

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44855
Docket No. MW-47089
23-3-NRAB-00003-210680**

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: (
(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed on Mr. W. Raisbeck, by letter dated December 13, 2019, for alleged violation of Policy 1300 - Workplace Harassment - Including Sexual Harassment, GCOR 1.6 - Conduct and GCOR 1.9 - Respect for Railroad Company was without just cause, on the basis of unproven charges and in violation of the Agreement (System File Z-2034D-701/USA-DM&E-BMWE-2020-00013513 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Raisbeck shall be placed back in service and this event expunged from his record and be compensated for all loss, meaning he must have his personal record cleaned of the excessive charges and dismissal, as well be made whole for all loss incurred as a result, such as but not limited to, wages, retirement, months of service under RRB, reimbursement for loss of health and welfare benefits, or expenses incurred throughout the discipline process and subsequent excessive discipline. This includes travel time and mileage to and from the hearing location and any additional expenses involved.”**

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 March 27, 2017 the Claimant entered service with the Carrier and established seniority in the Maintenance of Way Department.

In September 2019 he was assigned to the Machine Operator B position using a utility truck while assisting a steel gang based out of Dubuque, IA. On September 25, 2019 around 2300 hours the Claimant informed the front desk clerk, a minor of 16 or 17 years of age, at the Fremont Hotel in Bellevue Iowa that he could not recall his room number or name of the co-worker sharing the room with him. According to the clerk's text messages to the hotel manager, the Claimant turned the conversation to "do you or your friends have daddy issues?" and "I like talking about porn" . . . "I'm going to molest my friend while thinking about you." The clerk reported the Claimant followed her behind the front desk. The Claimant denies following the clerk but acknowledged he "knowingly drank past my limit" and "no doubt I was profane in attaining a laugh." The clerk described the Claimant as "super drunk" as well as "scary and weird" and Employees Hawkins and reported physically assisting the Claimant to his room. In response to the clerk's text messages the hotel manager requested assistance of local law enforcement.

The next day (September 26) a Carrier official - - Manager of Welding Hansel - - connected with a voice message recorded by the hotel manager and citing the clerk's texts. Manager Hansel immediately notified Production Supervisor Billmeyer and General Roadmaster Wold. At approximately 0900 hours on the 26th Manager Hansel obtained statements from the Claimant, Employee Hawkins and Employee Kuhn. After reviewing the Claimant's statement - - "knowingly drank past my limit" and expressed himself using profanity - - General Roadmaster Wold removed the Claimant from service pending formal investigation. On September 27 Special Agent Morrissey met with the clerk; she submitted a "Sexual Harassment Incident Report" which, essentially, replicates her text messages.

On October 23, 2019 Assistant Chief Engineer Ingram notified the Claimant to attend a formal investigation to develop facts and circumstances and to place responsibility, if any, in connection with an incident on September 25, 2019 at the Fremont Hotel, Bellevue (IA) where comments attributed to the Claimant implicate GCOR 1.6 - Conduct, GCOR 1.9 - Respect for Railroad Company and Policy 1300 - Workplace Harassment - Including Sexual Harassment. The parties agreed to convene the formal investigation on November 15, 2019.

After considering the evidentiary record established during the formal investigation, Chief Engineer Paradise notified the Claimant on December 13, 2019, that he was dismissed from service based on the charged rules violations.

On February 10, 2020, the Organization appealed the dismissal stating the Carrier (1) denied the Claimant a fair and impartial hearing, (2) failed to prove the charges and (3) imposed harsh and excessive discipline. The Carrier denied the appeal on April 9, 2020 and, thereafter, the parties discussed this matter in conference without resolution. The claim dated June 4, 2021, is before the Board for final adjudication after timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer. The Board is fully informed of the on-property record and each party's position and argument in its submission including awards submitted in support thereof.

The Organization asserts the Carrier violated Rule 34 - Discipline and Investigations as it denied the Claimant a fair and impartial hearing. Reviewing this assertion in the context of the record, the Board finds no rule violation and a fair and impartial hearing afforded the Claimant. Rule 34.5 authorizes the Carrier to remove an employee from service for, among other bases, inappropriate conduct. Based on the Claimant's statement, the Carrier ascertained he acted inappropriately with a minor. The Carrier's adding witnesses to amended formal investigation notices and not disclosing requested documents prior to the hearing is not violative of Rule 34. The Carrier offered to share the hotel lobby video with the Organization and certain witnesses did not appear for the hearing. In this regard, Employee Hawkins resigned prior to the hearing and, despite notifying the clerk and hotel manager of the formal investigation, the Carrier could not compel them to appear and testify. The presiding officer's conduct of the hearing reflects robust exchanges with the Organization's representative resulting in some objections denied, some sustained, some questions withdrawn and some rephrased.

In this forum the Carrier is required to prove the charged conduct levied against the Claimant by substantial evidence. In the evidentiary continuum, substantial evidence resides at the lower end and is not an onerous threshold to achieve. The Board finds substantial evidence to support the Carrier's charged conduct levied against the Claimant. The clerk's text messages are a real time recollection of the incident and initiated by the clerk without prompting by hotel staff or Carrier official. The "Sexual Harassment Incident Report" is materially and substantially aligned with her text messages. The clerk's description of the Claimant - - "super drunk" and profane - - was confirmed by him in his written statement - - "drank past my limit" and use of profanity. The Claimant denies following the clerk behind the counter but Employee Hawkins reported in his statement "you [Claimant] need to get back in front of desk or she's gonna get fired." The Claimant acknowledges in the recent past commenting to Supervisor Billmeyer whether the Supervisor's sister had "daddy issues" and he repeated that uninvited comment in the form of a question to the clerk and her personal life. The clerk described the Claimant as "weird and scary" which implicates intimidating conduct when he followed her behind the desk. A reasonable person assessing the Claimant's comments and behavior towards a minor in a public setting would find his comments inappropriate, offensive and suggestive and his conduct interfering with the clerk's work and work environment.

GCOR 1.9 states that "employees must behave in such manner that the railroad will not be criticized for their actions." The Claimant's behavior resulted in the hotel manager contacting local law enforcement and banning the Claimant from the property. The Claimant violated GCOR 1.9 and he violated GCOR 1.6 with his discourteous comments and "daddy issues" inquiry into the clerk's personal life.

Policy 1300 - Workplace Harassment - Including Sexual Harassment states that certain conduct and statements occurring outside the workplace and or outside of regular working hours are prohibited. This is the situation presented in this claim - - the Claimant outside the workplace and outside of regular work hours. The Policy defines "harassment" as unwelcome and inappropriate comments and "profanity" as suggestive remarks, dirty or offensive jokes, and inappropriate inquiries into another person's life. The Claimant's comments and conduct fit within the definitions and violate the Policy. The Hybrid Discipline and Accountability Guidelines identify a harassment policy violation as "unbecoming conduct" and a major offense.

Having proved the charged conduct by substantial evidence, the Carrier's decision to dismiss the Claimant is not arbitrary, capricious or an abuse of discretion.

Consistent with the Hybrid Discipline and Accountability Guidelines, a major offense such as conduct unbecoming an employee can lead to dismissal. In the circumstances presented, dismissal is not harsh or excessive but appropriate.

In view of the foregoing the claim will be denied.

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.