

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY

and

NMB Case No. 84  
Claim of H. A. Lewis  
Dismissal: Inappropriate  
Conduct in Violation of  
GCOR Rule 1.6 and TY&E  
Rule 26.4

UNITED TRANSPORTATION UNION

**STATEMENT OF CLAIM:** Request on behalf of Southern California Division Switchman H. A. Lewis for reinstatement to service of the BNSF with pay for all time lost, restoration of seniority and fringe benefits.

**FINDINGS OF THE BOARD:** The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on September 19, 2008 in Chicago, Illinois. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts. The Board makes the following additional findings.

Claimant was employed by the Carrier as a Switchman and was assigned to Barstow, California. He had been hired by the Carrier on May 29, 2006 and was a Qualified Conductor at the time of the incident at issue. If he had any prior discipline, it is not part of the record.

On August 4, 2007, Claimant was working Assignment 103. Two fellow-employees, Smith and Maakestad, were working Assignment 102 on the same shift. There had been communications between Claimant and Smith, the latter of whom was junior to Claimant and who had erroneously been awarded by the Crew Office a job to which Claimant aspired. Smith stated that Claimant engaged in an angry and profane exchange, apparently based on Claimant's belief that Smith had intentionally taken the job out of Seniority Order. Claimant told Smith that Smith was "making [Claimant] money," meaning that Claimant intended to grieve and be compensated for the Crew Office's error. Claimant's statement was made in anger and agitated Smith. Smith testified that Claimant then pulled down his pants, exposing himself to Smith and Maakestad. Smith testified that Maakestad was eating a sausage pizza and did not wish to see

what Claimant was showing. Smith did not report the incident to Management immediately, but "after much soul-searching", he did so on August 15, 2007 and submitted a written statement documenting the incident.

The Carrier convened an investigation to determine the facts and Claimant's responsibility for the alleged inappropriate conduct, in possible violation of Rules 1.6, GCOR and 26.4, TY&E Safety Rules.

Mr. Maakestad did not appear at the investigation, but prepared a written statement in which he stated that Smith and Claimant were joking about bumping each other off of jobs, but he denied having seen Claimant expose himself. He acknowledged that might have been Claimant's intent, but he (Maakestad) "went out of [his] way to avoid it".

Claimant denied having exposed himself to Smith and/or Maakestad. He denied having seen either on the day in question and denied having been at the Bowl Shanty where the incident allegedly took place. Claimant stated that he was working at the Hump and took his lunch at that location.

Claimant acknowledged a "misunderstanding and disagreement" between Smith and himself concerning jobs awarded to Smith by the Crew Office out of seniority order. He testified that he and Smith had exchanged personal cell phone calls while off duty in which Smith had been angry at him. He asserted that he had properly exercised his seniority and bumped Smith out of one of the positions. He acknowledged heated telephone exchanges, but asserted that it was Smith who was taunting him when they did see each other.

Smith denied being angry at Claimant in consequence of being bumped from the job he had been holding; he asserted that he understood that the rights which Claimant derived from his seniority included the right to bump Smith, who was junior. He asserted that he was bumped frequently and did not take it personally.

At the investigation, the Organization challenged the Carrier's failure to produce Mr. Maakestad as violative of Article 24 of the governing Agreement, which requires in part that "all yardmen involved in an investigation shall be present thereat", claiming that his absence was in violation of the provision and to the prejudice of Claimant. The Organization protested the entry of Maagstad's statement into the record in lieu of his presence and availability for cross-examination.

Following the hearing, the Carrier dismissed Claimant from employment for violation of the Rules cited.

The Organization submitted a claim protesting the Carrier's action dismissing Claimant. The Carrier denied the claim, which was progressed on the property to the highest designated official, but without resolution. The Organization invoked arbitration; and the claim was presented in due course to this Board.

