

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 532 – Award No. 532 – S. Benally
Carrier File No. 14-19-0350
Organization File No. 2400-BN40C5-1937

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Stanley Benally (6596878) Seniority date August 24, 1993, for reinstatement, with seniority, vacation, all rights unimpaired including health insurance, and pay for all wage loss including overtime work lost without deduction of outside earnings, commencing on October 24, 2019, continuing forward and/or otherwise made whole, also round trip Mileage (720 miles) for being required to travel from Colorado Springs, CO to Amarillo, TX to attend this investigation.

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, S. Benally, had been employed by the Carrier since 1993. On October 24, 2019, following an investigation, the Carrier found Claimant guilty of making offensive, intimidating, and illegal sexual propositions toward a hotel employee and a pizza delivery person at a Carrier-provided lodging facility on August 8, 2019. The Carrier determined that Claimant had violated Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct, and dismissed him from service.

At all times relevant, Claimant was working as a Machine Operator on mobile gang TTPX0056. On August 8, 2019, Claimant was staying at Carrier-provided lodging at an Extended Stay America in Amarillo, Texas. He was involved in two interactions with hotel clerk Jacey Bailey, and one with a Domino's Pizza delivery driver, Shelby Easley. Ms. Easley called the

police, and Claimant was removed from the property and informed that if he returned, he would be arrested.

At the investigation, Director of Human Resources Shannon Wells testified that on August 12, 2019, Amarillo Division Engineer Will Forbes called and told her that Claimant had been ejected from the Extended Stay America. Ms. Wells stated that Mr. Forbes added that he did not know what exactly happened but he did have a written statement from the hotel's front desk clerk, Ms. Bailey. Ms. Wells testified that she told Mr. Forbes she would take the lead on the investigation, and he provided her with handwritten statements from Claimant and Ms. Bailey. Mr. Forbes also obtained video footage of Claimant's interactions with Ms. Bailey from the hotel's manager, and a police report from the Amarillo Police Department.

Ms. Bailey's original signed, handwritten statement provides:

I, Jacey Bailey, was working the front desk at Extended Stay America in Amarillo from 3pm to 11pm. Stanley Benally had been hanging out in the lobby for a few hours when he came up to the front desk claiming his key had quit working. When he went to hand me his key to reprogram, I noticed he had \$50 bill under his key card. Before I could grab anything, he said he was kidding, but asked did I want the money (over and over) at 10:30pm to 10:45pm. He came up to the desk several times over the next 20 minutes asking if I wanted his money. He said, "come get it". When my relief got here, he came back with a \$100 bill asking for me to come to his room to find out what I could get the money for. He was very persistent. When I wouldn't go for it, he tried to solicit the pizza delivery girl, and that's when the cops were called.

Ms. Wells testified that she spoke with both Ms. Bailey and Ms. Easley on the phone, and that, even if a witness has provided a written statement, it is standard practice for the Carrier representative to interview the witness, to fill in any gaps. She typed notes of her discussions, and did not ask either witness to appear at the hearing.

Ms. Wells stated that Ms. Bailey told her that Claimant was sitting in the lobby for about two hours before he came up to her and asked when she got off work. Ms. Wells stated that Ms. Bailey told her at first Claimant was friendly and asking about her tattoos on her arms and if they hurt, but then said his key was not working and held it out to her with a \$50 bill. Ms. Bailey stated that when she tried to take the key, Claimant told her he was joking but asked, "do you want that, do you like that?" He then told her to "come get it if you want it" and started walking down the hallway.

Ms. Wells further testified that Ms. Bailey told her Claimant came back to the desk and kept holding his card out, asking her if she wanted it, if she liked it, and for her to come see. Ms. Bailey told Ms. Wells she did not know how to respond and tried to brush it off. Ms. Bailey alleged that Claimant first approached her around 10:45 p.m. and came to the desk five times before her relief arrived at 11:00 p.m., at which point Claimant returned to the desk with a \$100 bill, asking for his key to be remade. Ms. Bailey grabbed his key and remade it, and when her relief came up and asked if Claimant needed help, Claimant hid his money and left.

Ms. Wells also testified that Ms. Bailey stated as she was leaving, her relief told her that Claimant had acted the same way with a pizza delivery driver and the delivery driver called the police. Ms. Bailey spoke with the police outside, and they asked her for a key to Claimant's room because Claimant was not opening the door. Ms. Bailey told Ms. Wells that the police officers spoke with Claimant in the hallway, then removed him from the hotel and told him that he would be arrested if he returned.

