

PUBLIC LAW BOARD 5564

In the Matter of Arbitration between:

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

and

**NORTHEAST ILLINOIS REGIONAL COMMUTER
RAILROAD CORPORATION**

Case Number 50

Award No. 50

THE ORGANIZATION'S STATEMENT OF THE CLAIM

This Decision resolves the Organization's claim as follows:

1. The Carrier's decision to dismiss Claimant D. Ringo from service for alleged failure to protect his position on November 13, 2011 is entirely unwarranted, excessive and in violation of the Agreement (System File C120316/08-7-622 NRC).
2. As a consequence of the violation referred to in Part 1 above. Claimant D. Ringo shall be afforded the full remedy prescribed in Rule 32(e) of the Agreement.

STATEMENT OF FACTS

Based on the record developed by the Organization and the Carrier, this Public Law Board (Board) finds that the Parties herein to be a Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the Parties and the dispute.

This dispute is between the Brotherhood of Maintenance of Way Employees Division – IBT Rail Conference (BMWE or Organization) and the Northeast Illinois Regional Commuter Railroad Corporation, common known by the acronym Metra (Metra or Carrier), (collectively, Metra and BMWE are the Parties). The dispute arises out of BMWE's claim that Darin Ringo (Ringo or Claimant), a Bridge & Building (B&B) Mechanic, was unjustly dismissed by Metra.

The facts surrounding the incident giving rise to the Claimant's dismissal are as follows:

At the time of the incident giving rise to his dismissal, Ringo had been a Metra employee since June 4, 1995.

On Friday, November 11, 2011, Claimant's Foreman, Rodney Carter, offered Claimant overtime work for Saturday, November 12, 2011, and Sunday, November 13, 2011. Ringo accepted.

However, Claimant failed to show, and did not call in to report his absence, for the overtime assignment on Sunday, November 13, 2011. B&B Supervisor, Daniel Colantuono, discovered Claimant's failure to protect his overtime assignment on Monday, November 14, 2011.

On January 12, 2012, Carrier conducted a formal investigation to develop the facts surrounding the incident, to determine the cause of and the responsibility for Claimant's alleged failure to protect his November 13, 2011 overtime assignment. A transcript (Tr) was taken at the formal investigation.

The transcript establishes that Claimant admitted he failed to protect his assignment. (Tr 6-7). Claimant said the reason he failed to protect his assignment was that he overslept. (Tr 7-8). In addition, Claimant stated he had just worked 20-days straight; he had "5 kids to tend to" at home; and he had no access to a phone because his phone was off. (Tr 6-7).

The record establishes that at the time of the incident, Claimant was on Step 4 of the *Carrier's Progressive Discipline Policy (Policy)*. Pursuant to the *Policy*, Step 4 has a 2-year duration. Claimant was on Step 4 based on a November 25, 2009 incident involving his failure to protect his position. Regarding this incident, Claimant waived investigation and accepted a 7-day suspension. (Tr 7-8). The *Policy* provides that Step 4 is the penultimate disciplinary step. The ultimate step, Step 5, is dismissal.

As a result of the formal investigation, Claimant was found responsible for a violation of Metra Employee Conduct Rule Q and Engineering Special Instruction 1.

On January 23, 2012, Claimant was dismissed.

BMWE appealed Claimant's dismissal. Pursuant to the Parties' collective bargaining agreement (CBA), the dispute was conferenced between the Parties, but not resolved.

The dispute is now properly before this Board for adjudication.

APPLICABLE WORK RULES AND POLICIES

Employee Conduct Rule Q:

Employees must report at the appointed time, devote themselves exclusively to their duties, must not absent themselves nor exchange duties with, or substitute others in their place, without proper authority.

Engineering Special Instruction 1:

All employees must be punctual, maintain a satisfactory attendance record and cover their assignments scheduled in order for NIRCRC ("Metra") to provide reliable and efficient service. Excessive employee absences, lateness and/or early quits are costly, disruptive to our business operations and place an unfair burden on other employees.

* * *

Rule "Q" of NIRCRC Employee Conduct Rules requires that "Employees must report at the appointed time, devote themselves exclusively to their duties, must not absent themselves, nor exchange duties with, or substitute others in their place, without proper authority."

* * *

If an employee is going to be absent, for whatever reason, the employee must notify the designated supervisor prior to the start of the employee's assignment. Designated supervisors and phone numbers are listed in Special Instruction 22, Item 10. However, this notification, including voice mail messages, does not automatically give an employee an authorized absence.

PARTIES' CONTENTIONS

I. Metra's Contentions

The Carrier asserts that Claimant was proven guilty of the charge with substantial evidence at the formal investigation. Metra asserts that the formal investigation also proved that he violated Metra's Employee Conduct Rule Q and Engineering Special Instruction 1.

Specifically, Metra argues the facts establish Claimant accepted the weekend overtime assignments, then failed to protect his November 13, 2011 assignment. In addition, Metra argues that Claimant admitted his failure to protect his assignment.

Metra maintains that it met its burden of proof and Claimant's excuse that he overslept is not a mitigating factor and without merit. Metra says that Claimant was a "no call, no show" employee and many awards establish this is a dismissal offense.

Metra asserts that Claimant was afforded a fair and impartial investigation at which he was: advised of the nature of the charges; represented by a BMW representative; testified on his own behalf; questioned witnesses; examined the evidence; and offered the opportunity to make a closing statement. Metra argues that there is no evidence, and BMW has produced none, to support a procedural flaw in the formal investigation.

