

**PUBLIC LAW BOARD NO. 7529  
CASE NO. 99  
AWARD NO. 99**

<b>BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION – IBT RAIL CONFERENCE (Organization file: D70809615)</b>	)	
	)	
	)	
<b>vs.</b>	)	
	)	
<b>CSX TRANSPORTATION, INC. (Carrier file: 2015-190321)</b>	)	<b>PARTIES TO THE DISPUTE</b>

**STATEMENT OF CLAIM:** “Claim of the System Committee of the Brotherhood that:

1. *The Carrier’s dismissal of Claimant T. Allen for the alleged violation of CSXT Operating Rules 100.1, 104.3 and the CSX Policy Statement on Harassment was on the basis of unproven charges, arbitrary and in violation of the Agreement (System File D70809615/2015-190321 CSX).*
2. *As a consequence of the violation referred to in Part 1 above, Claimant T. Allen shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement.”*

**FINDINGS:**

The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Agreement, as amended, that this Board is duly constituted by Agreement dated February 15, 2012, that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings. The parties have been unable to resolve this issue and they have placed the issue before this Board for adjudication.

After a thorough review of the record, and a hearing on this matter held on August 25, 2016, the Board concludes that the Claimant in this case was a Maintenance of Way employee on the dates in question in this claim.

The facts in this case are not in dispute. The Claimant has been working for the Carrier since July 21, 2007 and has established seniority in the Carrier’s Maintenance of Way Department. On March 21, 2015, the Claimant sent an explicit photo to Roadmaster Jennifer Gallant using his personal phone. By letter dated April 10, 2015, the Claimant was charged with sending explicit material to a manager and was required to attend an investigation. The Claimant states that the photo was sent unintentionally. On June 16, 2015, the Claimant was dismissed for violating CSXT Operating Rules 100.1, 104.3, and the CSX Policy Statement on Harassment.

The Organization appeals that decision to this Board.

**POSITION OF THE ORGANIZATION:**

The Organization's position is that the Carrier has failed to provide a fair and impartial hearing as required by Rule 25. The Organization also asserts that the Carrier has failed to meet its burden of proof and even if it has, the discipline imposed is arbitrary, unwarranted and a violation of the Agreement. The Organization states that the Carrier's conducting officer made statements, which clearly indicate the Carrier's belief that the Claimant was guilty and would be dismissed following the investigation. These statements made by the charging officer destroy any semblance of a fair and impartial hearing. In order to meet its burden of proof the Carrier must produce substantial evidence, which supports its ultimate determination of guilt and the level of discipline imposed. The Claimant argues that he accidentally sent the subject of communication and his actions do not fall under CSX Operating Rule 104.3 as he was not on-duty during the incident, nor does Rule 104.2 apply. It is a widely held notion that discipline is to be progressive rather than punitive in nature. The Carrier has failed to meet its burden and therefore the discipline should be reduced.

**POSITION OF THE CARRIER:**

The Carrier's position is that the Claimant's due process rights as provided under Rule 25 of the Agreement and was granted a fair and impartial hearing. The Claimant was represented by the Organization, received proper notice of the charge, sufficient time to prepare a defense, the opportunity to present and examine evidence, and the opportunity to present and cross-examine witnesses. The Organization objected to the introduction of the Claimant's record, however, the Carrier states that it had no impact on the investigation's outcome. The Carrier states they have met their burden in determining that the Claimant violated CSX Operating Rules 100.1 and 104.3, as well as CSX Policy Statement on Harassment. In support they assert that the Claimant admitted to sending sexual explicit photos, which clearly violates the Harassment Policy, regardless of whether the Claimant is off-duty when the photo was sent. While Claimant did send an apology text, it was not until after he had been removed from service for the incident. The Carrier has therefore proven by substantial evidence that the Claimant is culpable for the charged violations. The Carrier asserts that the Claimant's actions demonstrate a violation of the rules and is considered a Major Offense. One for which a single infraction, if proven guilty, can result in dismissal. The Carrier has an obligation to protect its employees from the Claimant's behavior and supports a Carrier's dismissal for lewd and vulgar behavior, therefore it is reasonable

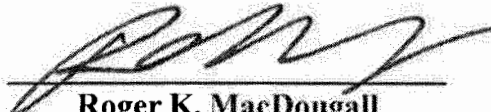
**RESULT:**

The Carrier, as this is a discipline case, has the burden of proof concerning this claim.

As to the merits, this Board does not find the Claimant's arguments to be credible. Although the Claimant argues that his actions were done by mistake, the record clearly establishes that he has always used his company phone to text in the past. It does not matter if Claimant's actions were intentional or by mistake. The Claimant did not apologize for his actions until after he was charged. Claimant's subsequent actions are not ones of someone who is credibly apologetic.

**AWARD:**

The claim is denied.

  
**Roger K. MacDougall**  
**Chair and Neutral Member**

Dated: 2/17/2017

At: Chicago, IL