

BEFORE PUBLIC LAW BOARD NO. 6043

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION
IBT RAIL CONFERENCE
and
ILLINOIS CENTRAL RAILROAD COMPANY**

Case No. 353

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

1. The discipline (dismissal) imposed upon Mr. B. McIntyre in connection with allegations Mr. McIntyre engaged in inappropriate behavior toward other employees on May 31, 2016 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C 16 07 29/IC-BMWED-2016-00128 ICE).
2. As a consequence of the violation referred to in Part 1 above, Claimant B. McIntyre shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.”

FINDINGS:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934. Public Law Board 6043 has jurisdiction over the parties and the dispute involved herein.

Claimant B. McIntyre had established and held seniority within the Carrier’s Maintenance of Way Department and continued to accumulate seniority while working as a Carrier official. The event that gave rise to this dispute was the Carrier’s termination of Claimant from his employment in a non-Agreement/managerial position.

On July 29, 2016, Claimant was given notice of his termination:

On May 31, 2016, allegations of your inappropriate conduct towards other employees were raised to the company. Specifically, it was alleged that while on duty as a Trainmaster, you made remarks of a sexual nature towards another employee, and that you have perpetuated a negative work environment at Champaign yard by yelling, bullying, and showing an overall lack of respect towards employees at various levels. The Company conducted a thorough and impartial investigation into these issues which included a meeting with you in Champaign, on June 14, 2016.

We concluded the investigation and determined that you have violated CN's Code of Business Conduct and our expectations regarding the Company's Prohibited Harassment, Discrimination and Anti-Retaliation policy.

Your workplace conduct continues to be of considerable concern. The results of the investigation represent a violation of CN standards and your actions lack the professionalism we expect of our supervisors. Consequently, you are dismissed from the employment of Illinois Central Railroad Company effective immediately. ...Per Rule 7 of the collective bargaining agreement between IC/CCP and the BMWED, since you are dismissed for cause, you will not be allowed to exercise your seniority.

The Organization filed this claim asserting that the Carrier had arbitrarily cut off Claimant's seniority rights under Rules 7 and 33 of the parties' agreement, which provide, in part:

RULE 7. PROMOTION AND DEMOTION

(a) Employees who are now filling or who are promoted to official or excepted positions shall retain their seniority rights and continue to accumulate seniority in the territory from which promoted provided such employees remain members in good standing with the union organization. Such payment of union dues will not constitute an obligation to retain membership in the organization, if the employee no longer wishes to do so, or to meet requirements that may be placed on employees not holding official or excepted positions.

(c) An employee who voluntarily resigns from an official or excepted position may not displace any regularly assigned employee, but may accept any vacancy or new position or may perform such extra work as entitled to by seniority. Employees returning to the bargaining unit for reasons other than voluntary transfer may displace junior employees in any classification in accordance with the agreement. When an employee who occupies an official or excepted position is dismissed for cause, said employee automatically forfeits all seniority and right to return to positions covered by this agreement. This rule does not bar the union from filing a grievance to appeal the loss of such employee's seniority....

RULE 33. DISCIPLINE

(a) Employees shall not be disciplined* or dismissed until after a fair and impartial hearing. Notice of such hearing, stating the known circumstances involved, shall be given to the employee in writing within ten (10) days of the date that knowledge of the alleged offense has been received by the Engineering Superintendent or the employee's authorized representative....

The Organization contends that the Carrier is attempting to erase the seniority that Claimant established under the parties' collective bargaining agreement and which he maintained during his time as a Carrier official. The Organization contends that before Claimant could be dismissed from the Carrier's service, he was entitled to the benefit of the disciplinary proceedings set forth in Rule 33, including a fair and impartial investigation to determine the necessary "cause" for dismissal.

The Organization contends that the Carrier has improperly attempted to extinguish Claimant's seniority which he had established, maintained, and accumulated.

The Organization contends that even if the allegations against Claimant are sufficient to warrant his dismissal from Agreement-covered service, the Carrier must prove those allegations in a contractually-mandated investigation. The Organization contends that in this case, there was no Rule 33 investigation and thus, Rule 7 "cause" was not proved.

