

Case 118  
Carrier File: 2016-199826  
System File: D21003015

**PARTIES  
TO THE DISPUTE**

**Brotherhood of Maintenance of Way Employes  
Division of the International Brotherhood of Teamsters**

**VS.**

**CSX Transportation, Inc.**

**Arbitrator: Sherwood Malamud**

**Decision: Claim denied.  
Employee: J. Turner**

**Statement of the Claim:**

*It is my desire to process the discipline assessed to me and to obtain a decision as quickly as possible. Therefore, I hereby elect to have said discipline submitted to Special Board of Adjustment No. 7529. In so electing, I understand that the Neutral Member of Special Board of Adjustment 7529 will base his decision on the transcript of my hearing, my prior service record, the notice of my hearing, the notice of discipline and Rule 25 of the Maintenance of Way Agreement.*

**Findings of the Board:**

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

**Procedural Issues:**

By letter dated November 13, 2015, System Production Manager, Tie Team T7 Aaron Brooks, the charging official, notified Claimant of an investigation:

“The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 0700 hours on November 5, 2015, in the vicinity of the Indianapolis Terminal, when you were observed engaging in harassing and unwanted touching of another employee...”

The Carrier hired Claimant on February 19, 1976. He had no prior discipline over his long career with the Carrier.

The incident that gives rise to the 45-day suspension that is the subject of this appeal to this Board occurred on November 4, 2015. The notification letter states that the alleged conduct occurred on November 5. The Carrier argues this is a typographical error. In its written submission it cites PLB 7629 Award 80 (Halter) for, “Precedent in Third Division Award 33046 establishes that a typographical error does not constitute a fatal procedural defect.” Neutral Member Halter notes in Award 80 that the omission of a date on which an incident occurred did not rise to the level of a procedural defect.

Here, the victim complained to Manager Brooks on November 5 about the touching and harassing conduct that occurred on November 4. The Board concludes this misstatement did not mislead Claimant or the Organization as to the conduct that was the subject of the investigation.

The Organization raised a second procedural objection. It charges that Claimant was denied a fair and impartial hearing, when the Rules allegedly violated by Claimant were omitted from the notification letter. This Board has addressed and dismissed this objection in previous awards, PLB 7529 Award 106 (MacDougall) and 114 (Malamud). The objection is without merit in this case, as well.

### **Merits:**

The record generated at the December 1, 2015 investigatory hearing provides substantial evidence that Claimant engaged in the following conduct. After the morning briefing at approximately 7:00 a.m. on November 4, Claimant rubbed Machine Operator Gibson’s shoulder, neck and back. Gibson, the victim of Claimant’s harassing conduct, asked Claimant to stop. Claimant testified he did not recall Gibson asking him to stop.

Gibson was uncomfortable with Claimant’s actions that morning. Claimant admitted that prior to rubbing Gibson’s shoulders, Claimant attempted to sit in Gibson’s lap. Gibson got up out of the Operator’s seat in the Plate Boom and exited the machine. On his way out of the machine, Gibson testified at the investigatory hearing that Claimant poked him in the butt. Claimant did not recall that he poked Gibson.

On November 4, 2015, Gibson had 13 months seniority to Claimant’s 39 years with the Carrier. Gibson testified he did not know how to deal with Claimant’s conduct. He reported the incident to Manager Brooks on November 5, rather than on November 4.

Gibson’s testimony and Claimant’s admissions provide ample evidence that Claimant violated the Carrier’s Anti-Harassment Policy, which provides in material part:

Sexual harassment is defined as any unwelcome sexual advance, request for sexual favors or other verbal or physical conduct of a sexual nature when:

(1) Submission to conduct is made, either explicitly or implicitly, a term or condition of an individual's employment; (2) Submission to or rejection of the conduct is used as a basis for employment decisions affecting an individual; or (3) The conduct has the purpose or effect of unreasonably interfering with the individual's performance or of creating an intimidating, hostile or offensive working environment. Sexual harassment can include harassment by men towards women; women towards men; men towards men; or women towards women.

CSX is committed to providing all employees with a work environment that is free from any and all forms of harassment...other employees. Examples of Sexual Harassment Include, But Are Not Limited To:

- Unnecessary and unwelcome touching, patting, pinching, or attention to an individual's body

...

### **Enforcement**

Employees are expected to support this policy and report any violations. Violations of this policy will be addressed pursuant to CSX's disciplinary practices and other actions that CSX deems appropriate. Employees who violate this policy will be subject to discipline, up to and including discharge.

### **Level of Discipline:**

On December 17, 2015, 43 days after Claimant had been taken out of service, Chief Engineer R.E. Moore, Jr. notified Claimant of his decision to impose a 45-day disciplinary penalty. The penalty was equivalent to time served during the pendency of the investigatory proceedings.

Based on the seriousness of the incident, the Board finds no reason to disturb the discipline imposed.

### **Award:**

Claim is denied.

Date: June 22, 2017



---

Sherwood Malamud  
Neutral Member