

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 96, (Case No. 96)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman and Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing October 4, 2011, when Claimant, Adam W. Cornejo (1741966), was Dismissed by letter dated November 4, 2011, for conduct unbecoming when he groped co-workers in an appropriate manner while working as a machine operator on TC01. The Carrier alleged violation of MOWOR 1.6 Conduct.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and pay for wage loss commencing when Claimant was withheld from service and continuing forward and/or otherwise made whole."
(Carrier File No. 14-12-0001) (Organization File No. 50-13C5-113.CLM)**

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.

On October 4, 2011, Claimant was directed to attend a formal Investigation on October 10, 2011, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misconduct when you groped co-workers in an inappropriate manner on the Thayer North Subdivision, Springfield Division

while working as machine operator on TC01.

The investigation will determine possible violation of MOWOR 1.6 Conduct."

On November 4, 2011, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that Rule 13(a) the Discipline Rule requires that decisions on Investigations will be rendered as promptly as possible and the decision in this instance was not made until 32 days after the Claimant was removed from service, therefore, it reasoned that was not prompt. It further argued that the Claimant and Organization had not received a copy of the transcript which denied the Claimant and Organization the opportunity to review the transcript before making its appeal. Lastly, it suggested that because the transcript had not been promptly sent out raises the question as to whether or not the Disciplinary Officer reviewed the transcript before making his decision. Based upon those alleged procedural errors the Organization asserted that the claim should be sustained without even reviewing the merits. However, if the merits are examined it argued that the transcript shows that the Claimant never groped any co-workers in an inappropriate manner, but instead participated in some harmless horseplay that was not a dismissible offense. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that there were no procedural defects. It argued that the Claimant was not subject to Rule 13(a) and Appendix No. 11 because Claimant was a member of a Regional System Gang at the time of the alleged offense and was governed by Rule 40 of the former Burlington Northern Agreement and under that Agreement its decision was timely. It further stated that it had mailed the transcript to the Claimant and the Organization, but because the Organization asserted it had not received its copy, it was sending another copy of the transcript with the right of the Organization to present any new evidence or argument within 60 days with no objection by the Carrier. Turning to the merits it argued the record verifies that Claimant grabbed co-workers inappropriately and made obscene comments towards them and because of that dismissal was proper. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board will first address the Organization's argument as to whether or not the dismissal decision was made in a timely fashion and in accordance with the Agreement. The parties have stated that the Claimant was governed by two different Agreements regarding the time limits for the issuance of the disciplinary decision. The Organization argued that under Rule 13(a) the Discipline Rule the decision was not prompt. The majority of Agreements in the railroad industry have specific timelines as to when decisions must be rendered with many stating that decision must be made within 30 days. Rule 13(a) states in pertinent part:

"...Decisions on investigations will be rendered as promptly as possible."

The Board is not persuaded in this instance that the Carrier's decision was untimely or that it violated Rule 13(a).

The Carrier argued that the Claimant was governed by Rule 40(D) of the BN Agreement that stated in pertinent part:

"A decision shall be rendered within thirty (30) days following the investigation and written notice thereof will be given the employee, with copy to local organization representative...." *(Underlining Board's emphasis)*

The decision was rendered in less than 30 days after the Investigation was held and the Carrier did not violate Rule 40(D).

It is clear that under either Agreement the decision was rendered in a timely fashion. Additionally, the record indicates the Claimant was a former ATSF employee, but because he was working on a region/system gang at the time the discipline was issued he was covered by the former BN Agreement, thus Discipline Rule 40 was applicable.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation and appeal process met the guidelines for fairness of both of the aforementioned Agreements and the Claimant was not denied his "due process" Agreement rights.

The Carrier alleged that the Claimant groped his co-workers in an inappropriate manner on multiple occasions. On pages 10 and 11 of the transcript one of Claimant's co-workers, M. Hunsaker, Machine Operator was questioned about the alleged incidents as follows;

"James Sadler: Okay. You said, "Grabbing you." Of course there's several ways and places grabbing you. Can you be more specific on what you mean?"

