

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41482
Docket No. SG-41163
12-3-NRAB-00003-100008**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

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

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of H. Ramirez, for reinstatement to his former position with compensation for all lost wages, 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 Signalmen’s Agreement, particularly Rule 54, when it imposed the harsh and excessive discipline of dismissal 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 May 2, 2008. Carrier’s File No. 35-08-0036. General Chairman’s File No. 08-032-BNSF-188-SP. BRS File Case No. 14243-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 was first employed by the Carrier on April 16, 2007. At the time of his termination, he was working as an Assistant Signalman on Signal Crew SSCX0105, headquartered at Ellensburg, Washington. On or about April 18, 2007, the Claimant contacted HR about filing a complaint about two of his co-workers on the gang, Ryan Bolstad and Joshua Dawley. On April 17, 2008, during their lunch period, Bolstad and Dawley had played a practical joke on Ramirez that involved tampering with his food, which he did not appreciate. In the course of investigating the Claimant's complaint, HR solicited written statements about what happened during the lunch break from all four employees present: Ramirez, Bolstad, Dawley, and Crew Foreman Chuck Vogt. Bolstad's statement went well beyond what might have happened on April 17, to describe continuing conduct on the part of the Claimant toward Bolstad that the HR Department found disturbing. Specifically, Bolstad claimed that in addition to numerous pranks played on him by Ramirez, "he . . . continually harassed and antagonized me verbally since we have worked together. The two consistent things I am harassed about are commonly about how much I eat, that I should stop eating, that I will eat anything and joking about supposedly how fast my food disappears. Moreover he continues to make fun of an incident where I accidently [sic] walked around a corner while a coworker was urinating, which he then refers to me as 'meat gazer' and tells co-workers to watch out." "Meat gazer" is a derogatory slang term for a homosexual male or a male who shows an inappropriate interest in another man's genitalia. Concerned about possible sexual harassment, by letter dated April 24, 2008, the Carrier notified the Claimant of an impending Investigation and held him out of service pending the outcome of the Investigation. (The Carrier also conducted investigations into the Claimant's charges against his co-workers. They were not held out of service.)

At the Investigation, which was held on May 2, 2008, there was testimony that while the entire crew did not get along well, the Claimant, Bolstad and Dawley appeared to have a good working relationship, "talking and joking with each other." Co-workers occasionally play practical jokes on each other, without malicious intent. Bolstad testified that the Claimant referred to him as a "meat gazer" in front of other employees on their crew and on other crews several times, at least two of which he was able specifically to describe. It was offensive to him, not a joke, and caused him discomfort around his coworkers. He had not complained because he felt intimidated by the Claimant and because he did not want to "rock the boat" as a relatively new employee with the Carrier. Joshua Dawley, another Assistant Signaller, testified that he had also heard the Claimant refer to Bolstad as a "meat gazer." The Claimant denied having called Bolstad a "meat gazer," and attributed Bolstad's and Dawley's testimony to a desire to retaliate against him for having complained about the conduct at lunch on April 17, 2008. He had heard the term used in a joking manner at the workplace by other employees. Three other witnesses were called; one of them distinctively remembered the Claimant having used the term in reference to Bolstad, while the other two had no recollection one way or the other.

Following the Investigation, the Carrier concluded that the Claimant was guilty of misconduct and sexual harassment of another employee in violation of MOW Operating Rule 1.6, Conduct, and the Carrier's Workplace Harassment policy. The Claimant was dismissed from service on May 29, 2008. The Organization filed an appeal on the Claimant's behalf by letter dated July 17, 2008.

