

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO 345, (Case No. 345)**

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

**VS**

**BNSF RAILWAY COMPANY**

William R. Miller, Chairman & Neutral Member  
Michelle McBride, Carrier Member  
Louis R. Below, Employee Member

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- 1. The Carrier violated the Agreement commencing February 12, 2020, when Claimant Stephen R. Spencer (0293894) was removed from service and subsequently dismissed on March 6, 2020, for harassment of a coworker when he showed pornographic material and made lewd comments and threats of violence in violation of MWOR 1.6.**
- 2. As a consequence of the violation referred to in part 1, the Carrier shall remove this discipline with all rights unimpaired and pay for all wage loss including overtime (if applicable) commencing February 12, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”  
(Carrier File No. 14-20-0156) (Organization File No. 2401-BN40H1-201)**

**FINDINGS:**

Public Law Board No. 7048, upon the whole record and all the evidence finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The facts indicate Claimant was a Head Welder on Cicero, Illinois, Gang TRWX2566 in January 2020, and had also worked various other positions in the area. On January 21, 2020, Division Engineer B. Ferencak received a call from an Organization Representative concerning allegations of Claimant’s misconduct reported to him by Maria Gonzalez-Navarro. Mr. Ferencak

contacted Mrs. Gonzalez-Navarro and during his conversation with her, she alleged Claimant discussed sexual exploits with various women, showed her pornographic photos/videos including some with himself and told her that if she rats him out he would send someone to shoot up her house. Additionally she asserted that Claimant had made it clear to many people that he carried a gun in his personal vehicle at all times.

Based on those serious allegations, Mr. Ferencak contacted Carrier's Internal Police force (ROC) and Human Resources Department (HR) as required by Carrier Policy regarding any report of harassment. Claimant and Mrs. Gonzalez-Navarro were interviewed concerning these allegations. Claimant admitted he did have a firearm on Carrier property and a four page written statement was obtained from Mrs. Gonzalez-Navarro concerning Claimant's alleged harassment and threats directed towards her. At that time, neither HR or ROC were able to substantiate or refute those allegations, but because of the seriousness of the issue Claimant was directed to attend a formal Investigation on February 12, 2020, concerning in pertinent part the following:

**"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged harassment of a coworker when you alleged showed pornographic material and made lewd comments, and your alleged threats of violence if the behavior was reported.**

**This is to advise STEPHEN ROMELLE SPENCER is being withheld from service pending results of investigation."**

On March 6, 2020, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the Organization's position that the Carrier did not provide the Claimant with a "fair and impartial" Investigation because the Hearing Officer exhibited a pre-judgement of the Claimant's guilt and hindered its defense. It asked the discipline be rescinded without reviewing the merits.

Turning to the merits, the Organization argued that Claimant sent a video made by a comedian to Mrs. Gonzalez-Navarro, per her request, which some people might characterize as being lewd and vulgar. Claimant asserted he never intended to offend Mrs. Gonzalez-Navarro and only sent it to her because it was funny along with a couple other videos that she had requested. Claimant emphasized he assumed it would not be offensive to Mrs. Gonzalez-Navarro as she was used to "shop talk" and was a regular participant in the exchange of "off color" language. Claimant furnished copies of text messages between the parties to verify the

aforementioned language. Claimant also argued that the accusations raised against him by Mrs. Gonzalez-Navarro were the result of him directing her to do snow blowing work on switches. It was further argued that if Mrs. Gonzalez-Navarro actually felt threatened by Claimant it is difficult to believe that she would let months go by without saying anything. Lastly, it asserted that since HR and ROC were unable to substantiate Mrs. Gonzalez-Navarro's allegations it was clear that Claimant was innocent. It concluded that the Carrier had not met its burden of proof and it requested the discipline be set aside and the claim be sustained as presented.

It is the position of the Carrier that there were no procedural errors in the handling of Claimant's Investigation and that several objections after the Investigation closed concerned the Hearing Officer's handling of the Investigations should not be considered because they were not raised during the Hearing. It requested that the claim be resolved on its merits.

