Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38993
Docket No. SG-39837
08-3-NRAB-00003-070015
(07-3-15)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe:

Claim on behalf of F. J. Stottler, for compensation for all time lost, including skill pay, with all rights and benefits unimpaired and any mention of this matter removed from his personal record, account Carrier violated the current Signalman's Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of a 40-day suspension with a one-year probation against the Claimant without providing a fair and impartial investigation, and without meeting its burden of proving the charges in connection with an investigation held on September 22, 2005. Carrier's File No. 35-06-0007. General Chairman's File No. 05-103-BNSF-103-C. BRS File Case No. 13665-BNSF."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant is a 52-year-old Signal Foreman with 16 years of service with the Carrier. On September 12, 2005, a 17-year-old female hotel clerk accused him of kissing her without her permission. As a result of her complaint, the Claimant was removed from the hotel by local police. An Investigation was held into his "inappropriate conduct which included unwanted physical contact with a female member of the staff at [the hotel] while registered in a BNSF provided lodging facility on September 12, 2005, at approximately 2130 hours, which led to your removal from this facility under police escort to a different facility, while assigned as Signal Foreman headquartered at Burlington, IA." Signal Manager D. Golder conducted the Investigation held on September 22, 2005, and as a result of the Investigation, the Claimant was issued a Level S, time served, 40-day suspension, with a one year probation period for his violation of Maintenance of Way Operating Rule 1.6 – Conduct.

The Carrier contends that the Claimant received a fair and impartial Investigation, that there is substantial evidence that the Claimant committed the offense with which he was charged, and that the discipline was appropriate. The Organization asserts that the Investigation was not fair and impartial, that the Carrier failed to substantiate the alleged behavior, that the behavior was not a serious violation of MOW Rule 1.6, and that the discipline violated Rule 54.

The Board concludes that the claim must be denied. Rule 1.6 provides that employees must not be "immoral" or "discourteous," and further provides that "Any act of . . . misconduct . . . affecting the interest of the company or its employees is cause for dismissal and must be reported." The Hearing record includes the transcript of the Claimant's telephone conversation with an employee of the Carrier's lodging contractor the same evening of the incident, during which the Claimant admitted that he had hugged and kissed the clerk. At the Hearing, the Claimant testified that he did not recall this conversation. The Carrier also presented both the clerk's written

statement describing the hug and kiss, and the testimony of the Carrier's Resource Protection Officer who interviewed both the clerk and the hotel manager a few days after the incident. According to this evidence, while the clerk said "yes" when the Claimant asked her for a hug, she never agreed to his kiss, and turned her face away when he tried to kiss her lips. She was alone in the hotel front office at the time. When the hotel manager returned to the hotel 20 minutes later, the manager found the clerk in the manager's on-premises apartment, shaken and crying.

None of the Organization's objections outweigh the significance of this evidence. The Organization contends that the written statement and hearsay evidence of the clerk's comments to the Resource Protection Officer must be disregarded because the clerk failed to appear to testify at the Investigation. However, Investigations are not held to the same standards as a court of law. Boards have upheld discipline based on hearsay, such as written witness statements presented without supporting testimony from the witness. See Third Division Awards 10596 and 17424. The clerk's statement was dated the same day as the incident, and the Carrier's Resource Protection Officer confirmed with the clerk that the written statement was a true account of the events. Firsthand witnesses need not personally testify at the Investigation in order for the Carrier to rely on their statements as evidence, so it was not unfair or inappropriate for the Hearing Officer to rely on this evidence.

Similarly, the failure to call the police officer who removed the Claimant or to present the police officer's report of the incident does not mean that the Investigation was not fair or impartial. In light of the other evidence available, it was the Carrier's prerogative to decide that the police officer and his report would have added nothing new to the Investigation. Had the Organization deemed the police officer's testimony necessary, the Organization could have sought his appearance. See Third Division Award 6067. In fact, the police officer's report, submitted by the Organization during the course of its appeal, includes another admission of the behavior by the Claimant, so omission of the report at the Hearing cannot be said to have prejudiced his case.

Recognizing that it must defer to the on-property credibility decisions of the Hearing Officer, the Board concludes that the record contains substantial evidence in support of the Carrier's conclusion that the Claimant engaged in inappropriate conduct as charged. The Hearing Officer reasonably could find substantial evidence

from which to conclude that the Claimant hugged and kissed a 17-year-old hotel clerk while lodged on Carrier business; that the clerk, who was the only hotel employee on duty at the time, consented only to the hug and was upset by the Claimant's behavior; and that the Claimant was thereafter barred from the property by the hotel manager due to his conduct.[1] The Hearing Officer could reasonably conclude that the clerk's consent to the Claimant's request for a hug did not excuse his behavior, because the Claimant's request itself was inappropriate. Having drunk a couple of beers, by his own admission, he took advantage of a very young employee while she was working by herself. In any case, there is no evidence that the clerk consented to the kiss. It is irrelevant that criminal charges were not filed; it is irrelevant that the hotel may have sought the Claimant's removal to appease the clerk's father. The Claimant's discourteous and immoral conduct plainly violated MOW Operating Rule 1.6.

Once the Board concludes that substantial evidence supports the Carrier's determination of the Claimant's guilt, it is not our function to substitute our judgment for that of the Carrier over the quantum of discipline assessed. We will not disturb the penalty unless it appears from the record that the Carrier's actions were so unjust, unreasonable or arbitrary so as to constitute an abuse of its discretion. In this case, the Claimant admitted his misconduct, but insisted even at the Investigation that he had done nothing wrong. Under all the circumstances, we cannot say that the discipline imposed was an abuse of the Carrier's discretion.

Finally, the Board notes the Organization's other procedural objections. Contrary to the Organization's contention, the charge letter adequately informed the Claimant of the particular conduct under investigation and allowed him the opportunity to properly prepare his defense. It is well-established that citation of a specific Rule in the Notice of Investigation is unnecessary so long as the charge is otherwise sufficiently precise. The Organization also objects to Signal Manager Golder's multiple roles in the disciplinary process, but made no showing of actual prejudice or deprivation of a fair and impartial Investigation as a result of Golder's multiple roles. Arbitration tribunals do not reverse otherwise appropriate disciplinary action on this basis unless there has been a showing of actual prejudice or

[1] Although the Claimant testified that the assistant manager at some later point told him he would again be welcome at the hotel, that does not contradict the evidence of the hotel manager's contemporaneous decision.

bias. See Third Division Award 31818 as well as Public Law Board No. 4901, Award 145. Thus there is no reason to set aside the Carrier's action.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of March 2008.