Ms. Wells testified at the investigation that she next spoke with Ms. Easley, the pizza delivery driver who had called the police that evening. Ms. Wells explained that Ms. Easley told her she parked off to the side of the hotel at about 11:15 p.m. She approached the entrance to deliver a pizza and noticed two men sitting on a bench outside. As she was leaving after her delivery, one of the men from the bench went back inside the hotel and the other asked if she had a pizza for him. When Ms. Easley said no but he could order one, he told her he had a \$100 bill. Ms. Wells stated that Ms. Easley told her that she explained to the man that she was going back to the store and if he ordered a pizza, she would deliver it. She then walked back to her car.

Ms. Wells further testified that Ms. Easley told her she could see the man staring at her and he followed her to her car, asking when she got off work, where the store was, and if she wanted \$100. She told Ms. Wells that when she made it back to her car, he was right at her door and before she was able to get in and shut her car door, he asked her again if she wanted \$100. When Ms. Easley asked him why he wanted to give her money, he told her he wanted to touch her and tried to reach toward her lower crotch area. Ms. Easley told Ms. Wells that she tried to kick at him but did not think she made contact, and he then left. Ms. Easley then told Ms. Wells that she had pepper spray but did not use it because he left, and that she then called the police. An officer arrived to talk to her about the incident.

Mr. Forbes testified that he also spoke with Ms. Easley. His recitation of her account of events is consistent with Ms. Wells' statements about what Ms. Easley told her. The Organization objected to the testimony of Ms. Wells and Mr. Forbes about what Ms. Bailey and Ms. Easley allegedly told them, as the two witnesses were not present to testify at the hearing.

The Hearing Officer, Claimant's representative, Claimant, and Ms. Wells viewed videos from the hotel during the investigation but the full videos were not made part of the hearing record. Ms. Wells also entered two still photos taken from the video footage and identified Ms. Bailey as the individual in the green shirt and Claimant as the individual in the white shirt. Ms. Bailey had explained that Claimant allegedly propositioned her by handing her his room key and either a \$50 or \$100 bill, and, Ms. Wells stated, in the videos, those hand motions are clear.

Ms. Wells also entered a police report as an exhibit. It is dated August 8, 2019 and identifies Shelby Easley as the caller. It does not identify Claimant. However, Mr. Forbes testified that when he went to the Amarillo Police Department, he referenced Claimant and the police report in evidence is what the Police Department provided him. Mr. Forbes further explained that the Amarillo police officers told him that Claimant was cited and released from the property and that if he returned, he would be arrested.

The police report states:

NOT IN A ROOM / A PIZZA DELIVERY DRIVER

** LOI search completed at 08/08/19 23 :18:23

C STATES A MAN WOULD NOT STOP FOLLOWING HER
AND ASKING TO TOUCH HER

SUSP: HM / 50 YOA / GLASSES/ WHI SHIRT / WHI SHORTS THAT WENT
TO KNEE /

CORR C IS A PIZZA DELIVERY DRIVER

C STATES THE SUSP IS STILL IN THE PARKING LOT
AND C IS IN THE PARKING LOT

C VEH: SIL CHEVY COLBALT

SUSP WAS WALKING PER C

C STATES THE SUSP FOLLOWED HER TO HER CAR/ C GOT IN HER CAR
AND WOULD NOT LOOK AT SUSP / UNKDOT

NO WEAPONS

UNK DRUGS JUNK ALCOHOL

C STATES SHE DOES NOT KNOW WHICH ROOM HE CAME FROM BUT
SUSP IS POSS A GUEST

C STATES THE SUSP CAME UP TO HER SAYING "DO YOU WANT A 100
DOLLARS OR 50?"

C ASKED WHY AND HE SAID "I WANT TO TOUCH YOU" AND WAS
LOOKING AT HER PRIVATE AREA

SUSP NEVER PUT HIS HANDS ON C BUT HE WAS TRYING TO PER C
164 WILL ADVS

C HAS HER HAZARDS ON

C STATES SHE HAS A KNIFE AND PEPPER SPARY ON HER

C STATES SHE DOES HAVE THEM OUT RIGHT NOW

THE KNIFE AND PEPPER SPRAY ARE IN HER LAP

OFFICERS WITH C/END OF CALL

164 REQ ANOTHER UNIT

SUBJ TRESPASSED. 164

Ms. Wells also testified concerning Claimant's statements; she stated she obtained his original handwritten statement and then took a second written statement from Claimant when they met in person during her investigation, before she interviewed any other witnesses. Both statements were entered into evidence. The initial handwritten statement provides:

Thursday August 8, 2019. Last Thursday I went back to motel. I just stay in the room. In evening I went outsid[e] walking around. I saw one of the maid. I talk to her. I start playing around and she took it the wrong way. The last min I was thinking I shoulding (sic) do that. She tell on me, they tell me to leave, so I leave from there. It's late in the evening. I didn't check the time. I know I make a big mistake. I shoulding (sic) playing around like that. I was play around with my money, but I didn't say bad word. I didn't do anything stupid.

