

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	*
	*
-and-	*
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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	*
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On May 13, 1983 the Brotherhood of Maintenance of Way Employees (hereinafter the Organization) and the Burlington Northern Railroad Company (hereinafter the Carrier) entered into an agreement establishing a special board of adjustment in accordance with the provisions of Section 3 of the Railway Labor Act. The agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 925 (hereinafter the Board).

This agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction is limited to disciplinary disputes involving employees dismissed from service. Although, the Board consists of three members, a Carrier Member, an Organization Member, and a Neutral Referee, awards of the Board only contain the signature of the Referee, and are final and binding in accordance with the provisions of Section 3 of the Railway Labor Act. Employees in the Maintenance of Way Craft or Class who are dismissed from the Carrier's service may choose to appeal their dismissals to this Board, and they have a sixty (60) day period from the date of their dismissals to elect to handle their appeals through the usual appeal channels, under Schedule Rule 40, or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. The employee who is dismissed may elect either option, but upon such election that employee waives any rights to the other appeal procedure.

The agreement further establishes that within thirty (30) days after a dismissed employee's written notification of his/her desire for expedited handling of his/her appeal is received by the Carrier Member of the Board, that said Member shall arrange to transmit one copy of the notice of investigation, the transcript of investigation, the notice of dismissal, and the dismissed employee's service record to the Referee. These documents constitute the record of proceedings and are to be reviewed by the Referee. In the

instant case, this Board has carefully reviewed each of the above described documents prior to reaching findings of fact and conclusions. Under the terms of the agreement the Referee had the option to request the parties to furnish additional data regarding the appeal, in terms of argument, evidence, and awards, prior to rendering a final binding decision in the instant case. The agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified or set aside, will determine whether there was compliance with the applicable provisions of Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Mr. Jack Lee Jackson, the Claimant, who entered the Carrier's service on March 21, 1977 as a B & B Helper, was dismissed from the service of the Carrier effective August 27, 1984 as the result of an investigation which was held on August 3, 1984 in Denver, Colorado. At the time of his discharge, the Claimant was assigned as a B & B Foreman working at or near Denver, Colorado.

Findings and Opinion

The Claimant was properly served with a notice of investigation dated July 27, 1984 in which the Regional Superintendent advised that a hearing would be held on August 3, 1984 for the purpose of ascertaining the facts and determining the Claimant's alleged responsibility regarding alleged sexual harassment and alleged threats of violence by the Claimant against employee Terry R. Holbert during the period that the Claimant was Holbert's supervisor commencing in late 1979 or early 1980 and continuing thereafter.

The investigation was conducted on August 3, 1984 and the Carrier concluded after reviewing that investigation and the documentary evidence submitted that the Claimant had violated the Carrier Safety and General Rules by sexually harassing and threatening violence against employee Terry R. Holbert. Accordingly the Carrier dismissed the Claimant from service.

A review of the evidence of record establishes clearly that the Claimant, who was Holbert's foreman, entered into a

homosexual relationship with Mr. Holbert which relationship continued for some time between the years 1980 and 1983. The evidence of record also establishes clearly that when their relationship began to deteriorate that the Claimant began to engage in a series of actions which must be categorized as coercive and/or threatening in nature. The evidence of record indicates that the Claimant was particularly chagrined when Mr. Holbert took on another lover, a Mr. Marc Schoenherr, and that the acts of harassment began at or about that time. The most significant act of harassment involved an incident when the Claimant notified police authorities that Mr. Schoenherr was allegedly physically brutalizing Mr. Holbert. The Claimant accompanied police officers to Mr. Holbert's residence for the purpose of having Mr. Schoenherr prosecuted. The Claimant admits at page 78 of the transcript that he did have the police brought to Holbert's residence. The testimony and reports of the police officers, who investigated the Claimant's allegations, indicates, without question, that there was no substance to those allegations and that they were made purely as the result of apparent jealousy and for the purpose of harassment.

The Carrier was justified in concluding, after reviewing the evidence in the record, that the Claimant engaged in a pattern of harassment of employee Holbert for a substantial period of time. The Carrier was further justified in concluding that this type of activity was violative of its Safety and General Rules and therefore did not act improperly in disciplining the Claimant.