The Carrier contends that Claimant was not working under the collective bargaining agreement at the time of his dismissal. It further contends that Claimant was dismissed for cause after a thorough internal investigation. The Carrier contends that Rule 7(c) makes clear that an employee who is removed from an exempt position for cause forfeits all seniority and right to return to a position under the agreement. The Carrier contends that it is evident that Claimant was dismissed for cause. Finally, the Carrier contends that Claimant is not entitled to any monetary relief.

There is no dispute that the Carrier can terminate Claimant from his supervisory position without the benefit of the contractual protections afforded to those covered by the BMW agreement. This case concerns the additional penalty of prohibiting Claimant from exercising the seniority he had established and then retained and accumulated while in an excepted position.

According to the Carrier, once it dismissed Claimant for cause, Claimant's seniority and right to return to any position covered by the Agreement were automatically forfeited. The Organization concedes that once dismissal for cause has been found, Claimant's rights under the agreement cease. However, it argues that Claimant's seniority rights cannot be extinguished without a fair and impartial investigation and that the parties did not intend for the Carrier to be the sole and exclusive determiner of "cause" for purposes of its members' seniority rights.

The Organization pointed to awards by boards on other properties which have examined whether a carrier may unilaterally determine cause for dismissal. In Third Division Award 6250, the Board found that a claimant could be discharged from a supervisory position without prior investigation, but his seniority rights under the agreement could not be destroyed without a fair and impartial investigation. In Third Division Award 41808, the Board confirmed that an organization cannot challenge the carrier's decision to dismiss an employee from a supervisory position but held that before a carrier can prohibit exercise of seniority rights, it must be determined through a fair and impartial hearing that the dismissal was for cause. That Board rejected the notion that a carrier's determination of cause was not subject to any independent review. Both decisions, however, were construing different agreements and not the one on this property.

The Carrier argues that this issue has already been decided on this property by this Public Law Board, citing this Board's Award 14, in which this Board held that a track supervisor who was dismissed for cause could not exercise his seniority to displace a junior employee. This Board held, "Once the Claimant was dismissed from his position, the Claimant lost his rights pursuant to Rule 7....He automatically forfeited all seniority and rights to return to positions covered by the agreement when he was terminated for cause."

In PLB 6043-14, the claimant admitted the wrongful conduct and the Board specifically found “there was sufficient evidence in the record to support the finding that the Claimant was guilty of violating Carrier rules when he fondled a subordinate’s wife’s breast.” Unlike in the case before this Board, that record contained an admission of the claimant’s guilt and thus, the Carrier’s cause for dismissing him. The evidence of Claimant’s guilt in this record is simply the Carrier’s statement that an investigation was conducted, and Claimant was found to be guilty.

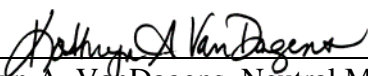
The Carrier cited other awards in which no additional review was required. For instance, in Public Law Board 6139, Award No. 7, that board found that where the record showed that the Carrier had investigated and removed the manager after allegations against him were substantiated, the manager had been removed for cause, thereby extinguishing his right to exercise seniority under the agreement. Recognizing that the details of the manager’s removal were “not as clear as they would be if he had occupied an agreement-covered position,” the board nonetheless found that the claimant’s removal was for cause.


Under Rule 7(c), an excepted employee may exercise his accumulated seniority and return to a classification under the Agreement *unless* that employee is dismissed for cause. Here, the Carrier investigated allegations against Claimant and determined that he had violated the Company’s Prohibited Harassment, Discrimination and Anti-Retaliation Policy and dismissed him. The cause for the dismissal was determined by the Carrier. There is nothing in this record that suggests that the Carrier did not dismiss Claimant for cause.

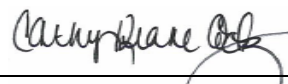
Only those holding positions covered by the Agreement are entitled to a Fair and Impartial Hearing under Rule 33 prior to discipline or dismissal. This right did not inure to Claimant in an excepted position. Once Claimant was dismissed for cause, the Agreement provides that he forfeited all seniority and right to return to positions covered by the Agreement. The extinguishment of Claimant’s seniority rights occurred not by discipline or dismissal, but by operation of the Agreement.

AWARD

The claim is denied.


Kathryn A. VanDagens, Neutral Member


Ryan Hidalgo, Organization Member


Cathy Cortez, Carrier Member

Dated: May 1, 2019

Dated: _____