

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44845
Docket No. MW-47241
23-3-NRAB-00003-220280**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. B. Flickinger, by letter dated October 1, 2020, for alleged violation of MWOR 1.6 Conduct for alleged sexual harassment towards a hotel employe was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-6556-J/11-21-0047 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Flickinger shall be reinstated to service, have his record cleared of the charges leveled against him and he shall:**

‘... be made whole for all financial and benefit losses as a result of the violation. Any benefits lost, including vacation and health insurance benefits (including coverage under the railroad industry National Plan), shall be restored. Restitution for financial losses as a result of the violation shall include compensation for:

- 1) Straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the Claimant while wrongfully suspended);**

- 2) Any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the Claimant was out of service;
- 3) Overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was suspended from service, or on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended from service;
- 4) Health, dental and vision care insurance premiums, deductibles and co-pays that the Claimant would not have paid had he not been unjustly suspended.

Therefore, due to this excessive and prejudged discipline, Mr. Flickinger must be immediately paid for his lost time on the day he attended the investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, difference in pay. We also request that Mr. Flickinger be made whole for any and all benefits and his record cleared of any reference to any of the discipline set forth in the letter dated October 1, 2020 from Robert J. Jouppe.”

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.

Factual Background:

On September 1, 2020, BNSF provided lodging for Claimant at the Cobblestone Hotel & Suites in Crookston, Minnesota. On the morning of September 2, 2020, Strategic Sourcing was notified by the Manager, Ms. Lisa Tadd, of an incident that had taken place late the previous evening involving Claimant and the night front desk hotel employee Ms. Samantha Watkins. Strategic Sourcing is an internal BNSF department that handles procuring hotels (Corporate lodging, commonly referred to as CLC) and various other materials and services. Two written statements were provided to Strategic Sourcing regarding the incident, one from Manager Tadd and the other from Ms. Watkins. Based on these statements, the Carrier conducted an investigation and determined that Claimant had violated the MWOR Rule 1.6 regarding conduct. As a result, he was dismissed from his employment.

The Organization grieved, and the grievance was fully processed to consideration by the instant Board of Adjustment.

Position of Organization:

Claimant was denied any opportunity to confront his accuser because no one from Cobblestone Inn appeared at the investigation. The whole case was built on statements from absent witnesses. Further, if the matter had been so serious, the police would have been called. It concludes the matter was overblown and lacking in any reliable evidentiary basis.

Position of Carrier:

Ms. Watkins' statement explained that at approximately 2345, Claimant called the front desk and asked the hotel employee who answered the phone, Ms. Samantha Watkins, if the hotel offered lotion. Ms. Watkins apologized and said no. Claimant then asked if the hotel offered "anything like that." After explaining that the hotel did provide shampoo and conditioner, Claimant asked Ms. Watkins to bring some conditioner up to his room. According to Watkins, when Claimant opened his door, he appeared to be pulling up his pants. Ms. Watkins gave Claimant the conditioner and noticed that he apparently had an erection. Instead of simply thanking Ms. Watkins, Claimant asked her questions about her work while looking her up and down. He then asked if Ms. Watkins was busy. She told him she had to return to work and asked if he needed anything else. Claimant asked her if she could give him a hand while pointing to the conditioner and his penis. She responded no, informed

him she needed to return to work, and left. Ms. Tadd's statement explained that other staff members stated Claimant asks them for lotion often and he had already been told the hotel does not provide it.

Ms. Tadd contacted CLC to report the incident.

At the Investigatory Hearing, Claimant testified as follows in pertinent part:

“ROBERT JOUPPI: Well, those weren't my words. They were your words. So what would she need to give you a hand for?

BRANDON FLICKINGER: When I said give me a hand, it was supposed to be in a joking manner.

ROBERT JOUPPI: What kind of joking manner?

BRANDON FLICKINGER: It was a laughing matter.

ROBERT JOUPPI: About what?

BRANDON FLICKINGER: Uh define about what?

ROBERT JOUPPI: What was the laughing matter about? Per your statement on the record you said that she wouldn't give you a hand and I asked you why and what was it about. So what joking matter are you referring to?

BRANDON FLICKINGER: I was just kind of being flirty with her. (TR 42) * * *

ROBERT JOUPPI: No. All I want to know is what he needed a hand with. I've asked the question and I expect an answer. What did you need a hand with? Was there a problem with your room?

BRANDON FLICKINGER: No, there wasn't.

ROBERT JOUPPI: Okay. Then what? What did you need a hand with?

BRANDON FLICKINGER: I was just trying to be flirty with her. (TR 44)”

In the Carrier’s assessment, the evidence of record more than adequately supports the conclusion that Claimant’s conduct was immoral and a violation of MWOR 1.6. Claimant already had another disciplinary event on his record for a very similar incident—using sexually offensive language towards an employee working at AmericInn Hotel on March 22, 2018. Claimant signed a disciplinary waiver admitting guilt in April 2018 for violating MWOR 1.6 accepting a Level S 10-day Actual and 20-day Record Suspension with a three-year review period.

The Carrier notes that the instant case was Claimant’s second serious violation within an active review period. It points out that as a result, he was subject to dismissal as outlined in Section IV.C.2.b: “If an employee commits an additional Serious Violation within the Review Period, he or she may be subject to dismissal.”

Analysis:

Under MWOR 1.6 Conduct Employees must not be:

- “1. Careless of safety of themselves or others.**
- 2. Negligent.**
- 3. Insubordinate.**
- 4. Dishonest.**
- 5. Immoral.**
- 6. Quarrelsome. or**
- 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.”

Under the “substantial evidence” rule, BNSF need only show that a reasonable person could conclude from the facts of this case that Claimant violated the rules as charged.

In Public Law Board 7499, Award 7, referee MacDougal addressed the issue of witness confrontation:

The Organization also claims that they have a right to confront the accuser in the Carrier investigation, and failure to do so indicates the lack of fairness in an investigation. This is not so. Unlike a criminal trial, or perhaps even an arbitration hearing outside the rail industry, the railway is charged with conducting a fair and impartial investigation, on property. It has no ability to compel a non-company witness to attend this internal investigation. They asked for, and received, a statement from the witness. The testimony of that witness, through her statement, may be subject to a weighing of credibility, but there is no absolute right to cross-examine in this forum. In this instance, this Board finds that the Carrier had no reason to doubt the credibility of this independent third-party witness.

This Board is in agreement with Macdougal's analysis. The Carrier is not in a position to coerce third parties into attending investigatory hearings. The statement of Ms. Watkins was made with no discernible bias. There is no basis in the record for calling into question her credibility. Claimant's testimony at hearing was not a denial of the incident but an effort by Claimant to diminish the offensive nature of the exchange; he admitted he was being "flirty." In our assessment, this substantiates the Carrier's conclusion that his conduct was harassing and offensive in nature.

We find the Carrier had sufficient basis for the dismissal of Claimant Flickinger.

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 10th day of March 2023.