Ms. Wells explained Claimant told her that at around 7:00 p.m. or 8:00 p.m. on August 8, 2019, Ms. Bailey started talking to him on the side of the front desk and said he had nice shoes. He told Ms. Wells that he went outside and when he came back in his room key was not working. Claimant told Ms. Wells that the money was in his pocket with his key, and the \$50 bill and \$100 bill came out when he retrieved his key from his pocket. Claimant told Ms. Wells that the bills were on the bottom and Ms. Bailey took his key, but he grabbed his money back.

Ms. Wells stated that when she asked Claimant why he offered Ms. Bailey the \$50 bill, Claimant told her that he was playing around with the money and asking if Ms. Bailey wanted it, and Ms. Bailey did not say anything at first but then started to laugh. Claimant told Ms. Wells that he did not ask Ms. Bailey anything and he thought he was playing around, but he realized that Ms. Bailey took it seriously. Claimant explained to Ms. Wells that he thought Ms. Bailey believed Claimant was giving her the money to take her back to his room like a prostitute. Claimant further told Ms. Wells that he did not tell Ms. Bailey he would take her back to his room and did not offer Ms. Bailey more money the second time he came back to the desk.

Ms. Wells further testified that when she asked Claimant about Ms. Easley, the pizza delivery driver, Claimant told her that he was going outside and Ms. Easley was coming in. Claimant explained to Ms. Wells that when Ms. Easley was leaving the hotel, he asked her if he could buy the pizza for \$100 but he did not have the money out. Ms. Wells testified that Claimant denied following Ms. Easley to her car, explaining that her car was parked near his and they had both started walking to their respective cars. Ms. Wells added that Claimant denied walking up to Ms. Easley's car door, denied saying he wanted to touch Ms. Easley, and denied touching or trying to touch Ms. Easley.

Ms. Wells also testified that she asked Claimant if he spoke with the police that day, to which he explained that he went to get something to eat and he knew the front office "told" on him because the police came to the hotel and told him to leave. Claimant told Ms. Wells that the police asked him if he was drunk and looked in his room. He also said he knew "she" told on him because of the way she looked at him and told Ms. Wells that he thought it was crazy and stupid and he made a mistake. Ms. Wells testified that she asked Claimant if he had joked around like this before and Claimant stated he had never done that before, that he was a serious man, and that maybe he did not know how to joke around. Ms. Wells typed Claimant's statements in question-and-answer form and e-mailed the statement to him to review. She stated that she also asked him why he thought Ms. Easley was so scared she called the police, Claimant responded that she probably thought Claimant was following her, but he was not, Ms. Wells stated.

Claimant testified at the hearing that he attempted to give money to both Ms. Bailey and Ms. Easley. He explained that the money came out of his pocket when he retrieved his room key, Ms. Bailey laughed, and he and Ms. Bailey were joking before she fixed his room key. He explained that he approached the front desk three times: the first, he did not speak to Ms. Bailey; the second, he gave her his key with the money; and the third, he came back out of his room and showed her the money again. Claimant stated that he knew she thought he was asking for her to come back to his room even though he did not ask her to. He stated that he should have apologized.

Claimant further testified that he had asked Ms. Easley for pizza as Ms. Easley was leaving the hotel, and when she told him there was none, he proceeded to his car so he could go get something to eat. He explained that Ms. Easley had parked next to him, and he was not following her. Claimant denied reaching for Ms. Easley in her car, denied that she kicked at him, and stated that she did not appear uneasy. Claimant testified that he was about 20 feet away from Ms. Easley's car. When the police arrived, he complied and told them what happened. He was then told to leave the hotel, which he did, and was not allowed to return.

Claimant previously received a Level-S 30-day Actual Suspension with a three-year review period for engaging in a violent altercation at Company-provided lodging on January 19, 2005. On December 5, 2006, Claimant received a Level-S 30-day Record Suspension for failing to stop a machine from colliding with another, resulting in an injury to a coworker. Claimant then received a Level-S Conditional Suspension on January 14, 2011, for violating the Carrier's Alcohol and Drug Policy, and a Level-S 30-day Record Suspension with a one-year review period on March 14, 2018 for fouling adjacent track.

The Carrier addresses the Organization's assertion that Claimant was denied his right to a fair and impartial investigation because Ms. Bailey and Ms. Easley were not in attendance. The Carrier cites several arbitration awards for the proposition that hearsay is reliable and competent evidence in arbitration, especially where the evidence originates from a non-employee such as Ms. Bailey or Ms. Easley, because the Carrier cannot compel a non-employee to participate in an internal investigation. There is also no indication, the Carrier stresses, that either Ms. Bailey or Ms. Easley was coached when giving her statements.