Addressing the record, the Carrier asserted that the evidence and testimony shows that Claimant harassed and threatened a coworker, Mrs. Gonzalez-Navarro by discussing his sexual escapades and sending her pornographic photographs/videos after she asked him numerous times to stop. Mrs. Gonzalez-Navarro also testified that Claimant made numerous threatening statements in her presence what would happen if anyone ever reported him. It further argued that contrary to the Organization's argument that Claimant was innocent because HR and ROC had not proven Mrs. Gonzalez-Navarro's allegations the Organization was overlooking the fact that neither department had been provided the photographs and videos Claimant sent to Mrs. Gonzalez-Navarro. It pointed out neither department made a conclusion of guilt or innocence and the Senior Special Agent in charge of the RCO investigation testified that if they had Exhibits 4 through 6 at the time they were reviewing the matter, Mrs. Gonzalez-Navarro's allegations would have been substantiated. It further argued there was no denial that Claimant had a gun on company property in violation of Carrier Policy.

The Carrier argued Mrs. Gonzalez-Navarro was honest in her depiction of the events surrounding the continuing harassment by Claimant whereas Claimant was not. It asserted that Mrs. Gonzalez-Navarro was fearful for her safety and even bid to another job at a different location so as to get away from the Claimant whereas the Claimant suggested she bid to another job for monetary gain. The Carrier concluded that Claimant harassed a coworker and made it known to her that he had direct access to a firearm both on and off property, and that anyone who crossed him would either be beat up or shot. It concluded that Claimant was guilty as charged and in light of the seriousness of Claimant's misconduct, dismissal was appropriate. It asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and is not persuaded by the Organization's procedural arguments as it is clear that Claimant's defense was not hindered as the Claimant and Organization were given free rein to ask questions, cross-examine witnesses offer testimony and witnesses in Claimant's behalf. It is determined that the case will be resolved on its merits.

The Carrier has a responsibility to provide a safe work environment free of harassment and threats of physical harm. Employees should not fear their coworkers nor should they be required to tolerate lewd and pornographic materials and/or discussions at the work place.

The record is clear that Mrs. Gonzalez-Navarro was concerned about Claimant's conduct directed towards her and because of that she contacted her Organization for guidance. The Organization met its obligation and appropriately forwarded that concern to the proper people for review.

Contrary to the Claimant's colorization of the video sent to his coworker, the video was not comical, as it portrayed a man performing oral sex on a woman. The Organization is correct that individuals have varying levels of tolerance for questionable material, but the subject video was pornographic and lewd. The record is clear that Mrs. Gonzalez-Navarro had consistently advised the Claimant on several prior occasions not to send her such material and that she did not appreciate the Claimant's discussion of his personal sex life.

Claimant argued that he never intended to offend the Mrs. Gonzalez-Navarro when he sent her the video and he argued that he thought she would find it humorous because she was not offended by "shop talk" and had sent him off color text messages. Claimant's argument is not persuasive as there is a significant difference between off color language and the material Claimant forwarded to his coworker who repeatedly told him not to send her such material. Claimant's attempt to make the victim complicit with Claimant's bad behavior because Mrs. Gonzalez-Navarro may have used profanity occasionally does not excuse Claimant's harassment and threat of potential violence towards her.

In its defense the Organization and Claimant argued that Mrs. Gonzalez-Navarro made the instant allegations against the Claimant because of an incident that occurred between them in January, 2020. Claimant stated she was unhappy with his instructions to assist him with blowing snow out of switches and because of that she made up charges to get back at him. In an effort to substantiate that assertion, the Organization called a witness Mr. Charles Segura, to testify to an alleged behavior related to reporting harassment.




Mr. Segura testified that Mrs. Gonzalez-Navarro had reported him to HR for harassing her during an incident that transpired in 2015. Mrs. Gonzalez-Navarro explained during her testimony that it was Roadmaster Marisa Proctor, not her, who contacted HR about a 2015 incident that was reported to Ms. Proctor by other employees that witnessed the event. Mrs. Gonzalez-Navarro did not contact Roadmaster Proctor nor did she contact HR. She testified, without rebuttal, that when she was interviewed by HR she explained she had simply overreacted and that was the end of it.

It is clear there was no substantive evidence that Mrs. Gonzalez-Navarro made up charges against the Claimant for revenge purposes or that she had a history of making unfounded allegations of harassment. Review of her testimony finds it to be credible whereas the Claimant's testimony was less than forthright. It is clear that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately six years of service with a clear record. Despite that record, Claimant's offense was a very serious infraction that was a Stand Alone Dismissible Offense. As stated before the Carrier had a responsibility and obligation to provide its employees with a safe workplace free of harassment or potential danger. Claimant's conduct was not excusable, therefore, the Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

**AWARD**

Claim denied.



William R. Miller, Chairman & Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: July 2, 2021