

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44554  
Docket No. MW-46210  
22-3-NRAB-00003-200904**

**The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(Canadian Pacific Railway (Former Dakota, Minnesota &  
(Eastern Railroad Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [thirty (30) day deferred suspension], by letter dated July 5, 2019, imposed upon Ms. L. Brisbois for alleged violation of Policy 1300 - Workplace Harassment - Including Sexual Harassment and GCOR 1.6 - Conduct for alleged sexual harassment of a co-worker while working as part of the P2 Tie Crew on the Detroit Lakes Subdivision on the morning of May 30, 2019 was arbitrary, excessive and in violation of the Agreement (System File D-34-19-445-18/2019-00009689 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Brisbois’ suspension shall now be set aside “... and all notations of this thirty (30) day deferred suspension be expunged from all Carrier records, including Claimant’s personal record, and Claimant shall be made whole for any loss she may experience as a result of this assessment of discipline.”**

**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.

On May 30, 2019 the Claimant served as assistant foreman for the P2 Tie Crew on the Detroit Lakes Subdivision. During the morning on the 30<sup>th</sup> the Claimant and employee N. Armstrong were in the work trailer when conversation of a personal nature occurred between them. Armstrong alleges the Claimant inquired whether he was “working out” for a woman or a man; the Claimant denies the allegation. Armstrong reported this situation to his supervisor which led to a formal investigative hearing on June 20, 2019.

Following completion of the hearing and assessment of the investigative record, the Carrier notified the Claimant on July 5, 2019, that her comments to Armstrong violated Policy 1300 - Workplace Harassment - Including Sexual Harassment and GCOR 1.6 - Conduct. The Carrier assessed the Claimant a thirty (30) day deferred suspension plus completion of training on Policy 1300.

On August 30, 2019 the Organization filed a claim asserting the Carrier failed to meet its burden of proof, the hearing officer rendered no credibility determinations and the discipline was improper, harsh and excessive.

This claim is before the Board following its proper and timely presentation at all stages of appeal, up to and including the Carrier’s highest designated officer, culminating with a conference where the parties discussed their positions advanced during on-property handling. In rendering this award, the Board confined itself to the record developed by the parties.

According to the Carrier, the Claimant received a fair and impartial hearing consistent with First Division Award 5197. That is, the Claimant was apprised of the charges levied against her, was afforded a reasonable amount of time to prepare a defense and was notified she could call witnesses and cross-examine witnesses as well as submit documentation. In other words, she received due process.

The Carrier maintains it produced substantial evidence of the Claimant's guilt. Armstrong testified that the Claimant made comments to him which violated Policy 1300 - Workplace Harassment - Including Sexual Harassment (comments about a person's body; inappropriate inquiries into or comments about another person's life) and GCOR 1.6 - Conduct (careless of the safety of themselves or others, negligent, insubordinate, dishonest, immoral, quarrelsome, discourteous). Armstrong testified that the Claimant entered the trailer and initiated a conversation whether his "working out" was to impress a woman or a man. Armstrong: "I was pretty furious and upset with the questions that I was presented from Brisbois, which kind of had me distracted throughout the day." He promptly informed his supervisor of the Claimant's inappropriate comments; the supervisor informed a manager and the notice of formal investigative hearing issued.

The Claimant's sexually harassing conversation was not the kind of personal conversation these employees have engaged in on prior occasions over the years and there is no reason for Armstrong to fabricate this incident. The Claimant lacks credibility whereas the employee, supervisor and manager are credible. The hearing officer is in the best position to assess credibility and determined Claimant was culpable as charged.

The discipline imposed is appropriate and justified. The Claimant's inquiries into Armstrong's personal affairs cannot be tolerated and represents grave infractions of Policy 1300 - Workplace Harassment - Including Sexual Harassment and GCOR 1.6 - Conduct. She committed a major offense - - conduct unbecoming - - which usually is assessed a minimum twenty (20) day suspension. CP assessed the Claimant a 30-day deferred suspension - - a progressive measure given the Claimant's record - - coaching letter, 5-day suspension, 10-day suspension and 20-day suspension. This 30-day deferred suspension is not excessive, arbitrary or capricious.