Metra asserts the discipline was not harsh, arbitrary, or an abuse of discretion. Metra argues that the discipline was for proven rules violations in accordance with the Metra's *Progressive Discipline Policy* for Step 5 discipline which is dismissal.

Metra asserts that because Claimant was on Step 4, his dismissal was neither excessive nor capricious.

Metra argues that it is not required to continue to employ individuals who intentionally disregard rules and that it is within its rights to terminate Claimant.

Metra argues that assessing discipline progressively is intended to correct behavior. Metra says that in this case, there is no grounds to overturn the discipline imposed because Claimant's discipline was not excessive, harsh or capricious.

Metra asserts that even assuming, *arguendo*, the Board reverses this dismissal, then Claimant would only be entitled to back pay less the amount earned in other employment.

Metra concludes there was nothing presented in the record to warrant an alteration of the discipline. For these reasons, Metra concludes, BMW's claim is without merit and must be denied.

II. BMW's Contentions

BMW asserts that the purpose of discipline is to rehabilitate, correct and guide employees. In this instance, Claimant's dismissal, after 15 years of service, serves nothing more than to punish, and so is harsh and excessive and cannot stand.

BMW cites numerous NRAB, PLB and SBA awards holding that discharge is too severe a penalty.

Furthermore, BMW argues the Claimant's testimony was honest, open and frank, demonstrating a willingness to cooperate with Metra's investigation and the potential for rehabilitation. BMW argues that Metra should follow the well-established purpose of discipline not to inflict punishment but rather to rehabilitate, correct and guide employees. BMW argues that the ultimate penalty of dismissal should be reserved for repeated and serious infractions of work rules which is not present in this case.

BMWE concludes that when these principles are applied to Claimant, there can be no question that the Metra's dismissal of Claimant was were excessive and exceedingly harsh. Therefore, BMWE asserts the claim must be sustained.

DISCUSSION AND FINDINGS

Metra has the burden to prove that Claimant's dismissal was proper under the Parties' CBA and Metra's work rules and policies. The Board's review of Claimant's dismissal is appellate and not *de novo*.

For the reason discussed below, the Board is persuaded that METRA has met its burden of proof to establish that Claimant violated Carrier work rules, but the discipline should be mitigated based on the unique facts surrounding the incident.

The relevant and material facts were established in Metra's formal investigation and are not disputed.

Much to his credit, Claimant admitted his failure to protect his November 13, 2011 overtime assignment was a violation of Rule Q and Engineering Instruction 1. Many awards hold that when there is an admission of guilt, there is no need for further proof to support the Carrier's discipline. However, there maybe particular, specific or unique grounds to support mitigation of the penalty imposed for the work rule violation.

Claimant's stated reason for missing his assignment, that he overslept, initially appears to be a mere excuse. However, in the record, on the property, there exists uncontested, extenuating, **unique** circumstances in this case.

The Board finds that the record establishes grounds for mitigation. Specifically, Claimant overslept as a result of fatigue after working 20-days straight in his position. His personal family situation and lack of a phone contributed to missing the assignment and failing to timely notify his supervisor of his absence. Events quickly spiraled out of control for Claimant ending in a "no call-no show" violation of Carrier work rules. His 15 years of seniority provides additional grounds for mitigation or penalty. While Claimant is not a model employee, there is no evidence that his performance has been even marginal or

less over his 15 years in service with the Carrier.

Regarding his teetering on Step 4 of the Carrier's *Progressive Discipline Policy*, the record shows he was but a few days from being off Step 4 at the time he missed his overtime assignment. While a deadline is a deadline, Claimant had was only days short of 2 years' work without incident as regards his performance or compliance with Carrier work rules. His satisfactory performance and compliance with Carrier work rules during this time serves as additional support for mitigation of penalty.

For these reasons, the Board concludes that the totality of the record and circumstances support mitigation of the dismissal penalty based on the **unique** facts and circumstances of this case.


However, the mitigation of the penalty for Claimant's failure to protect his position comes with conditions to ensure his future acceptable performance and conduct in compliance with Carrier work rules. The Board recognizes that this is not Claimant's first disciplinary action, but it must be his last. Therefore, the mitigation of penalty shall place Claimant in no better, or no worse, a position than the day of his dismissal.

For all these reasons, the Board finds that the Claimant is to be reinstated, without back pay, to his B&B Mechanic position. His appropriate accrued seniority from the date of his entry on service to his dismissal date is to be restored. He is to be returned to service on Step 4 of the Carrier's *Progressive Discipline Policy*, which must remain in effect for two years from his reinstated date.

AWARD

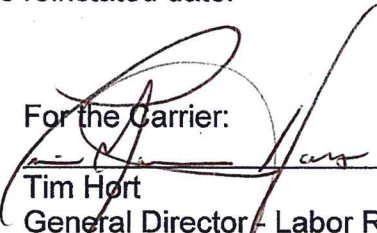
Based on the record developed by the Parties and for the reasons discussed above, Claimant is reinstated, without back pay and with his accrued seniority from the date of his entry on service to his dismissal date. With regard to Metra's *Progressive Discipline Policy*, Claimant will be on Step 4 for two years from his reinstated date.

For the Organization:




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Public Law Board Advocate
BMWE

For the Carrier:



Tim Hort
General Director - Labor Relations
Metra

Neutral Member:



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