

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY

and

NMB Case No. 85
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 9, 2007, Claimant was working Assignment 105. Adam Janisse, another Switchman, was working Assignment 105 on the same shift. A second Switchman named Ryan Maakestad, who was coming off the night shift, was in the same area as Claimant and Janisse. Janisse testified that Claimant stood with his back to Janisse and Maakestad, pulled down his pants, exposed himself, spread his buttocks and made the comment "mmm, do you want some?" Janisse stated that, in response, both he and Maakestad told Claimant to "knock it off" and that Claimant stopped. He described himself as having been "flabbergasted" by Claimant's conduct and considered it to have been "highly inappropriate".

Janisse acknowledged that he had read materials with respect to legal rights he might have in consequence of the alleged

creation of a hostile working environment. He testified, however, that the Company "has done everything right up to this point," an apparent reference to the Company's actions treating the complaint seriously and investigating the incident.

Neither Janisse nor Maakestad reported the incident to Management at the time it allegedly took place; and that might have been the end of it, except, according to Janisse, when he heard on the 14th that J. W. Smith, another Switchman and the complainant in Case No. 84 before this Board, was being criticized for having complained about Claimant engaging in conduct similar to what Janisse had subjected to on the 9th.

Janisse, according to his testimony, raised the matter with Maakestad, who recalled the incident of the 9th and commented that [Claimant] "is weird like that" and said that he knew that Claimant would get into trouble for such conduct some day. Janisse described Claimant as a "jokster", but asserted that his conduct was part of a "pattern" of such conduct and was "over the top".

Janisse contacted Management on August 16th concerning the incident in which he was allegedly involved. In making a statement to Management describing the incident, Janisse wrote that he was making the statement because "I will not let Jeremy Smith stand out there on his own", an apparent response to the criticism of Smith by other employees and assertions that he was lying about Claimant. He conceded that he did not know the date of Claimant's conduct; he recalled that it took place during the time he was working Job 104, which was between August 1st and August 9th.

Mr. Maakestad acknowledged being in the computer room with Janisse at the time of the incident Janisse described. He testified he was working on the computer and looking straight at the screen. He denied having seen Claimant "drop his pants exposing his rear end". He acknowledged hearing Claimant "joking around" with Janisse, back and forth, but denied hearing the words which Janisse described. Maakestad's testimony about his schedule appears to place the incident in time on August 9th.

Claimant acknowledged having been in the computer room with Janisse and Maakestad, but he denied having pulled his pants down and "showing his rear end" to them. He stated that Janisse and he talked on that date. He also acknowledged having had a previous run in with Janisse and ongoing exchanges between them.

The Carrier convened an investigation on September 5, 2007 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. There, the above evidence was adduced.

At the hearing, the Organization protested the charges as being simply the result of a disgruntled employee making accusations against Claimant. It pointed out lack of certainty in Janisse's testimony, even as to such basic facts as when the alleged incident took place.

Following the hearing, the Carrier dismissed Claimant from employment for violation of the Rules cited. The record contains no documentation of the Carrier's reasoning in determining to dismiss Claimant. The Carrier argues that the hearing officer necessarily credited Janisse's testimony, rejected Claimant's testimony as incredible and inferred from Maakestad's failure to flatly deny the alleged conduct that Claimant had, in fact, dropped his pants, spread his butt cheeks and asked if Janisse and/or Maakestad "wanted some".

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 the gross unacceptability of Claimant's 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 specific testimony, maintaining that the Carrier as the trier of fact was within its rights to make credibility determinations, which it did in favor of Claimant's guilt. BNSF contends that Maakestad's evasive testimony and his failure to flatly deny the conduct with which Claimant was charged warranted a conclusion that he knew the conduct at issue took place. Citing authorities, the Carrier maintains that this Board is obligated to defer to the credibility determinations made by the hearing officer, based on the totality of the circumstances, 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 Janisse 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 his willingness to shoulder that burden increased his credibility.

