rule arguably contains a specific provision granting such entitlements, language of the Clerical Agreement does not foreclose the possibility that the Yardmaster's Agreement may constructively provide for such entitlements.

The operative contract provisions of the Yardmaster's Agreement applicable to this matter are, Rule 15 and the first sentence of Rule 22 A. These provisions read:

RULE 15. PROMOTIONS

Yardmasters promoted to official positions with the Burlington Northern Inc., its' subsidiaries, or Railroad Yardmasters of America (including General Yardmasters not covered by the terms of this agreement) will not forfeit any seniority provided they report for duty within thirty (30) days from the termination of their connection with such position.

RULE 22. INVESTIGATION AND DISCIPLINE

A. A yardmaster charged with an offense involving discipline will be advised the nature of such offense in writing and no yardmaster will be discharged, demoted, suspended or given record suspension without an investigation within ten

days from date of knowledge of such offense by the superintendent or proper supervisory officer.

While Carrier has argued in this case¹ that the termination from the exempt position also constituted termination from Claimant's yardmaster entitlements, Rule 15 does not support this result. Instead, the opposite seems apparent. Rule 15, fairly read, entitles an employee promoted to an official position to exercise seniority to a yardmaster position if this is done within "thirty days from the termination of their connection with such position." The use of the phrase "termination of their connection with such position" is broad and all encompassing. It covers a variety of factors, e.g., being relieved because the position is discontinued, unable to physically meet the requirements of the job, refusing to move if the position is relocated, removal from the official position because of management style or lack of team play, removal from the official position for minor misconduct infractions, and/or termination because of a major misconduct infractions, etc.

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 also 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. Rules 15 and 22 are operative in all types of situations, some serious and some not so serious.

For example a yardmaster promoted to an exempt position may be terminated from that assignment for a minor infraction that would not require the same level of discipline if it were applicable to his yardmaster employment. The place to judge misconduct that is applicable to yardmaster service, and the discipline to be assessed for this misconduct, is an investigation under the Yardmaster Agreement. Failure to timely hold such an investigation after Claimant placed Carrier on notice that he was exercising his yardmaster seniority following his termination of his connection with the exempt position is a fatal flaw.

Accordingly, the Board concludes that Carrier violated Rule 15 of the Agreement when it failed to permit Claimant to exercise his seniority following his termination as an exempt employee. Further, Carrier violated Rule 22 of the Agreement when it failed to hold a timely investigation before removing Claimant from the yardmaster seniority list.

The claim will be sustained.

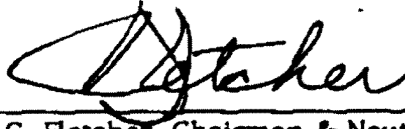
¹ It must be noted that Carrier's arguments here seem to differ from those made before the BN- Clerks Appendix K Board. In Award 187 of that Board, Carrier's Position, at page 5, states, *inter alia*, that "[I]t merely terminated his managerial services."

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A W A R D

Claim sustained.

O R D E R

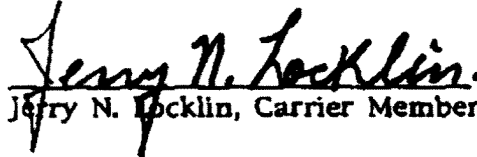
Carrier is directed to comply with this award within thirty days of the date indicated below, by restoring Claimant's name to the yardmaster seniority roster, permitting him to exercise this seniority to a yardmaster position and making full payment for wage losses incurred subsequent to August 15, 1992.



John C. Fletcher, Chairman & Neutral Member



John W. Callan, Employee Member



Jerry N. Locklin, Carrier Member

Dated at Mt. Prospect, Illinois - May 20, 1994