

PUBLIC LAW BOARD 5564

In the Matter of Arbitration between:

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

and

**NORTHEAST ILLINOIS REGIONAL COMMUTER
RAILROAD CORPORATION**

Case Number 83

Award No. 83

THE ORGANIZATION'S STATEMENT OF THE CLAIM

This Decision resolves the Organization's claim as follows:

1. The Carrier's discipline (suspension) of Mr. D. Jones, by letter dated November 14, 2017, for alleged violation of Metra Employee Conduct Rule 'B' Paragraph #1, Rule 'N' Paragraph #1, Item #4 and MOW Rule 1.25 Paragraph #1 in connection with his alleged failure to follow instructions and dishonesty while acquiring a tool was arbitrary, unwarranted and in violation of the Agreement (System File 17 11 14/8-2018-4 NRC).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Jones shall now have the charges and discipline removed from his record and be reimbursed for all wage loss associated with the Carrier's actions.

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, commonly known by the acronym Metra, (Metra or Carrier), (collectively, Metra and BMWE are the Parties). The dispute arises out of

BMW's claim that Delbert Jones (Jones or Claimant), a water service mechanic in Bridge & Building (B&B) with 19 years seniority, was unjustly suspended for 10 days by Metra. At the time of incident giving rise to his suspension Jones' foreman was James Smith and his supervisor was Luis Diaz.

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

On October 25, 2017, Mike Tempinski, Metra Director of Engineering, was reviewing and approving payments for tool purchases in Metra's accounting system. Tempinski discovered a bill from Marco Supply for a Rigid 30088 ratchet cutter which he did not recognize. Tempinski asked Luis Diaz, Metra Supervisor, about the purchase. Diaz had no knowledge of the purchase. Tempinski asked, James Smith, Metra Foreman, about the purchase. Smith told Tempinski that the Claimant said he received permission to purchase the Rigid ratchet cutter from Tempinski and Smith.

The credible, material record evidence establishes that Claimant did **not** have permission to purchase the tool from Tempinski or Diaz. The record also establishes that Claimant told Smith that he had permission to purchase the tool from Tempinski or Diaz when he knew he did not.

On October 30, 2017, Tempinski spoke to Claimant following up on his recent review of tool purchases. Claimant stated that Tempinski and Diaz approved the purchase. Claimant said that the tool was needed to replace a defective tool. Tempinski asked Claimant for the defective tool. Claimant responded that he did not have the tool because he returned the tool. However, he had no paperwork to show that he returned the tool and never produced any.

On November 7, 2017, Metra conducted a formal investigation which resulted in a November 14, 2017 Notice of Discipline notifying Claimant that he violated: *Employee Conduct Rule B, Paragraph 1; Rule N, Paragraph 1, Item 4; and Maintenance of Way Rule 1.25, Paragraph 1.*

In accordance with the *Carrier's Progressive Discipline Policy (Policy)*, Claimant was

assessed Step 4 discipline, a ten-work day suspension. Step 4 discipline is the penultimate discipline before dismissal.

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 B, Paragraph 1; Rule N, Paragraph 1, Item 4; and Maintenance of Way Rule 1.25, Paragraph 1:

Rule B of the Employee Conduct Rules:

Employees must have a proper understanding and working knowledge of and obey all rules and instructions in whatever form issued, applicable to, or affecting their duties. If in doubt as to their meaning, employees must contact their supervisor for explanation.

* * *

Rule N of the Employee Conduct Rules:

Employees must not be:

* * *

4. Dishonest.

* * *

Rule 1.25 of Maintenance of Way Rules:

Unless specifically authorized, employees must not use the railroad's credit and must not receive or pay out money on the railroad account. Employees must not sell or in any way get rid of railroad property without proper

authority.

RULE 32. HEARINGS - DISCIPLINE AND UNJUST TREATMENT

(a) An employee who has been in the service sixty (60) calendar days or more will not be disciplined or dismissed without a proper hearing as provided for in paragraph (d), below, unless such employee shall waive formal hearing and accept discipline in writing (sample waiver form on the next page) witnessed by his representative. Suspension from service pending charges and hearing is permissible in major offenses.

(b) Whenever charges are preferred against an employee, they will be filed in writing within ten (10) days from the date the Carrier has knowledge of the alleged offense, with copy to the General Chairman. Such notice shall specify the specific charges against the employee.

