

**BEFORE
PUBLIC LAW BOARD No. 6993
Case No. 4**

AMERICAN TRAIN DISPATCHERS ASSOCIATION)	
)	
vs.)	PARTIES TO DISPUTE
)	
CSX TRANSPORTATION, INC.)	

Carrier file: 87403

Claimant K. T. Turner

C.R. Mundy, Member designated by ATDA

J. Klimtzak, Member designated by CSX

L.S. Kohn, Esq., Neutral Member and Chair appointed by National Mediation Board

STATEMENT OF CLAIM:

The Organization requests that the claimant "be reinstated to his position of Train Dispatcher and be compensated for all lost wages including lost wages in attending investigation."

BACKGROUND:

The Claimant was employed by the Carrier as a Train Dispatcher at its Indianapolis, Indiana office. On September 6, 2005, a female Train Dispatcher informed Chief Train Dispatcher Williamson that she felt that she had been harassed by the Claimant and felt uncomfortable working with him, and described to him four incidents that bothered her. On September 9, 2005, the Claimant was served notice that he was being held out of service and was to arrange to attend a formal hearing based on the following charge:

You are charged with violation of the CSX Code of Ethics and CSX Unlawful Harassment Policy, and all circumstances relating thereto.

The investigation was held on September 27, 2005, at which time the Chief Dispatcher, the accusing co-worker, and the Grievant testified. On October 7, 2005, the Claimant was notified that he was dismissed from service effective immediately based on the finding that he had violated the CSX Code of Ethics and CSX Unlawful Harassment Policy. When the matter could not be resolved by the parties, the matter came before a hearing of this Board on April 20, 2007, at the offices of the National Railroad Adjustment Board, Chicago, Illinois. The Claimant did not appear at the hearing.

The Organization has appealed the Carrier's decision on the ground that the Carrier failed to meet its burden to prove by substantial evidence that the Claimant violated either

the Code of Ethics or the Unlawful Harassment Policy. The Organization contends that the Hearing Officer improperly credited the accusing employee, since she repeatedly contradicted her own testimony and that of the Chief Dispatcher, while the Claimant has consistently and credibly denied that any of the incidents occurred as his accuser describes. The Organization also suggests that it was unreasonable for the Hearing Officer to credit the accuser since it is unclear when each of the incidents occurred or why they were reported all at one time. The Carrier asserts that the Hearing Officer properly credited the accuser's testimony and that the record fully substantiates the charges and demonstrates that the dismissal from service was just and warranted.¹

FINDINGS AND DECISION:

This Board upon the whole record and all the evidence, finds that the Carrier and employees involved in this dispute are respectively a Carrier and employees within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction of the dispute here involved.

In this case, the Hearing Officer heard evidence from the accusing employee about four incidents. For each instance, the Claimant denied that the incident occurred, or denied that it occurred as described by the Claimant. Other than these four incidents, there was no evidence of any conduct by the Claimant that might be deemed to violate either the Code of Ethics or the Sexual Harassment Policy. The record concerning the four incidents is as follows:

- First, when she was in her truck in the parking lot, the accuser testified, the Claimant came over and put his hand in through the window and started to touch her. According to the accuser, she "smacked him," and the Claimant apologized to her repeatedly after that. Although the Chief Dispatcher testified that the accuser had reported on September 6, 2005 that the Claimant had "grabbed her breast," the accuser testified during the investigation that the Claimant did not actually touch her breast. Instead, she said that he reached "towards [her] breast" but "he didn't grab me or anything." The Claimant testified that on the occasion described, they had a conversation about family issues and he then reached into her truck to touch her shoulder, she said she was going to be all right, and he said good night. He denied that she hit him or that he ever apologized to her for the contact.

¹The Carrier also objects to this Board's consideration of correspondence from ATDA President McCann, on the ground that the Organization's General Chairman alone is designated to handle on-property appeals at the highest level, citing Rule 18, Section 4, paragraphs (c) and (d). However, here, as in Award No. 30789 of the Third Division of the NRAB, the remarks of the ATDA President are merely a summary of points made previously in the course of on-property argument by other Organization representatives. Accordingly, this issue is not dispositive of the instant dispute, and it is unnecessary to address it further here.