On the merits, the Carrier asserts that it has met its burden of proving Claimant's guilt by substantial evidence. In addition to the fact that Claimant's hearing testimony was inconsistent with his prior written statement, Claimant admitted that he attempted to give money to both the hotel clerk and the pizza delivery driver. Each witness's investigation testimony, except for Claimant's, was similar in nature. Further, there is no evidence that Ms. Bailey and Ms. Easley ever spoke or knew each other, and thus no explanation for the similarities in their statements other than that the events occurred as they described.

The Carrier further argues that there is no way Claimant's actions could have been taken out of context. Claimant admitted that he knew he should not have acted the way he did with Ms. Bailey, then proceeded to act in the same manner with Ms. Easley. Claimant's harassment is a serious matter and cannot be written off as a joke, especially when someone feels threatened to the point of calling the police.

The Carrier also addresses the police report, which, despite not naming Claimant, provides a description of Claimant consistent with the video footage and corroborates both Ms. Bailey's and Ms. Easley's statements as well as Claimant's acknowledgement that he spoke with the police and was escorted off the property. For these reasons, the Carrier maintains that it has provided substantial proof of Claimant's guilt.

Moreover, the Carrier stresses, the offense's seriousness warrants dismissal. The Carrier notes that its Policy for Employee Performance Accountability (PEPA) classifies this type of

violation as a standalone dismissible offense. Further, it states, the plain language of Maintenance of Way Operating Rule 1.6 also classifies this as a standalone dismissible offense, stating, in part, "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". Moreover, the Carrier points out, Claimant had four previous serious violations on his record, one of which involved a violent altercation at Carrier-provided lodging. The Carrier concludes that dismissal is warranted and urges that the claim be denied.

The Organization argues that the Carrier failed to provide any facts demonstrating Claimant's guilt. Although the Carrier presented statements allegedly taken from Ms. Bailey and Ms. Easley, there were prepared by Ms. Wells and is no way for the Organization to know who wrote the statements or if they had been coached. The Board cannot accept any of these statements as factual as neither witness was at this hearing. Claimant's testimony is the only testimony that is not hearsay.

The Organization also notes that the police report entered into evidence did not name Claimant, nor does it mention an arrest or citation despite allegedly serious allegations against Claimant. Because the police report does not name Claimant, the Organization stresses that it should not be considered as part of the record.

The Organization points out that Claimant has been employed by the Carrier for 26 years and takes great pride in his work. Claimant was simply joking around and showing off to Ms. Bailey and Ms. Easley, and his conversations were taken out of context. Neither Claimant nor the Organization was given the opportunity to question Ms. Bailey or Ms. Easley, and simply because they may have found any of Claimant's comments offensive does not mean he intended to be offensive. The Organization adds that the discipline is excessive, and requests that Claimant be reinstated and made whole.

We have reviewed the record in its entirety, and we find the Carrier has met its burden of proving Claimant's guilt by substantial evidence. While the Organization is correct that neither Ms. Bailey nor Ms. Easley was present to testify at the hearing, it is well established, as the Carrier states, that hearsay testimony is admissible in arbitration. Here, Ms. Bailey's initial statement and what Ms. Wells reported of the witnesses' statements to her are reliable evidence of Claimant's guilt, as the two women described separate, but strikingly similar, interactions with Claimant. Further, although the police report does not name Claimant, it was provided to Mr. Forbes when he asked for a report concerning Claimant, and what it reports of Ms. Easley's complaints is entirely consistent with what she reported to Ms. Wells.

We also note that in his hearing testimony Claimant largely admitted the allegations against him, acknowledging that he offered the two women money and stating that he should have apologized. Most importantly, he acknowledged that he was aware Ms. Bailey believed she was being propositioned for money, yet continued his conduct, both with her and then Ms. Easley. While he maintained that he was simply joking, the record clearly supports the Hearing Officer's determination that Claimant was not credible, especially given that Ms. Easley was sufficiently concerned to call the police. The Carrier has proven Claimant's guilt by substantial evidence.


With respect to the penalty, we recognize that Claimant was a long-time employee, but he was guilty of a stand-alone dismissible offense and had a record of troubling personal conduct. Carrier employees often stay at provided lodging, and the Carrier must be able to rely upon them to conduct themselves respectfully, not harass other persons to the point that police are called and the employee is banned from the property. We cannot say that the Carrier's decision to dismiss Claimant was an unwarranted or arbitrary exercise of its discretion to determine the appropriate penalty.

AWARD

Claim denied.


DAN NIELSEN
Neutral Member


LOGAN MCKENNA
Carrier Member


JEFFERY L. FRY
Organization Member

Dated this 31 day of August, 2023.