* * *

d) An employee against whom charges are preferred, or who may consider himself unjustly treated, shall be granted a fair and impartial hearing by a designated official of the Carrier which shall take place within ten (10) days after notice is served, either under paragraph (b) or paragraph (c), above. A charged employee shall be given reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented by the duly-accredited representatives of the employees.

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 B, Paragraph 1; Rule N, Paragraph 1, Item 4; and Maintenance of Way Rule 1.25, Paragraph 1*.

Metra argues that Claimant's testimony during the formal investigation was not credible and his account of permissions to buy the tool changed. Metra argues Claimant provided multiply inconsistent accounts of permissions from Tempinski and Diaz. Metra

argues his accounts amounted to evolving recollections of the incident that are without merit.

Moreover, Metra asserts that testimony during the formal investigation established that Claimant requested permission to buy the tool from Tempinski, but Tempinski denied Claimant's request.

Metra maintains that it met its burden of proof and provided substantial and reliable evidence that Claimant failed to follow work rules and instructions, and was dishonest about his Rigid rachet cutter purchase.

Metra asserts that Claimant was: given proper and timely notice of the formal investigation; advised of the specific charges; present at and represented by a BMW representative at the formal investigation. Metra says that Claimant provided testimony on his own behalf; questioned witnesses; examined the evidence; and was 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 commensurate with the proven rule violations and in accordance with Metra's *Progressive Discipline Policy*, Step 4.

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 Metra's conduct of the formal investigation deprived Claimant of a fair and impartial hearing pursuant to Rule 32. Specifically, BMW argues that Hearing Officer, Paul Sorenson, was considered by Claimant as a potential witness in an Equal Employment Opportunity Commission (EEOC) complaint against Tempinski. BMW argues that, despite its objection to Sorenson as the Hearing Officer and its request for Sorenson to recuse himself as the Hearing Officer at the formal investigation hearing, Sorenson continued as the Hearing Officer. BMW says Sorenson's failure to recuse himself deprived Claimant of a fair and impartial hearing.

BMW asserts Claimant informed Smith that he was purchasing the tool and Smith gave him permission to purchase the tool. BMW argues that Metra has never had an issue with Claimant's tool purchases during his 19-year career. BMW says overwhelming case precedent holds that discipline must be progressive rather than punitive.

For all these reasons, BMW argues Metra's discipline of Complaint was inappropriate and unwarranted. BMW requests the claim be allowed.

DISCUSSION AND FINDINGS

Metra has the burden to prove that Claimant's 10 day suspension was proper under the Parties' Agreement and Metra's work rules and policies. The Board's review of Claimant's suspension 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 and a 10-day suspension was the appropriate penalty.

The relevant and material facts established in Metra's formal investigation show that the Claimant did **not** have permission to purchase the Ridge rachet cutter from any Metra supervisor or foreman. Furthermore, when the Claimant was confronted with the inappropriateness of his purchase by Tempinski, the Claimant fabricated several explanations. Claimant's evolving explanations of the purchase unraveled one after another as the facts became evident.

Moreover, the Claimant never provided proof of the return of the defective tool thereby further damaging his credibility as regards the entire incident.

Finally, the record also established that Tempinski told the Claimant **not** to buy the tool.

BMW challenges the fairness and impartiality of the formal investigation hearing

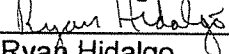
because Sorenson refused to recuse himself as the Hearing Officer. BMW's grounds to request Sorenson's recusal was that Sorenson was a potential witness in Claimant's EEOC complaint. As the basis for recusal, Sorenson's potential participation as a witness in an EEOC proceeding, which is an independent forum, is attenuated and remote. For this reason, BMW's challenge of Sorenson's neutrality as a Hearing Officer in the formal investigation is without merit.

For all these reasons, the Board concludes that the totality of the record and circumstances require that the claim be denied.

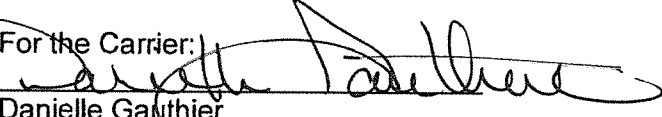
AWARD

Based on the record developed by the Parties and for the reasons discussed above, the claim is denied.

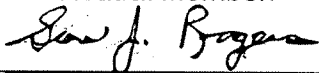
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October 31, 2019