**POSITIONS OF THE PARTIES:** The Carrier argues that it met its burdens to prove Claimant's guilt of the charges against him by substantial evidence and to prove the appropriateness of the penalty of dismissal. It asserts that the evidence establishes establishes the unacceptability of Claimant's gross conduct, which it maintains constituted sexual harassment and created a hostile work environment which the Carrier is not obligated to tolerate. BNSF contends that Claimant's conduct constituted a dismissable offense.

The Carrier argues that the record contains substantial evidence of Claimant's guilt. It points to Smith's testimony and to the written statement submitted by Maakestad, maintaining that the Carrier as the trier of fact was within its rights to make credibility determinations as between Smith and Claimant, which it did in favor of Claimant's guilt based on the totality of the circumstances. Citing authorities, BNSF contends that this Board is obligated to defer to the credibility determinations made by the hearing officer and not to substitute the Board's judgment for that of the hearing officer.

The Carrier argues in support of its determination that Smith was more credible than Claimant that Smith had no motive to lie and much to lose for coming forward, in violation of a claimed "code of silence" among employees to protect their fellows. It asserts that Smith's willingness to shoulder that burden increased his credibility. BNSF also points to evidence from Mr. Janisse, adduced in Case No. 85 as part of Janisse's complaint, that Claimant had engaged in a pattern of "flashing" his fellow employees.

BNSF maintains that the evidence establishes that the incidents at issue in this case and Case No. 85 are part of a pattern of unacceptable - albeit mostly unreported - conduct and were not mere isolated incidents, warranting a conclusion that Claimant's conduct was part of a pattern of behavior which warrants the most serious penalty. It also maintains that the code of silence and pattern of Claimant's conduct explains Mr. Maakestad's failure to affirmatively testify as to Claimant's conduct. It

points out that Maakestad did not affirmatively deny Claimant's conduct at issue, leading to a conclusion that "something happened".

The Carrier argues that the Organization's challenge to its action, based on an assertion that, unless Maakestad supported the testimony of the accusers in both this Case and Case No. 85, the accusers must be lying, is improper. It contends that is not the proper conclusion, pointing out that Maakestad's testimony in Case Nol 85 was evasive and inconclusive: he never stated that Claimant did not engage in the conduct and was simply attempting to avoid breaking the code of silence. It points out that the hearing officer was convinced of the credibility of the accusers, who resisted considerable pressures in order to come forward. BNSF contends that there is sufficient, substantial and credible evidence to support Claimant's guilt, even if the written statement (and, in the other case, the testimony) of Maakestad were to be disregarded.

The Carrier urges, for the foregoing reasons, that Claimant's guilt be affirmed, his dismissal allowed to stand and the claim denied.

**The Organization** argues, as an initial matter, that Claimant was denied the fair and impartial hearing to which he was entitled as a result of the Carrier's failure to produce Mr. Maakestad - clearly a witness to the alleged incident - at the investigation, as required by Article 24 of the governing Agreement, and by the improper receipt and consideration of Maakestad's written statement, each action taken over the Organization's unanswered protest at the hearing. It points out that Mr. Maakestad would have been able to testify clearly and without prejudice as to what happened, establishing Claimant's innocence.

The Organization argues that the Carrier failed to meets its burdens of proof, beginning with its failures to prove when the incident took place and that Claimant was even at the location where the incident was alleged to have taken place. UTU points out that Mr. Smith, the Carrier's only witness with knowledge of the alleged incident, was unable to confirm the date the incident took place - either the 2<sup>nd</sup> or 4<sup>th</sup> of August - and that he waited fifteen days to report it. It points out that Mr. Smith testified that the incident took place at the Bowl Shanty, but that Claimant testified he was working at the Hump and took lunch at the Hump Shanty, never going to the Bowl on the day or days at issue. The Organization maintains that the Carrier had the means, by cameras and documentation, to establish the whereabouts of Smith and Claimant on the dates at issue, but failed to do so.

The Organization points out, in addition, that Smith stated to Claimant "you will get what's coming to you", which UTU argues meant that Smith was going to get Claimant in trouble by making accusations against him. It asserts that the description of the conflict between Claimant and Smith, including that comment, establishes that Smith was not the brave and unbiased witness the Carrier claims he was.