The Carrier contends that there was substantial evidence to substantiate the Claimant's misconduct and sexual harassment of another employee in violation of MOW Operating Rule 1.6. The Carrier is required to provide a work environment free from any form of harassment for all of its employees. If even one employee is offended, intimidated, or made to feel that the environment is hostile, a violation of policies and Rules has occurred. Three witnesses, none of whom wanted to see the Claimant withheld from service, testified to his usage of the term "meat gazer" and gave detailed descriptions of where the events took place. His conduct was not just a practical joke that went too far. Bolstad was offended and intimidated by the Claimant's repeated comments. Moreover, the level of discipline assessed was appropriate. BNSF's Policy for Employee Performance Accountability clearly states that EEO policy infractions are considered serious Rules violations. The offense here

was aggravated, because it occurred repeatedly. As an Appendix C violation, this offense alone subjected the Claimant to dismissal, but even if the Carrier had elected to grant leniency to the Claimant, it was his second Level S violation within 36 months, which would also subject him to dismissal. The Carrier has proven the Claimant guilty of misconduct and sexual harassment with substantial evidence, and the Organization can only request leniency on his behalf. But the Board's role is to interpret whether a violation occurred, not whether to grant leniency, which is within the sole discretion of the Carrier.

According to the Organization, the termination was arbitrary and capricious, because the Carrier failed to prove during the Investigation that the Claimant had violated any Rule or was involved in any misconduct or sexual harassment toward another employee. There is simply not enough evidence to satisfy the Carrier's burden of proving the allegations against the Claimant by substantial evidence, much less the higher standard required by the Board in other cases of alleged sexual misconduct. "Meat gazer" was not the primary focus of Bolstad's statement. Bolstad and Dawley were biased against the Claimant because he had filed a complaint against them and their testimony should not be credited. The Claimant denied calling Bolstad a "meat gazer." Several alleged witnesses had no memory of the Claimant having used inappropriate language toward Bolstad, who never complained until he needed to defend his own actions. Bolstad's claim that he felt intimidated by the Claimant does not square with the practical joke he played on the Claimant: if he felt intimidated and feared the Claimant, he would not have tampered with the Claimant's food. Moreover, if he were traumatized by the Claimant, why did he not confront him or inform someone of the alleged problem? Finally, if matters were as difficult with the Claimant as Bolstad alleged, he would not have continued to carpool with him or assist him in setting up his personal laptop computer. A reasonable mind can only conclude that Bolstad was never intimidated or sexually harassed by the Claimant, as alleged by the Carrier. Even if the Claimant used the term "meat gazer," it is no worse or derogatory than what one hears on television sit-coms these days. All of the crew members played practical jokes on one another, and the comment was taken by anyone who heard it as such, without any malicious intent. No one ever complained to the Foreman or Supervisor, and they had no knowledge of such a term being used. The Claimant's alleged actions cannot possibly be defined as vicious, hostile, or intimidating behavior or sexual harassment. The Carrier's decision to permanently dismiss the

Claimant with this lack of evidence is arbitrary and capricious. Even if the Carrier had substantial evidence that the Claimant was guilty, the proper procedure would have been to counsel him. The atmosphere on the crews is male, and it is a fact that joking, rough language, and immature behaviors do happen. The Carrier failed to produce the kind of evidence required to justify disciplining the Claimant at all, let alone dismissing him from service. It is the Claimant, not his coworker, who is the victim in this case, and he should be reinstated to his position with back pay and all benefits.

The Organization contends that the Carrier did not establish the Claimant's guilt by substantial evidence. The Carrier decided on the basis of evidence presented at the Investigation that the Claimant had, in fact, called his co-worker a "meat gazer" on several occasions, in front of their own crew and other crews. Boards of Adjustment sit as appellate bodies and do not hear evidence de novo. As a result, the Board is not in a position to make determinations about credibility or to substitute its judgment for that of the Carrier in evaluating the credibility of witness testimony. The Board notes, however, that evidence came not only from the two co-workers that the Claimant had filed a complaint against, but also from an independent witness who had no stake in the outcome of the Claimant's complaint. While the witnesses could not remember specific dates, they were able to identify the incidents by location and specific job, which adds to their credibility. As for why Bolstad never lodged a protest, it is not uncommon for those who feel uncomfortable to say nothing, either because they are hoping that the situation will resolve on its own, or because they feel intimidated – and Bolstad testified to both. All in all, the evidence in the record was more than "surmise and speculation." It was testimony about actual events presented by participants and/or eyewitnesses to those events. The record supports the Carrier's conclusion that the Claimant did refer to Bolstad as a "meat gazer" on repeated occasions and in front of their co-workers.

