

PUBLIC LAW BOARD NO. 7566

BROTHERHOOD OF MAINTENANCE	)	
OF WAY EMPLOYES DIVISION	)	
IBT RAIL CONFERENCE	)	Docket No. 30
	)	
and	)	
	)	
CANADIAN NATIONAL/WISCONSIN	)	
CENTRAL LTD.	)	Claimant: E. Bertrang

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

1. The Carrier's decision to terminate employee E. Bertrang's seniority under letter dated December 28, 2010, was entirely arbitrary, improper and unwarranted (Carrier's File WC-BMWED-2011-00002).
2. As a consequence of the Carrier's violation referred to in Part 1 above, Claimant E. Bertrang shall be returned to service immediately, with all seniority rights unimpaired and he shall be compensated for all time lost due to the Carrier's improper termination."

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

Parties to said dispute were given due notice of hearing thereon.

Carrier issued Claimant a letter dated December 28, 2010 which provided in pertinent part:

Our records indicate that you were to return to service Tuesday, December 21, 2010 following your suspension per waiver of investigation signed October 6, 2010. Since you have not reported to your position as of Monday, December 27, 2010 you are considered absent without authority.

Rule 31- Discipline Procedure, paragraph J, of the BMWED Agreement ratified on July 1, 2004, provides that employees absent without authority for 3 or more consecutive days be considered resigned from the CN and forfeit all seniority without right of investigation.

The Organization argues that Claimant should not have been terminated. In support, the Organization states that Claimant was suspended from service from September 28, 2010 through December 20, 2010. In connection therewith, the Claimant signed a disciplinary waiver that

stated he “may return to service Tuesday, December 21, 2010.” The Carrier bulletined the position Claimant had held and a senior employee was awarded the position on October 22, 2010. According to the Organization, Claimant had no position to which he could return upon the completion of his suspension. There were no positions or vacancies for the Claimant and he exercised his right to enter into a furlough status. Because the notice used the word “may,” Claimant was not required to report to work on December 21, 2010. He tried to displace in January and could not because his seniority had been terminated on December 28, 2010 and a letter was sent to him informing him that he was no longer employed with the Carrier.

The Carrier responds that use of the word “may” in the notification to Claimant was not a permissive statement meaning that he could return to work whenever he wished. Rather, the clear meaning of the letter was to inform Claimant how long he was suspended from the workplace and the date he should report to work. Claimant should have contacted the Carrier and notified the appropriate supervisors of his return to work. The Carrier is under no obligation to contact the Employee and notify them that they are to return to work. The Claimant’s inaction means that he abandoned his employment. This is a self-executing rule and Claimant abandoned his job with the Carrier. It is not disciplinary.

The pertinent Rules provide:

#### **RULE 06 - BULLETINING OF POSITIONS**

H. Employees returning from a leave of absence or vacation may return to the positions to which they hold assignment (unless abolished or occupied by a senior employee in the exercise of seniority pursuant to Rule 11) or exercise seniority to any positions bulletined and awarded during their absence. In the absence of either of these options, the employee may exercise displacement rights.

#### **RULE 11 - EXERCISE OF SENIORITY (DISPLACEMENT)**

A. Employees whose positions are abolished or who are displaced will have the right to displace any employee junior to them, provided they possess the specific qualifications of the job and that such displacement rights are exercised by physical displacement within seven (7) days from the date released from the employee’s prior position. Vacation time taken will extend the employees displacement time by the extent of time taken.

\* \* \*

F. Employees failing to exercise seniority in accordance with paragraph A will be furloughed, subject to recall in accordance with Rule 12.

After a review of the record, the Board finds no merit in the Organization's argument that Claimant was not required to return to work on December 21, 2010. However, there is some merit to the Organization's argument that Claimant had no job to which he could return because the job had been bulletined in his absence. He had been replaced by a senior employee and could not displace that employee. There is also merit to the Carrier's argument that Claimant did nothing to alert the Carrier that he was returning to work and could not displace the employee that occupied his previous position. To the Carrier, it appeared that Claimant had abandoned his job. Further, if Claimant had been notified that his seniority had been terminated on December 28, 2010, it was pointless for him to try and displace nearly a month later.

This Board has reviewed the evidence and finds that the Carrier improperly terminated the Claimant's seniority. However, that conclusion does not end the inquiry. This is a close case and the above determination is fact-specific to the instant matter. Instructive in the instant matter is an analogous matter found in PLB NO. 6302 Award 159, which provides in pertinent part:

Carrier's Manager of Employee Assistance, [name omitted] telephoned Claimant and apprised him he had been released to return to service and made clear to Claimant he was no longer going to be covered by his MLA. According to the Organization, since prior to Claimant's going on an approved Medical Leave of Absence he had been disqualified from his position of roadway equipment operator (backhoe), Claimant could not return to work in that position. As a result, Claimant elected not to remain in service of the Carrier through the exercise of displacement rights, that is, by the exercise of his seniority rights but instead elected to remain in service of the Carrier by entering into a furlough status pursuant to the provisions set forth in Rule 21(f) which states in pertinent part as follows: Employees who do not elect to remain in service through the exercise of displacement rights or who are unable to do so will be furloughed.

\*\*\*

something is amiss here that undercuts Carrier's position in this matter. On the other hand, Claimant must also bear an equal responsibility in not clearly communicating to Carrier the basis for his not returning to service as it is unclear that he was granted furloughed status.

Accordingly, based on the foregoing Findings, the Board orders Carrier to reinstate Claimant with seniority unimpaired but without back pay and without compensation for benefits as so requested by the Organization.

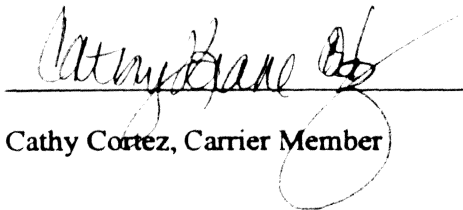
The above-cited Award is instructive in the instant matter. Claimant was coming back from a suspension and chose not to communicate with the Carrier following his return to work date until well after that date. That he thought he was in furlough is instructive for the analysis, but not dispositive. Claimant shares culpability. Accordingly, this Board orders Carrier to reinstate Claimant with seniority unimpaired but without back pay and without compensation for benefits as so requested by the Organization.

**Award:**

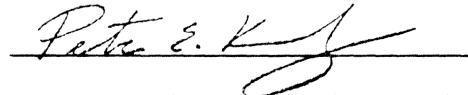
Claim sustained in part and denied in part as discussed above.



Brian Clauss, Chairman



Cathy Cortez, Carrier Member



Peter Kennedy, Organization Member

Signed on June 10, 2013