

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- “1. The Carrier violated the Agreement when on November 19, 2002, Mr. J. Castillo was dismissed from service for allegedly violating Rule 1.6 of the Maintenance of Way Operating Rules, Rule 21.2 of the Engineering Instructions and Rule 26.4 of the Maintenance of Way Safety Rules in conjunction with inappropriate behavior towards the Clerk at the Super 8 Motel in Belen, New Mexico.
- “2. As a consequence of the Carrier’s violation referred to in part (1) above, Mr. Castillo shall be reinstated with seniority, vacation, all rights unimpaired and paid for all wages lost in accordance with the Agreement.”
[Carrier File No. 14-02-0272. Organization File No. 240-13A2-024.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees (“Parties”) herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Jonah Castillo, was employed as a Trackman in the Carrier’s Maintenance of Way Department on September 19, 2002. He was a guest of the Super 8 Motel in Belen, New Mexico on that date, off duty, but his lodging was being provided by the Carrier in accordance with its Agreement with the Organization for employees required to live away from home during the work week.

An incident occurred at the motel which caused the Claimant to be instructed to vacate the premises, and which eventuated in charges being filed against him in accordance with the Discipline Rule in the Parties’ Agreement. An investigation was set for October 4, 2002. The notice of charges read as follows, in part:

“[T]o develop the facts and place responsibility, if any, in connection with possible violation of Rule 1.6, Maintenance of Way Operating Rules, . . . Rule 21.2 Engineering Instructions, and Rule 26.4, Maintenance of Way Safety Rules, . . . concerning your alleged inappropriate behavior towards the Clerk at the Super 8 Motel in Belen, New Mexico on September 19, 2002.”

The investigation was twice postponed by agreement of the Parties, and finally held on October 30, 2002. The record contains copies of Certified Mail Return Receipts indicating that each letter sent to the Claimant with respect to the investigation and its postponements was received by him at his address of record.

The Claimant did not appear when the investigation was convened at 8:00 a.m. on October 30, 2002. His representative, the Organization’s Vice General Chairman Gary Marquart, stated that he had been trying for an hour to contact the Claimant, without success. A recess was granted to permit him to make additional efforts. At 8:23 a.m., according to the record, he said that all telephone numbers for the Claimant in his and the Carrier’s possession had been disconnected. The Conducting Officer therefore ruled that the investigation would proceed without the presence of the Claimant. Mr. Marquart entered a *pro forma* objection to proceeding, which was overruled by the Conducting Officer.

The Carrier’s Division Engineer, the motel’s General Manager, and its Front Desk Clerk appeared as witnesses. The Front Desk Clerk was the object of the alleged “inappropriate behavior” attributed to the Claimant. By her account, the Claimant, who had been a guest for more than one night at the motel, had been persistent in attempting to hug and touch her. She said she had previously rebuffed his advances with crude comments of her own, and suggestions that they keep their relationship professional.

On September 19, 2002, she said that he attempted to come behind the counter, but she pushed him away and told him to go to his room, get some coffee, and calm down. She said he was accompanied by his roommate (to whom no misconduct was attributed), and they both left at that time. The Claimant shortly returned, however, alone, and while standing across the counter from her, made a crude comment about her “chest,” then suddenly reached across the counter and grasped her breast. She said she backed away from him and ordered him to go back to his room.

She then contacted the motel’s Assistant General Manager, who in turn notified the General Manager of the incident. The General Manager testified that she contacted the company with which the Carrier contracts to handle its lodging arrangements. The General Manager then called the Claimant in his room at the motel, and ordered him to leave within ten minutes. She testified that he said no more than “okay.”

The motel does not have a video nor a photographic monitoring device for its front desk area.

On November 19, 2002, the Carrier's General Manager addressed a notice to the Claimant, advising him that he was dismissed from the Carrier's service for violation of the three Rules named in the notice of charges, because of his inappropriate behavior at the motel, as charged. These Rules read as follows:

Maintenance of Way Operating Rule (MWOR) 1.6

"Employees must not be

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
- or
7. Discourteous."

Engineering Instruction 21.2

"Employees using lodging facilities while on BNSF business are representatives of the BNSF Railway Company and should be professional and courteous.

On- or off-duty behavior at a lodging facility that discredits BNSF, or otherwise is contrary to BNSF interests, will not be tolerated. Employees are responsible for damages they inflict on lodging facilities and must comply with the following:

- Pets are not allowed in any lodging facility regardless of the lodging facility's policies.
- Employees using company-provided lodging cannot arrange to pay the difference between the motel rate and the BNSF rate to stay one employee to a room.
- BNSF's no smoking policy is in effect at all IML lodging facilities.
- Lodging facility policies govern such things as cooking in rooms, improper conduct while on hotel property, proper payment of additional charges (meals, phone, movies, etc.) and room damages (grease on carpet, burns, etc.).
- Respect the privacy and personal property of roommates and other motel guests."

