

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 500 – Award No. 500 – Ogle
Carrier File No. 14-18-0571
Organization File No. 2409-SL13C5-1820

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Chris Ogle (1547264) Seniority date May 15, 2006 for reinstatement, with seniority, vacation, all rights unimpaired including health insurance, and pay for all wage loss including overtime work lost, commencing September 17, 2018, continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Chris Ogle, had been employed by the Carrier since 2006. On July 12, 2018, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged discourteous behavior while speaking with a hotel employee on July 6, 2018 at approximately 1530 hours in Enid, OK, and to determine possible violation of Maintenance of Way Operating Rule (MWOR) 1.6 Conduct and MWOR 1.9 Respect of Railroad Company. Following the investigation, the Carrier found Claimant guilty of the misconduct alleged and dismissed him from service.

The facts leading up to this incident are not in dispute. On July 6, 2018, Claimant was an Assistant Foreman on Region System Gang TTPX0005, which was working in the Enid, Oklahoma area. At approximately 3:30 p.m., having completed his work for the day, Claimant

was at the front desk of his Carrier-provided lodging hotel. The hotel's Assistant Manager, Ms. A. L., was working the desk, and Claimant asked her to reprogram his hotel key. The conversation which followed is the basis for the charges against Claimant.

Ms. A.L. gave a detailed statement following the incident, which she affirmed "word for word" in telephone testimony at the hearing. She recounted that Claimant noticed her wedding ring and asked about her husband; she replied that she had a wife. He then asked if she was a lesbian, and she responded that she was. According to Ms. A.L., Claimant then proceeded to make shocking, offensive, graphic remarks concerning her sexuality. She stated that it was not possible Claimant's comments had been taken out of context. She reported the matter to the hotel's manager and Claimant was banned from the property.

Claimant, in his written statement following the incident, maintained that he did ask Ms. A.L. her husband's name and, when she replied that she was a lesbian, he said simply that he liked women too. He also affirmed that account at the hearing. He claimed that he did not make the offensive remarks attributed to him by Ms. A.L., and there must have been a misunderstanding.

Roadmaster Josh Woolverton, Claimant's supervisor, testified at the investigation that Claimant told him following the incident that he did nothing more than "ask a lady out to dinner." That account was recited in neither Claimant's written statement nor his hearing testimony.

Claimant's personal record shows a Level S record suspension, with a 12-month review period, issued on March 9, 2018, for failure to lock out/tag out the spiker machine before making a repair. His record also includes three additional serious violations, all for operational incidents.

The Carrier states that Ms. A. L's testimony was clearly more credible than Claimant's, as she would have had no motive to fabricate her account and have Claimant barred from the hotel. The Carrier urges that Ms. A. L's testimony clearly establishes it has met its burden of proving Claimant's guilt by substantial evidence, as he was highly inappropriate and discourteous to the complaining witness, causing embarrassment to the Carrier. He violated MWOR 1.6 Conduct, and MWOR 1.9, which provides, "Employees must behave in such a way that the railroad will not be criticized for their actions."

The Organization stresses that the Carrier bears the burden of proving Claimant guilty of the charges, and Claimant had the right to face his accuser in person at the hearing. There was no way, it states, to know who was on the telephone or whether she was coached. There is no support for the conclusion that she was more truthful than Claimant.

The Organization argues that the incident involved nothing more than Claimant "asking a lady out to dinner," followed by an "adult conversation." This conversation was clearly taken out of context, and there is no way to know why the complaining witness would make such claims against Claimant. Perhaps she was offended that he, a straight man, had asked a lesbian out to dinner; there is no way to know.

The Organization points out that there was no physical contact of any kind, even according to her version of events, simply a conversation. Even if the complaining witness' account was

accurate, which it was not, Claimant did not deserve to lose his career as a result of this unfortunate encounter. The penalty is extreme, unjustified and unwarranted. The claim should be sustained.

We have carefully reviewed the record in its entirety. First, we find no procedural error which deprived Claimant of his right to a fair and impartial investigation. On the merits, this case turns on credibility, as the Carrier asserts. The Organization does not deny that the remarks attributed to Claimant were shocking and offense; rather, it denies that he made them. The Hearing Officer found the Carrier's version of events, based upon Ms. A. L.'s graphic, detailed statements, more credible than Claimant's blanket denials, and that determination, amply supported by the record, should not, as is well established, be disturbed by this Board. Her account is sufficient to satisfy the Carrier's burden of proof.

As for the penalty, given the nature of the offense and Claimant's personal record, we cannot say the Carrier's decision that dismissal was warranted represents an unfair, arbitrary or discriminatory exercise of its right to determine penalties.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



SAMANTHA DAIGLE
Carrier Member



LOUIS R. BELOW
Organization Member

Dated this 9th day of June, 2021.