

BEFORE PUBLIC LAW BOARD NO. 7566
CASE NO. 196/Award No. 196

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2019-00034
Claimant: Kevin Sem

Statement of Claim

“Claim of the System committee of the Brotherhood that:

1. The dismissal imposed upon Mr. K. Sem for alleged violation Safe Work Procedures-Lockout/Tagout (LOTO), Life Rule D-20 Lockout/Tagout and LIFE Rule D-5 Conveyors, by letter dated May 10, 2019, was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2019-00034 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant K. Sem's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement, as well as having his seniority restored, his accredited months of service and made whole for all benefits that were not received during his time out of service.”

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 7566 has jurisdiction over the parties and the dispute involved herein.

Facts

The Claimant has established and holds seniority in the Carrier's Maintenance of Way Department, having been assigned as a Bridge and Building (B&B) Carpenter when the events leading to his dismissal occurred. His date of hire was April 20, 2010 and he had a clean disciplinary record. It is undisputed that on March 27, 2019 while assigned to repair conveyer 3 on the Duluth (MN) Ore Docks facility, the Claimant did not follow the lockout/tagout (LOTO) procedure necessary to ensure that power to the conveyer and associated rail-mounted equipment—in this case, a stacker—was disabled. This resulted in an April 5, 2019 letter directing the Claimant to attend an investigation, ultimately held on April 23, 2019. By letter dated May

10, 2019 Mr. Sem was informed that the Carrier had found him in violation of Safe Work Procedures – Lockout/Tagout (LOTO), LIFE Rule D-20 Lockout/Tagout and LIFE Rule D-5 Conveyers. Therefore, the Claimant was dismissed immediately. On May 5, 2019 the Organization filed a timely claim on Mr. Sem’s behalf. The claim was properly progressed on the property without resolution and advanced to this Board for final and binding adjudication.

Carrier Position

The Claimant’s admission during the investigation provides substantial evidence of the violations, which the Carrier characterizes as willful and intentional. Mr. Sem placed himself and his co-worker in jeopardy. Moreover, he did not hold the required briefing. The investigation was fair and impartial without prejudgment, with the Claimant afforded representation, with a Hearing Officer who acted professionally and who did not commit procedural violations. The dismissal was just and with sufficient cause as the Claimant had committed a Level 4 violation. The Claimant’s case can be distinguished from two other cases in which employees locked out machinery but did not properly tag out. There are no mitigating circumstances. This is an appellate process in which the Board should not substitute its judgment for that of the Carrier in the face of proven infractions.

Organization Position

The Claimant admitted his mistake and a momentary lapse of judgment. He did not willfully and intentionally disregard the LOTO requirement. Moreover, he received disparate treatment as Mr. Bovee and Mr. Bauman received Level 2 discipline for their LOTO violations. The Claimant had been a model employee during his nine (9) years with the Carrier with a letter of caution related to attendance the only blot on his record. The dismissal was harsh, excessive and unwarranted, punitive rather than rehabilitative.

Findings

The Carrier’s Discipline Policy, at Part 4—Level 4 Violations provides several examples of Level 4 violations for “conduct that is extremely serious enough to result in immediate termination.” Included in the list of examples are “Intentional acts that cause harm to other persons or recklessly endanger the safety of employees or the public” and “Purposeful disregard for rules or policies.” It is unnecessary to set forth the rule and procedures that the Claimant violated. Suffice it to say that all required LOTO, that relevant procedures were set forth and that the Claimant had properly performed LOTO on at least two prior occasions. The only question before this Board is that of the appropriateness of dismissal.

There is uncontested testimony that the Claimant violated at least four (4) elements of the LOTO procedure:

- he called for but did not wait for the electrician to move the power switch handle from on to off;
- he did not secure sign-off from the electrician;
- he secured the on-off handle in the on position;
- he did not verify that LOTO had been properly completed, although his entry in the Safety Lock-Outs form indicated otherwise.

The Board finds that the Claimant's faulty performance of LOTO was far greater than what the Organization has characterized as a "momentary lapse." The Claimant acted with extreme carelessness—even recklessness—that could have had grave if not tragic consequences. The case under consideration herein is easily distinguished from those of Mr. J. Bauman and Mr. J. Bovee, who correctly locked out energy sources but did not properly tag out the machinery. The Claimant's extreme carelessness is also viewed as more serious than that shown in PLB No. 7566, Award No. 77 and Second Division Award No. 6485, both submitted by the Organization.

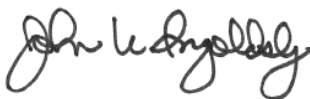
However, the Board does not find that the Claimant's infractions were intentional. The Board is convinced that the Claimant's prompt reporting of his error to Assistant Port Manager B. King and his acceptance of responsibility from the outset are inconsistent with a conclusion that he intentionally disregarded LOTO. This finding, coupled with the Claimant's nine (9) years of service, the absence of formal discipline on his work record and the evidence that prior to March 27, 2019 he had correctly performed LOTO establishes him as a candidate for corrective rather than punitive discipline. Under the circumstances we view dismissal as arbitrary and capricious. Because of the seriousness of the Claimant's infractions, we do no more than reinstate the Claimant with seniority intact but without back pay and benefits, with the discipline to be recorded as a Level 3 violation.

Award

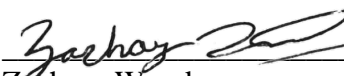
Claim partially sustained.

Order

The Board hereby orders that an Award partially favorable to the Claimant be made in accordance with the Findings.



John K. Ingoldsby
Carrier Member



Zachary Wood
Organization Member

A handwritten signature in blue ink, appearing to read "I.B. Helburn", followed by a long horizontal flourish.

I.B. Helburn
Neutral Member

Dated: December 9, 2021