The Organization argues that the Carrier had insufficient proof of Claimant's misconduct and was merely protecting itself from possible liability to Smith by firing Claimant.

The Organization urges that, based on the due process violations and lack of proof, the Claim be sustained and Claimant returned to work, with seniority unimpaired, and that he be made whole for all time and benefits lost.

**DISCUSSION AND ANALYSIS:** It was the burden of the Carrier to prove Claimant guilty of the charges against him and to establish dismissal as the appropriate penalty. It was also the Carrier's burden to establish, when challenged, that it afforded Claimant a fair and impartial hearing, in compliance with the requirements of the governing Agreement. For the reasons which follow, the Board concludes that the Carrier failed to meet its burdens.

Article 24 of the Agreement requires the Carrier to have present at the investigation all Yardmen involved, except as the Parties may otherwise agree. The evidence is clear that Mr. Maakestad was present at the alleged incident and had at least some knowledge of it. His written statement confirms his involvement. There is no assertion that there was any agreement not to have him present at the investigation.

The record contains no indication that he was unavailable or that the Carrier should otherwise be excused from having him present. The Board notes, in this regard, that Maakestad's possible reluctance to testify - or his possible reluctance to testify in support of the Carrier's position - is not a reason to excuse the Carrier from having him attend the hearing. The Carrier has the authority to direct its employees to perform official duties and to discipline them if they do not comply. The Board concludes that the Carrier's failure to produce him was in violation of the Agreement.

The Carrier's failure is not mere harmless error. Clearly, if Maakestad had been present, he might have testified in contradiction to Mr. Smith and, whatever he might have said, he certainly would have been subject to cross-examination by the

Organization. His testimony might have either confirmed, or undermined, the Carrier's case. The impact of his absence on the hearing officer's credibility determinations would likely have been significant. The Organization was entitled, at the least, to have the benefit of that testimony and to require the hearing officer to give consideration to it. The Organization properly and timely objected to the Carrier's failure; the Carrier failed to respond or correct its error.

The Board is persuaded that the Carrier then compounded the error by taking Maakestad's written statement, entering it into the record and giving consideration to it in determining Claimant's relative credibility and guilt. Such a statement is not and cannot be a substitute for live testimony by an employee whom the Carrier is required to produce.

The Board notes, in this regard, that the Carrier argues that a "code of silence" exists which interfered with Maakestad's willingness to give testimony or to give a true statement of what he knew. It is plausible that is the case, but the record is devoid of any evidence to establish such interference. Indeed, whatever reluctance Maakestad might have had did not interfere with his willingness to submit a written statement and, in Case No. 85, to appear and testify at the investigation.

The Carrier has clearly identified the type of behavior in which Claimant is alleged to have engaged as unacceptable. The Board endorses that characterization. Whether deemed sexual harassment or non-sexual, but gross harassing conduct, the Carrier's rules prohibit such behavior. Such conduct interferes with the order, morale and safety of the workplace. An employee who engages in a pattern of such conduct is properly subject to dismissal.

The Carrier argues that Claimant engaged in such a pattern, although it concedes that much of his improper conduct has gone unreported. There are, to be sure, allusions in the record to the effect that Claimant was "always joking around", the implication being that he had a pattern of engaging in "flashing" his co-workers or engaging in other gross conduct. It may well be that Claimant's local reputation is accurate; but the Board is limited in its determinations to the record. And the record is, well, thin. It fails to establish that Claimant engaged in so-called "pattern" behavior. Indeed, other than the incident at issue in Case No. 85, there is no direct or specific evidence of previous such incidents in the record; and, even with respect to the other case before this Board, Claimant's charged conduct there cannot be

used to establish that he is guilty of the conduct at issue in this case.