BNSF maintains that the evidence establishes that the incidents at issue in this case and Case No. 84 are part of a pattern of unacceptable - albeit mostly unreported - conduct and were not mere isolated incidents. It contends that the evidence warrants a conclusion that Claimant's conduct was part of a pattern of behavior which warrants the most serious penalty. It points to evidence from Mr. Janisse that Claimant had engaged in a pattern of "flashing" his fellow employees. BNSF also contends 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 it 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. 84, the accusers must be lying, is improper. It asserts that is not the proper conclusion, pointing out that Maakestad's testimony was evasive and inconclusive: he never stated that Claimant did not engage in the conduct and was simply working to avoid breaking the "code". It points out that the hearing officer was convinced of the credibility of the accusers, who resisted considerable pressures from fellow employees 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 that the Carrier failed to meet 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. It points out that Janisse could not even pinpoint the date on which the alleged incident took place and that the Carrier did not introduce cameras and video records of the location at issue on the dates at issue, but did not introduce them.

The Organization points out that Janisse did not report the incident at the time it occurred and that, when he did so, it was based not on the conduct but to protect Mr. Smith from criticism after he had complained about Claimant. UTU contends that the Carrier was on a "witch hunt" because of the complaints, but lacked evidence of Claimant's guilt from other than the disgruntled employees. It points to communications over time between Claimant and Janisse as contrary to the latter's complaint as to the seriousness of the conduct alleged.

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

The Organization urges that, based on the lack of proof, the Claim be sustained and Claimant returned to work, with seniority unimpaired, and 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. For the reasons which follow, the Board concludes that the Carrier failed to meet its burdens.

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. 84, 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 three first-hand witnesses in Janisse's favor was a necessary element of the conclusion. The Carrier argues that Janisse was credited because he had no reason to lie and came forward at some risk of criticism and worse from other employees in support of his fellow-employee Smith. It points to Maakestad's testimony as corroborating parts of the incident and lacking in any denial that the events occurred as Janisse testified. BNSF maintains that Claimant 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. In the first instance, there is indication in the record that Claimant and Janisse had some type of run-in, so Janisse's objectivity is in question. The Board notes that Janisse did not come to Management when the alleged incident occurred, which must be considered as an indication either of what happened or how Janisse regarded it at the time. Only after another employee was criticized for complaining about Claimant did Janisse come forward; and he did so for the stated purpose of supporting the other employee. Indeed, Janisse waited so long that he could not pinpoint the date on which the incident allegedly occurred.

The two employees at the center of the dispute gave diametrically opposed testimony. Claimant denied the incident which Janisse described ever took place. Maakestad testified that there was a joking exchange, but that he saw no flashing and heard no comment as Janisse had described it. Indeed, he several times denied that he had seen anything. The Carrier's interpretation of that is that, since he did not absolutely deny the incident, his testimony does not contradict Janisse and must be deemed to support that testimony simply does not follow. The Carrier's reliance on Maakestad's testimony is misplaced; his denials cannot be stretched to constitute admissions.

Finally, the Carrier in its Submission argues back and forth between this Case and its companion (Case No. 84), 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 fact that it is not proven by substantial evidence considered on the record as a whole does not mean that it did not occur; it only means that the record is not sufficient to support the discipline. The discussion in the Board's Opinion should make clear that such conduct will not be tolerated, from Claimant or any other employee.

The Carrier took Janisse's complaint seriously after it was brought to Management's attention. It conducted a thorough investigation, made clear that such conduct would not be tolerated and, on the basis of the investigation, dismissed Claimant from all service. In so doing, it clearly did everything possible to protect Janisse and other employees from harassment by Claimant.


Claimant is a short-service employee; and lingering doubts remain whether he engaged in the harassing behavior described. Those concerns notwithstanding, the consequence of the Board's conclusion that the Carrier failed to meet its burden of proof is that Claimant is entitled to be made whole for the period of his absence.


AWARD: The Carrier failed to meet its burden to prove Claimant guilty of the charges against him. The claim is sustained.

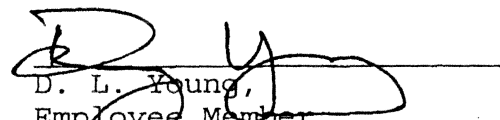
Claimant's dismissal shall be rescinded and he shall be reinstated to employment, with seniority unimpaired, and be made whole for wages and benefits lost. All records of the dismissals shall be expunged from his record.

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 3rd day of November 2008


M. David Vaughn,
Neutral Member


Gene L. Shire,
Carrier Member


D. L. Young,
Employee Member