

**PUBLIC LAW BOARD NO. 7564**

Case No. 125/Award No. 125  
Carrier File No. 11-21-0101  
Organization File No. T-D-6591-S  
Claimant: B. Loock

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BNSF RAILWAY COMPANY )  
 )  
-and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYEES DIVISION )  
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**Statement of Claim**

By letter dated November 6, 2020, B.Loock received a dismissal notice effective immediately detailing “quarrelsome and discourteous conduct for sending offensive texts to your foreman and manager on September 26, 2020 while working as a tamper operator on gang TSCX0381 on the KO Subdivision” in violation of MWOR 1.6 Conduct.

The Organization’s claim dated December 11, 2020, from Mathew C. Scherbing, Vice General Chairman, appealed the discipline, alleging procedural and substantive violations regarding the investigation, and characterizing it as excessive and prejudged. The Organization requested that any reference to the discipline outlined in the Carrier’s November 6, 2020, letter be “cleared” from [Claimant’s] record and that Claimant be “immediately reinstated and paid for all his lost time and day to attend [the] investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, difference in pay and ... be made whole for any and all benefits.”

**Facts**

By letter dated October 2, 2020, the Claimant received notice to attend an “[I]nvestigation... at 0900 hours, Sunday, October 11, 2020, at ... Fargo, ND ... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged quarrelsome and discourteous conduct and indifference to duty when engaging in unprofessional behavior when you refused to dial into the morning call while a passenger in a company vehicle on September 25, 2020 and sending offensive texts to your foreman and manager on September 26, 2020 while working as a tamper operator on gang TSCX0381 on the KO subdivision. The date [the Carrier] received first knowledge of this alleged violation is

September 26, 2020.” The investigation was postponed by mutual agreement on one occasion. On October 13, 2020, at 0900 hours, the investigation was held.

### **Carrier Position**

The Carrier avers that the investigation was fair and impartial, and the record proved by substantial evidence that Claimant violated MWOR 1.6 and that the discipline was in accordance with the Carrier’s Policy for Employee Performance Accountability (“PEPA”).

### **Organization Position**

The Organization asserts that Claimant was denied a fair and impartial investigation violating Rule 40 of the parties’ collective bargaining agreement (“CBA”). Not only are the allegations untimely, but Claimant’s dismissal is excessive and unwarranted due to the Carrier’s procedural and substantive errors. Moreover, the Carrier failed to meet its burden of proof because the record lacks sufficient facts and evidence.

### **Findings**

Claimant is a fourteen (14) year Carrier employee. At the time of the allegations, Claimant acted as a tamper operator on a mobile surfacing gang. According to the Carrier, Claimant sent “offensive text messages” to his foreman, Wayne Thompson, and his manager on September 26, 2020. Claimant concedes he sent the text messages at issue. However, the Organization characterizes the text messages as “shop talk” regarding Claimant’s concerns and perceptions regarding the foreman’s work ethic. After the investigation, the Carrier determined that Claimant violated MWOR 1.6.

MWOR Rule 1.6 Conduct precludes the following:

Employees must not be:

6. Quarrelsome

7. Discourteous

Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.<sup>1</sup>

The evidence demonstrated that on September 26, 2020, Claimant sent text messages to his manager and foreman.<sup>2</sup> Examples of the text messages Claimant sent to his manager are as follows:

I will go to whichever 6700 or surf crew foreman you

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<sup>1</sup> Carrier Exhibit 18.

<sup>2</sup> Claimant Exhibits 5,6, 7,13,14,15,

want me to next year...and would prefer not babysitting a lazy dumbass like Wayne Thompson. I will not cover for such a lazy incompetent dumbass next year!...

I'm done dealing with the blatant stupid lying of Wayne Thompson.<sup>3</sup>

Below are some of the examples of text messages sent by Claimant to his foreman, Wayne Thompson:

So you did go on you're phone while driving and I told you not to beforehand? I am in the wrong while Wayne Thompson lies?

...I'm done with your lying incompetent stupidity! ...you a complete fucking idiot...<sup>4</sup>

...I'm not done spanking you for how stupid you are! Stop being so fucking stupid and allowing it to be seen! You are a [p]at Anderson and should not be in the position that you are!

I will cover for you and actually get the job done, Karen

You just drive while on your phone genius.

Good luck keeping your job li[a]r.<sup>5</sup>

Notwithstanding Claimant's defense that the above text messages constitute "shop talk," it is crucial to consider the context of the messages. Based on accepted industry standards, some language is excused as the parlance of the Railroad industry when used in a general, descriptive, reactive context.<sup>6</sup> However, personally insulting language is viewed differently. The context of Claimant's text messages is mitigated by safety concerns regarding the foreman's conduct. However, this fails to excuse the invective content of the messages.<sup>7</sup> Claimant's text messages to the foreman and manager were quarrelsome and discourteous. His conduct in

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<sup>3</sup> Carrier Exhibit 13. See also Carrier Exhibit 5 containing additional text messages sent by Claimant to his manager.

<sup>4</sup> Carrier Exhibit 14.

<sup>5</sup> Carrier Exhibits 7 & 15.

<sup>6</sup> See Public Law Board Third Division Award 42877, Public Law Board 2746, Award 8.

<sup>7</sup> Although the foreman resigned pending an investigation that may have resulted in dismissal, the foreman's disciplinary issues are irrelevant to this proceeding.

sending offensive texts went beyond “shop talk” and violated MWOR Rule 1.6. Claimant’s other defenses were unsubstantiated by the evidence.

The Organization’s alleged procedural errors neither impaired nor prejudiced the proceeding and Claimant’s due process rights. The Organization contends that the investigation is untimely because Claimant sent a text message containing similar language to his manager on September 9, 2020. The fact that the Carrier chose not to pursue allegations regarding text messages from September 9, 2020, does not preclude the Carrier from preferring the instant charges. The charges at issue only concerned the text messages sent on September 26, 2020, and complied with the timelines in CBA Rule 40. Moreover, the notice issued to Claimant did not lack specificity and complied with CBA Rule 40(C). The timeframe and nature of the alleged misconduct and the date, time, and place of the investigation were all included in the notice received by Claimant. All other alleged procedural and substantive errors alleged by the Organization are unsubstantiated by the record.

Although Claimant is a long-term employee of the Carrier, his prior disciplinary record includes a Serious violation in 2019 for using “offensive, inappropriate and disrespectful language directed towards another Carrier employee.” Claimant also recently received Anti - Harassment Discrimination training regarding inappropriate conduct, demeaning comments, and bullying.<sup>8</sup> Unless the Carrier’s actions are deemed arbitrary, capricious, or an abuse of discretion, it is axiomatic that it is not the function of the Board to substitute its judgment for that of the Carrier in a disciplinary matter. Given his prior disciplinary record and the misconduct he conceded he engaged in, Claimant’s discipline of dismissal was appropriate and in accordance with the Carrier’s Policy for Employee Performance Accountability (“PEPA”).

#### **Award**

Claim Denied.

#### **Order**

This Board, after consideration of the dispute identified above, hereby orders that no Award favorable to the Claimant be made.



Zachary Voegel, Organizational Member



Joe Heenan, Carrier Member



Melinda Gordon, Neutral Referee

DATED: June 20, 2023

<sup>8</sup> Carrier Exhibit 10.