

## **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 84

Award No. 84

### **THE ORGANIZATION'S STATEMENT OF THE CLAIM**

This Decision resolves the Organization's claim as follows:

1. The Carrier's discipline (dismissal) of Mr. D. Jones, by letter dated November 20, 2017, for alleged violation of Metra Employee Conduct Rule 'N' Paragraph #1, Item #6 and Item #7 and Paragraph #2 in connection with a derogatory text message sent to Mr. Jones' immediate supervisor was arbitrary, unwarranted and in violation of the Agreement [System File 17 11 20/8-2018-4(b) NRC].
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Jones shall be reinstated to service and exonerated of the charges leveled against him as well as 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 BMW 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 dismissed by Metra. At the time of incident giving rise to his dismissal Jones' foreman was James Smith and his supervisor was Luis Diaz.

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

On November 3, 2017, Luis Diaz, Claimant's supervisor, received a text from Claimant which stated, "*I'm going to fuck Luis ass to[o] in this investigation.*"

Diaz notified Mike Tempinski, Metra Director of Engineering, of Claimant's text.

On November 6, 2017, Tempinski interviewed Claimant about the text to Diaz. Claimant told Tempinski that he should not be concerned because it was a personal matter between him and Diaz. Claimant also told Tempinski that he had apologized to Diaz for the text.

On November 7, 2017, Metra notified Claimant of a formal investigation on November 10, 2017 as regards the derogatory text Claimant sent to Diaz. Claimant attended the formal investigation at which he was represented by BMW and a transcript was taken.

Based on the formal investigation and pursuant to the Carrier's *Progressive Discipline Policy (Policy)*, Metra assessed Claimant with Step 5 discipline, dismissal.

On November 20, 2017, Metra dismissed Claimant for violating *Employee Conduct Rule "N", Paragraph 1, Item 6 and Item 7 and Paragraph 2*.

BMW 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 RULE**

#### **Rule N of the Employee Conduct Rules:**

Employees must not be:

\* \* \*

6. Quarrelsome or

7. Discourteous.

Any act of hostility, misconduct, willful disregard, or negligence affecting the interest of Metra or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.

### **PARTIES' CONTENTIONS**

#### **I. Metra's Contentions**

The Carrier asserts that Claimant was proven guilty of violating Metra's rules when he sent a derogatory text to Diaz. Metra asserts that the formal investigation developed substantial evidence that he violated Metra's Employee Conduct Rule N. Moreover, Metra argues that in the formal investigation, Diaz testified that \_\_\_\_\_ threatened by Claimant's text.

Metra notes that the record also shows that Claimant apologized twice to Diaz. However, Metra argues, Claimant provided three rationales attempting to mitigate his misconduct including: the text was for his lawyer; he thought that Diaz coming after him over a Family Medical Leave Act (FMLA) matter; and he did not know he sent the text to Diaz. Metra asserts these rationales differ from Claimant's statements to during Claimant's November 6, 2017 interview with Tempinski as well.

Metra maintains none of these rationales mitigate Claimant's responsibility for the

misconduct.

Metra asserts the record is clear that Claimant admits that he sent the text. Metra argues that well established precedent holds that once an employee admits guilt, no further proof is needed and, absent mitigation, a Board lacks the power to reverse the Carrier's discipline.

Metra asserts that there was a fair and impartial formal investigation of Claimant's misconduct. Metra asserts that the discipline assessed was commensurate with the Carrier's *Policy* at Step 5 and Claimant's conduct warranted dismissal no matter his standing under the *Policy*.

Metra concludes there was nothing presented in the record to warrant an alteration of the discipline of dismissal based on Claimant's unacceptable and derogatory language in his text to Diaz.

For these reasons, Metra concludes, BMW E's claim must be denied.

## **II. BMW E's Contentions**

BMW E asserts that Metra's discipline of the Claimant is arbitrary and unwarranted.

BMW E argues that the formal investigation transcript reveals that: Claimant meant to send the text to his lawyer not Diaz; Diaz did not report the text to the police; and, once Claimant realized he sent the text to Diaz, he called and apologized and then apologized in person the next day.

BMW E argues that Metra's dismissal of the Claimant for an inadvertent text to Diaz is unwarranted and excessive. BMW E argues that Claimant has been a productive, safe and respectful employee for 19-years with no history of this type of misconduct.

BMW E says Claimant can still be productive, safe and respectful and can learn from his actions.

BMWE concludes that when these principles are applied to Claimant, there can be no question that the Metra's dismissal of Claimant was excessively harsh. Therefore, BMWE requests that the claim be allowed.

## **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 when Claimant was at Step 5 of Metra's *Policy*.

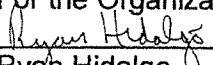
The relevant and material facts established by Metra's formal investigation were not mitigated by Claimant's shifting, evolving and dissembling explanations. Claimant's admission of the work rule violation of sending Diaz a crude, derogatory and, *arguably*, threatening text establishes that no further proof is needed and, absent mitigation, this Board lacks the power to reverse the Carrier's discipline. This is particularly true because Claimant is at Step 5 of the *Policy*. The Board can find no grounds for mitigation in this record.

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

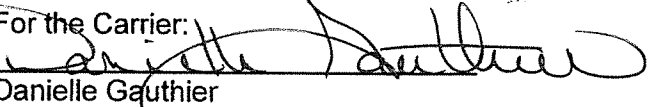
## AWARD

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

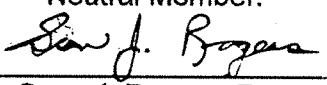
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Neutral Member:

  
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October 31, 2019