- Second, there was a conversation among the Claimant, the accuser and a third dispatcher one night about getting a milkshake, in which, according to the accusing employee, the Claimant made a comment about "putting cherries or and then he went on to say whip cream. I think he said chocolate on me. . . ." The accuser contradicted herself as to whether the Claimant said he wanted to use the food in a sexual manner, first saying he did not, and later, when asked follow-up questions by the Hearing Officer, saying that he did. The Claimant recalled a conversation about going to get milkshakes, and a separate conversation with the accusing employee about ice cream, but he denied ever saying anything about putting food on his co-worker. The third dispatcher mentioned by the accuser as having participated in this conversation was never identified nor called as a witness in the investigation.
- The accuser also asserted that the Claimant came up behind her that same night and, seeing that she was upset about something happening in the terminal, put his hands on her shoulders. She shrugged her shoulders and told him to get his hands off her shoulders, that she did not want a massage. (She testified that she did not consider this offer of a massage to be sexual conduct.) According to the accuser, the Claimant then said that she was taking the job too seriously, sat down in his chair behind her and said, "Yeah, I guess I better stop...I see your eyes looking back at me [in the monitor]." On a later recounting of the conversation, she added that the Claimant said he could "see she was getting excited." Because all the accuser could see reflected in the monitor was her chest, and not her eyes, she assumed he was talking about her breasts, she testified. The Claimant denied making the comment, testifying that after the accuser said she did not want a massage, he simply sat back in his chair against the wall.
- On a subsequent occasion, the accuser testified, the Claimant while sitting behind her in their work area rubbed his leg up and down hers, and when she asked him what he was doing, the Claimant said, "You know you like it," and laughed about it. When she asked him to stop, he did. The accuser testified that she felt that his contact was intentional and sexual in nature because it happened a second time after that. The Claimant testified that if there was any contact, it was unintentional, because the shared work area is so small that he has to pull his chair in so people can pass in the aisle. He denied making the comment alleged.

As a result of these incidents, the accuser testified, she was uncomfortable with the Claimant and did not want to work with him.

The CSX Policy Statement on Harassment states in relevant part,

It is the policy of CSX Corporation to provide all employees with a working environment,

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which is free of harassment by supervisors, other employees, customers, vendors, agents and other third parties. Harassment is personally offensive, lowers morale and interferes with the ability to work cooperatively. It is for these reasons that CSX Corporation has ZERO TOLERANCE for sexual or any other form of harassment.

* * *

Sexual harassment is defined as any unwelcome sexual advance, request for sexual favors or other verbal or physical conduct of a sexual nature when: . . . (3) The conduct as the purpose or effect of unreasonably interfering with the individual's performance or of creating an intimidating, hostile or offensive working environment.

Examples of Sexual Harassment Include, But Are Not Limited To:

1. Repeated and unwelcome sexual flirtations, advances, and propositions;
2. Telling offensive sex-based jokes or making inappropriate innuendoes in person....;
- * * *
4. Unnecessary and unwelcome touching, petting, pinching, or attention to an individual's body;
- * * *
6. Unwanted sexual compliments, innuendoes, suggestions, or gestures;
- * * *

Turning to the merits of the claim, it should be noted that even in a "he said, she said" dispute, where there are no eyewitnesses other than the accuser and the accused, it is within the authority of the Hearing Officer to make credibility determinations, credit the testimony of an accuser over that of a charged employee, and find that the credited testimony supports the charges. However, the Hearing Officer must have a substantial basis for the credibility determination and all procedural safeguards must have been followed, in order for the Carrier to meet its burden of proof on appeal. As an appellate body, this Board cannot make its own credibility determinations *de novo*, but must review the record to determine if the Carrier's assessment of the witnesses' credibility and its resolution of the evidentiary conflicts is supported by substantial evidence. See PLB No. 4757, Case No. 1.

Reviewing the entire record in this case, this Board concludes that the Carrier has failed to present substantial evidence to support the charges and discipline. The accusing employee repeatedly contradicted herself in the course of the investigation; she added details later in the investigation not included in her initial descriptions to the Hearing Officer; and she contradicted the Chief Dispatcher's description of her report to him. She failed to say when the incidents occurred or why she waited until September 6, 2005, to report them all. Her testimony about the touching of her shoulder (or "towards her breast," as she described) lacked any detail about the context in which the gesture was made, while the Claimant provided an un rebutted context: He testified without contradiction that he made the gesture after a conversation about "family issues." In sum, the Carrier has failed to show that the Hearing Officer had a substantial basis for crediting the accusing employee's account of the four incidents over the Claimant's.

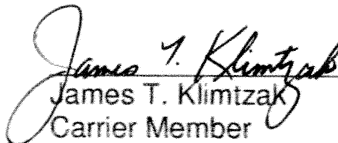
The Claimant acknowledges that he reached through the accuser's truck window to touch her shoulder after a conversation about family matters, that he may have had unintentional contact with the accuser's leg when he moved to let people pass in the aisle, and that he put his hands on the accuser's shoulders in a gesture that the accuser herself deemed non-sexual. Any other testimony against him he denied. Given the lack of a substantial basis for crediting his accuser over the Claimant and based on the record as a whole, the Board concludes that the Carrier has failed to present substantial evidence that the Claimant's conduct had the effect of unreasonably interfering with the accusing employee's performance or of creating an intimidating, hostile or offensive working environment, or that he violated either the CSX Code of Ethics or the Policy Statement on Harassment in the Workplace. The Carrier's policies properly protect its employees from unwanted sexual conduct or conduct of a harassing nature, but the record fails to demonstrate that the Claimant was guilty of the offense charge.

AWARD

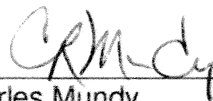
Claim is sustained in accordance with the Findings. The Claimant shall be reinstated to his position of Train Dispatcher and shall be compensated for all lost wages including wages lost in attending the investigation.



Lisa Salkovitz Kohn
Neutral Member



James T. Klimtzak
Carrier Member
7-18-07



Charles Mundy
Organization Member
7-18-07