The next issue for consideration is whether calling Bolstad a "meat gazer" constituted a violation of MOW Operating Rule 1.6 or the Carrier's Workplace Harassment policy. Rule 1.6, paragraph 7 prohibits employees from being "discourteous," and the Rule concludes:

"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.”

The Carrier’s Workplace Harassment policy states:

“BNSF does not tolerate verbal or physical conduct by any employee which harasses, disrupts, or interferes with another’s work performance or which creates an intimidating, offensive, or hostile environment. All BNSF employees will treat others with dignity and respect. . . . All BNSF employees are expected to contribute to a productive work environment that is free from harassing or disruptive activity. . . . No form of harassment will be tolerated, and BNSF will take the necessary actions to prohibit harassment Any sexually harassing or offensive conduct in the workplace, whether committed by supervisors, non-supervisory employees, or non-employees, is prohibited.”

As the policy makes clear, the Carrier takes harassment in the workplace of any sort very seriously. Using a derogatory term of a sexual nature to refer to another employee on a repeated basis could be offensive and create a hostile environment. Assistant Signalman Bolstad testified that the Claimant having called him a “meat gazer” made him feel uncomfortable around his co-workers and that he found other conduct by the Claimant intimidating. On the other hand, there was also testimony that crew members occasionally engage in practical jokes and pranks, rough language, and somewhat immature “boys will be boys” conduct, without any malicious intent.

The Board’s role is not to second-guess the Carrier, but to determine whether its decision that the Claimant’s conduct rose to the level of harassment was arbitrary and capricious, biased, or otherwise unsupported by the evidence. What constitutes sexual harassment has been the subject of numerous judicial opinions and academic commentary. In the end, the most important evidence comes from the person on the receiving end of the conduct – here, Bolstad. He testified that he did feel that the Claimant’s comments and conduct made for a hostile working environment. As with the issue of witness credibility with respect to whether the Claimant made the comments, above, the Board is not in a position to evaluate Bolstad’s credibility and sincerity with respect to whether he felt harassed, and must defer to the Carrier’s

judgment. It was not arbitrary and capricious, biased or unsupported by evidence for the Carrier to conclude that the term “meat gazer” is derogatory in nature and that Bolstad did experience a “hostile or offensive work environment,” as defined in MOW Safety Rule S-26.4, Sexual Harassment, as a result of the Claimant’s deliberate and repeated conduct.

The Board turns next to the question of the appropriateness of the level of discipline: that is, whether discharge was too harsh a penalty for the offense. Under the PEPA, “EEO policy infractions” are considered Serious Rule Violations, while “Aggravated EEO Policy infractions” are considered Dismissable Rule Violations. The Carrier concluded that the Claimant’s conduct was an “Aggravated EEO Policy infraction.” Given the fact-intensive nature of sexual harassment claims, the Board is yet again not in a position to second-guess the Carrier’s determination that the Claimant’s conduct toward Bolstad was an “aggravated infraction” warranting termination.

The Organization asserts that the Claimant should never have been subjected to the charges against him because it was he who first filed a complaint with the HR Department, against Bolstad and Dawley, for having salted the French fries that he had ordered without salt. The Claimant certainly never anticipated that his complaint might result in his own dismissal from service. But in investigating his complaint, HR reasonably asked Bolstad for a statement about the incident. Bolstad responded with a statement that went beyond the original incident on April 17, 2008, to encompass his interactions with the Claimant in general. Bolstad’s statement is not obviously retaliatory in nature so much as it appears to be trying to explain the context within which the April 17 incident occurred. But once the HR Department had notice of the Claimant’s alleged misconduct toward Bolstad, it had an obligation to investigate those allegations, as well as the ones lodged by the Claimant against Bolstad. The end result for the Claimant was surely not what he intended when he filed his complaint, but the Investigation into his conduct that was triggered by the investigation of his complaint was reasonable. The fact that he filed the initial complaint does not insulate him from the consequences of his conduct. In view of all of the foregoing, the claim must be denied.

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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 13th day of December 2012.