According to the Organization, the burden to prove the incident and that it warrants discipline resides solely with the Carrier. Since CP fails to carry that burden the claim must be sustained. There are two (2) plausible accounts of the conversation; they cannot be reconciled based on the evidentiary record. This incident is a he said, she said situation. Third Division Awards 18551 and 32565 establish that an employee should not be subjected to discipline based on the uncorroborated testimony of a singular witness.

The supervisor and manager testified they did not possess first-hand knowledge of the conversation and did not notify a representative in Human Resources (HR)

before they initiated a formal investigation. Their sole source of information is Armstrong who they credit whereas they arbitrarily discredit the Claimant. The investigative record shows no explanation by the hearing officer addressing credibility findings. Instead of the hearing officer making credibility findings, they were determined by the Regional Chief Engineer, an official not present at the investigative hearing. His credibility determinations should be discounted.

The alleged violation of GCOR 1.6 - Conduct is unproven. The rule specifies seven (7) items of prohibited conduct (careless of the safety of themselves or others, negligent, insubordinate, dishonest, immoral, quarrelsome, discourteous); none of them were addressed during the hearing. Rather, the Carrier lodged a general allegation of "misconduct" as the violation of Rule 1.6 - Conduct. GCOR 1.6 involves ethics violations which, when proven, are grave offenses as they lead to dismissal. The Carrier's failure to prove any of the seven (7) items shows a lack of evidence to sustain discipline. Thus, the discipline imposed was arbitrary and unwarranted.

In disciplinary proceedings, the well-established standard is that the Carrier bears the burden of proof. In determining whether the Carrier satisfies its evidentiary obligation, the initial question for the Board is whether substantial evidence supports the Carrier's position that the Claimant engaged in the charged misconduct and, should that question be answered favorably for CP, the next question is whether the discipline is arbitrary, excessive or harsh.

The Board finds that the Carrier has not met its evidentiary burden. The record consists of conflicting versions of a conversation. He said (Armstrong) that the conversation was sexual harassment and she said (Claimant) there was no sexual harassment. These employees have engaged in personal conversations over the years at work. After their conversation on the morning of the 30<sup>th</sup> they interacted throughout the remainder of the workday without incident.

The supervisor and manager did not involve HR to assess this situation under Policy 1300 - Workplace Harassment - Including Sexual Harassment. Policy 1300 states that managers and supervisors are responsible for "promptly reporting to the appropriate personnel in HR any unlawful workplace harassment that is ... reported[.]" HR reviews all complaints; however, "not all complaints warrant a formal investigation" and "[d]epending on the facts and circumstances, it may be possible for the supervisor or a resource selected by the complaining party to informally resolve a complaint" without a formal investigation. HR assessment did not occur as the supervisor and manager did not report the conflicting versions of the

conversation but proceeded directly to a formal investigative hearing where they did not submit Armstrong's written statement into the record.

Aside from Policy 1300 instructing officials to involve HR personnel experienced with this kind of situation, Armstrong confirmed in his testimony that the Claimant did not engage in an "act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees" which CP must establish to prove a violation of GCOR 1.6 - Conduct.

Given the record established by the parties in this claim, the Board finds insufficient evidence supporting the charged misconduct that the Claimant violated Policy 1300 - Workplace Harassment - Including Sexual Harassment and GCOR 1.6 - Conduct. Thus, the initial question in this proceeding - - whether there is substantial evidence to sustain wrongdoing - - is answered in the negative. Without substantial evidence of charged misconduct, the imposed discipline on the Claimant was unwarranted and arbitrary. Accordingly, this claim will be sustained with the requested remedy granted.

**AWARD**

Claim sustained.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

Dated at Chicago, Illinois, this 8th day of October 2021.