Maintenance of Way Safety Rule (MWSR) S-26.4

“Employees on duty or on railroad property must not sexually harass others. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, or other verbal or physical sexual conduct given under the following conditions:

1. An individual must submit to the conduct as a term or condition of employment.
2. If an individual submits to or rejects the conduct, that action is used to influence decisions affecting the individual’s employment.

Or

3. The conduct interferes with an individual’s work performance or creates an intimidating, hostile, or offensive work environment.

Employees who feel they have been sexually harassed must contact their manager, local Employee Relations, or Corporate Employee Relations.”

The Organization promptly appealed the Carrier’s disciplinary decision to its Assistant Director - Labor Relations. The Organization argues that the alleged event took place off the Carrier’s property and while the Claimant was off duty. The Carrier’s rules and policies are therefore inapplicable. It also argues that the Carrier has suffered no loss of business nor any other damage as the consequence of the Claimant’s acts. The Organization further argues that the Carrier has failed to provide evidence to support the charges, and even if it had, the discipline is disproportionate to the alleged charges.

The Carrier responds, first, that the Claimant was properly notified of the investigation, for which he gave receipts, and his failure to appear was at his own peril.

The Carrier rebuts the argument that this inappropriate conduct was off duty and off the Carrier’s property by submitting the decision in Award No. 117, Public Law Board No. 5850, as follows, in pertinent part:

“ . . . Had Claimant been in the motel on his own on the afternoon of his overnight stay, the Carrier would have no grounds for the charges, but claimant checked into the motel as a maintenance employee who intended to work on Monday, February 8, 1999. While in the motel and on its premises as a representative of the BNSF Maintenance of Way Department using a room paid for by the Carrier, he was

responsible for conducting himself in such a manner that the railroad would not be subjected to criticism or loss of good will.”

The Carrier further argues that the Claimant clearly violated the Rules with which he was charged, and it cannot be expected to continue to employ workers who have so little respect for others. The Carrier denies the Organization’s claim.

The Board has studied the record in this case, and is compelled to concur in the Carrier’s assessment of the circumstances and outcome of the charged misconduct.

The Claimant failed to attend the investigation, and thereby forfeited his opportunity to present a defense on his own behalf. No evidence is in the record to indicate that he was unable to attend, nor did he seek a postponement. Failure or refusal to appear is a decision which places him at peril.

While it is literally correct that the Claimant was off duty and off the Carrier’s property, he was still subject to the Carrier’s rules and policies while he was utilizing Carrier-provided lodging. The Board concurs in the decision rendered by Public Law Board No. 5850, above. Under certain circumstances, off-duty and/or off-property conduct which reflects unfavorably on the employer is sufficient grounds for a disciplinary penalty. The unrefuted inappropriate behavior here is the sort of thing which can permanently damage a company’s image in the community if left unpunished. Furthermore, it can tarnish the image and relationship of other employees who would never act in a similar manner.

The Carrier has borne its burden of proof, in the absence of any rebuttal evidence. The Board reasons that if the Claimant were innocent of the conduct related by the Front Desk Clerk, he would have protested his expulsion from the motel, and he would have vigorously and indignantly defended himself.

His behavior was both immoral and discourteous. He thus violated MWOR 1.6. He was neither professional nor courteous. His off-duty conduct at a Carrier-provided lodging facility discredited the Carrier and was not in its interests. He thus violated Engineering Instruction 21.2. Physically touching a person of the opposite gender, as well as expressing admiration for their physical features, no matter how attractive, uninvited and in a public place, constitutes sexual harassment which creates an offensive work environment. He thus violated MWSR S-26.4.

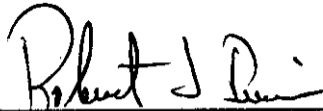
Finally, the Board notices that the Claimant’s personal record is not exemplary. Employed in 1993, he was assessed a conditional suspension for a first-time drug and/or alcohol offense in 1997, being reinstated after successfully completing treatment. He was assessed a 20-day record suspension in March, 2001, for failure to comply with instructions and walking off the job. He

received a formal reprimand in September, 2001, for absence without authority, and a record suspension in August, 2002, for laying off without authority.

With this disciplinary record, and in consideration of the behavior which eventuated finally in this dismissal from the Carrier's service, the Board cannot find any reason to change the Carrier's decision in this case.

AWARD

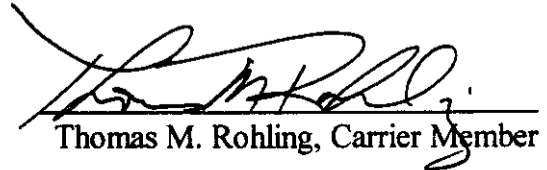
The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

June 13, 2003

Date