Mark Hunsaker: I mean, you want me to be blunt?

James Sadler: Yes.

Mark Hunsaker: Well, he'd reach over and grabbed your - - - - and - - - - and squeeze them.

James Sadler: And was this a one-time occurrence?

Mark Hunsaker: No, sir, several occasions, at least five.

Hunsaker went on to testify that the various incidents had happened over a period of seven to eight weeks. On pages 34 and 35 of the transcript two additional statements regarding the allegations were entered without objection. The first statement by T. Delcour dated October 4, 2011, stated the following:

"On three different occasions, over a period of approximately 2 months, a co-worker by the name of Adam Corneigho has grabbed my personal private body parts. It was the mid section of the front of my body. On all three occasions I told Adam to stop. Also during this two month period, while riding the van back to the motel after work, Adam stated that he 'liked gay butt sex'. He also stated 'he likes it when they cum in his mouth'. He made these comments several times while riding the van to and from work."

The second statement made by J. Carter stated the following:

"Separate occasions, Adam Cornejo grabbed my penis and testicles. He tried and failed on one other occasion because I turned and blocked him. I told him to stop, but the failed attempt occurred after I told him to stop. Also, he often said he 'loved gay butt sex'. The first time I heard him say that, we were in the van and I was sitting in front of him. I was shaking my head in disbelief and, without looking or speaking to him. He said, 'You are from Kansas, you know you like it,' and put his finger in my ear and wiggled it around. All of this occurred between August 22nd, 2011 to Sept. 23rd, 2011 during work, while on the P811."

The Claimant testified he never groped anyone and did not make any lewd remarks instead he stated he engaged in friendly horseplay. Claimant was questioned on page 38 of the transcript about the alleged horseplay as follows:

"James Sadler: And Mr. Roskilly said that you admitted to engaging in horseplay while at work, on Company time?"

Adam W. Cornejo: Yes, I did.

James Sadler: And what would the nature of that horseplay be?

Adam W. Cornejo: A gesture made between two friends at work, meant to do nothing more than scare the other individual or get a rise out of them, done in, like I said, just horseplay.

James Sadler: And what type of gesture?

Adam W. Cornejo: A hand motion made towards the groin area, again done just to make the other individual jump or just to scare them.

James Sadler: So this hand motion towards the groin of other employees, is this something that you do frequently?

Adam W. Cornejo: Define frequently.

James Sadler: I'll define it as is this something you do every day?

Adam W. Cornejo: No.

James Sadler: Is this something you do every week?

Adam W. Cornejo: Probably.

James Sadler: Is this something you do multiple times a week?

Adam W. Cornejo: On occasion, maybe.

James Sadler: So this was first brought to the attention on September 30th. Was this horseplay, making a handward motion towards an employee's crotch to Mr. Hunsaker?

Adam W. Cornejo: Yes. *(Underlining Board's emphasis)*

The Claimant's colorization of the multiple incidents as simple horseplay involving several co-workers was not persuasive. The statements from three employees who either testified or offered written statements were specific that it was not horseplay and each believed they had been harassed after repeatedly asking the Claimant to stop and one felt threatened. Substantial evidence was adduced at the Investigation that the Claimant was guilty as charged as he violated MOWOR 1.6 Conduct.

P.L.B. No. 7048

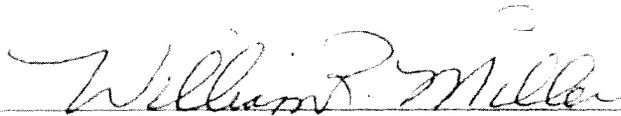
Award No. 96, Case No. 96

Page 6

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had a little over four years of service. Claimant's infraction was of a serious nature as he subjected his co-workers to intimidating and offensive behavior wherein he created a hostile work environment that was a dismissible first time offense. The dismissal assessed against the Claimant will not be set aside as it was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and it was not excessive, arbitrary or capricious. The claim will remain denied.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 9/28/12