It is well established that the hearing officer, as the trier of fact, is entitled to make credibility determinations, to which the Board must give deference. The hearing officer in the instant case issued no explanation of how he came to find Claimant guilty of the charges, but a determination of the relative credibility of the two first-hand witnesses in Smith's favor was a necessary element of the conclusion. The Carrier argues that Smith was credited because he had no reason to lie and that he came forward at some risk of criticism and worse from other employees. It points to Maakestad's written statement as corroborating parts of the incident and lacking any denial that the events occurred as Smith testified. BNSF maintains that Claimant had engaged in a pattern of such harassing conduct, thereby establishing that he was likely to have engaged in such conduct in the incident at issue.

The Carrier's arguments are not convincing. Smith was in a conflict with Claimant, who had just bumped him from a job he had obtained from the crew office out of seniority order. There had been verbal exchanges between them. There is suggestion that Smith was seeking to get back at Claimant. There is no basis from which to conclude that Smith was more or less angry than Claimant or more or less at fault. He had motive to retaliate against Claimant; an accusation that Claimant mooned him was an opportunity to do so. Whether that is what happened cannot be conclusively determined, but the possibility defies the simple analysis advanced by the Carrier.

Moreover, the Carrier's analysis relies, in part, on Maakestad's statement, which is, as indicated, an inadequate and improper substitute for having the employee present at the hearing. The simple device of disregarding the statement after the fact, as the Carrier argues can be done, does not resolve the problem, as the impact of removing the corroborating statement on the hearing officer's determination of Smith's credibility cannot be ascertained.

Finally, the Carrier in its Submission argues back and forth between this Case and its companion (Case No. 85), using evidence from that investigation in support of Claimant's guilt in this case. The Board is not persuaded that such co-mingling of the records is proper. While the Carrier's technique is understandable, the Board is convinced that Claimant's guilt in each case must be determined on the basis of the record in that case, without presumptions carried over from any other

investigation and without basing its conclusions on events only alluded to but not proven.

The Board concludes that the Carrier did not meet its burden to prove Claimant guilty of the charges against him. This is unfortunate in several respects, as the events described in the Opinion herein have created material problems in the workplace which Claimant's return is unlikely to help. Moreover, the Carrier's failure to meet its burden of proof may be seen as rewarding the code of silence to which it refers. Finally, there is certainly some evidence, or hints of evidence, that Claimant is, in fact, a workplace wiseguy who has engaged in gross and disruptive behavior. The discussion in the Board's Opinion should make clear that such conduct will not be tolerated.

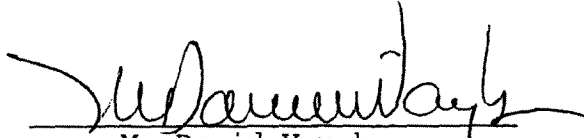
**AWARD:** The Carrier failed to afford Claimant a fair hearing and failed to meet its burden to prove Claimant guilty of the charges against him. The claim is sustained. All records of this dismissal shall be expunged from Claimant's record.


This sustaining Award entitles Claimant to be reinstated to service and made whole for wages and benefits lost and to have records of his dismissal expunged from his record. However, the remedy in this case must be consistent with the remedy in Case No. 85, which involves the dismissal of Claimant for essentially the same reasons, albeit as a result of a different incident.

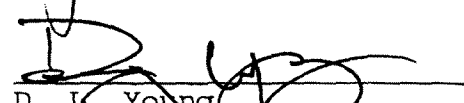
If the claim in that case (No. 85) is denied, Claimant will remain dismissed, notwithstanding the sustaining Award herein. If the claim in that Case is sustained, Claimant is entitled to be returned to service, but to be made whole only once. If the claim in Case No. 85 is partly sustained, Claimant will be entitled to be reinstated but to be made whole only for that portion of the time he is awarded pursuant to the other Case.

The Board will retain jurisdiction of this dispute for purposes of addressing issues of remedy. The Carrier shall make this Award effective within 30 days.

Dated this 3<sup>RD</sup> day of November, 2008

  
M. David Vaughn,  
Neutral Member

  
Gene L. Shire,  
Carrier Member

  
D. L. Young,  
Employee Member