This Board should note that the transcript of the hearing was filled with numerous irrelevant statements regarding the Claimant's alleged leaving work for the purpose of engaging in sexual activity with employee Holbert. This Board has not considered that evidence in our determination of whether the Carrier had sufficient proof to justify discipline on the charges specified in the notice of investigation. As the Organization representative properly pointed out throughout the course of the investigation, much of the evidence solicited by the Hearing Officer was irrelevant. However, this Board was not prejudiced by receiving that evidence as we did not consider it in reaching our determination.

The Organization also objected to the "general nature" of the charge in the notice of investigation on the basis that it did not specify a particular time, date, and/or place where the alleged sexual harassment occurred; but

rather spoke in terms of actions which began in late 1979 or 1980 and continued thereafter. This Board concludes that due to the nature of the Claimant's activities and the information available to the Carrier that it was not necessary, in this case, to specify a particular incident. Clearly the Claimant was properly charged for a pattern of conduct which had taken place over a protracted period of time. Additionally, it is clear that the Claimant was fully cognizant of the nature of the charges which were being brought against him and although the Organization representative contended that he was not able to prepare an adequate defense due to the alleged imprecise nature of the charges, this tribunal concludes that the Organization did, in fact, have sufficient notice and did, in fact, present more than an adequate defense in the circumstances.

Additionally, the Organization contends that Rule 40 was violated when the Carrier did not conduct the investigation within fifteen (15) days from the date of the occurrence. This contention by the Organization is based essentially upon the fact that Mr. D. E. McCoy, the Regional B & B Supervisor, had been aware for some time in the past of employee Holbert's claims that he was being harassed. This Board's review of the record convinces us that McCoy did not fully comprehend the nature of Holbert's complaints. He believed, and he so credibly testified, that Holbert and the Claimant were involved in a personality conflict. His testimony convinces this Board that he was unaware that Holbert was homosexual and that he was complaining about the Claimant's harassment because of their previous sexual relationship. This Board is convinced that the Carrier acted prudently when it thoroughly investigated the nature of the Claimant's relationship with Holbert and the charges which Holbert brought regarding the alleged sexual harassment before it issued a notice of investigation. Obviously, the Carrier wished to be somewhat circumspect before it issued charges where a question of sexual involvement and/or preference was involved. Accordingly, we cannot in good conscience find that the Carrier should be reprimanded for its short delay in thoroughly verifying the nature of the complaints in this case.

Finally, the Organization would have this Board conclude that the problem in this case involved no more than the typical emotional distress involved when two former lovers have a permanent falling out and then are required as a result of their jobs to work in the same environment. In this Board's view the case is not that clean. The record reflects that the Claimant, through his attitude both on and

off the job, harassed Mr. Holbert and caused Mr. Holbert to contemplate resignation, transfer, or return to their previous sexual relationship. Those acts can only be considered harassing and/or threatening and accordingly we find that the Carrier had sufficient cause to conclude that the Claimant had violated applicable rules.

We should observe that in this Board's opinion the Hearing Officer left much to be desired in the manner in which he conducted the hearing. Although he did not limit the Organization and the Claimant from entering evidence or from examining and cross-examining witnesses, he did engage more as a prosecutor than he did as an impartial investigating officer. He asked numerous leading questions and in many circumstances his questions formed the basis of evidence rather than the answers to those questions. Obviously, he was in possession of significant evidence prior to the investigation as the result of the lengthy written statements entered by several of the witnesses during the preinvestigation stages of this case.

We are sustaining the discipline since much of the probative and substantive evidence was entered through the free exchange of questions and answers by numerous witnesses in this investigation. We only point to the lack of professionalism in the Conducting Officer's investigation for purposes of encouraging the Carrier to improve in the future.

The evidence of record establishes that the Carrier had just and sufficient cause for disciplining the Claimant, and in view of the serious nature of the offenses and the Claimant's poor prior disciplinary record, this Board will not disturb the discipline of dismissal.

Award: The claim is denied.

This Award was signed this 1st day of February 1985 in Bryn Mawr, Pennsylvania.


Richard R. Kasher
Chairman and Neutral Member
SBA No. 925