

**BEFORE
PUBLIC LAW BOARD NO. 7499
CASE NO. 7
AWARD NO. 7
NMB Subject Code: 106**

BROTHERHOOD OF RAILROAD SIGNALMEN)	
(Organization file: 10-047-BNSF-20-C))	PARTIES TO THE
vs.)	DISPUTE
BNSF RAILWAY COMPANY)	
(Carrier file: 35-11-0015))	

STATEMENT OF CLAIM:

"The Organization requests that the Carrier should be required to remove all discipline imposed upon Mr. Westerberg and immediately clear his record of any part of this incident. He should be immediately returned to work, be paid for all time lost and all his employment rights restored as if he was never dismissed."

FINDINGS:

The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated June 22, 2011 that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings.

After a thorough review of the record, the Board concludes that on August 26, 2010 Mr. Westerberg was a BNSF Signal Maintainer on the La Crosse, WI gang, located in Savanna, IL, with less than 2 years of service since his hire date of December 1, 2008. On that date, Mr. Westerberg allegedly violated MOWOR Rule 1.13 Reporting and Complying with Instructions; MOWOR 1.6 Conduct; and MOWOR 1.9 Respect of Railroad Company; by displaying inappropriate behavior, harassment and sexual harassment toward an employee of a hotel in which the Carrier was putting up the crew.

After a series of agreed-upon postponements, Mr. Westerberg underwent an investigation by the Carrier on September 23, 2010 and was subsequently dismissed from service on October 6, 2010.

The BNSF Maintenance of Way Operating Rules and Instructions in question state:

MOWOR 1.6 Conduct

"Employees must not be:

- 1. Careless of the safety of themselves or others*
- 2. Negligent*
- 3. Insubordinate*
- 4. Dishonest*
- 5. Immoral*
- 6. Quarrelsome*

or

7. Discourteous

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated."

MOWOR 1.9 Respect of Railroad Company

"Employees must behave in such a way that the railroad will not be criticized for their actions."

MOWOR Rule 1.13 Reporting and Complying with Instructions

"Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties."

Engineering Instructions 21.2 state:

"21.2 Showing Proper Conduct

Employees using lodging facilities while on BNSF business are representatives of the BNSF Railway Company and should act professional and courteous. On- or off-duty behavior at a lodging facility that discredits BNSF, or otherwise is contrary to BNSF interests, will not be tolerated. Employees are responsible for damages they incur while staying at Company-provided lodging facilities and must comply with the following:

- Pets are not allowed in any lodging facility regardless of the lodging facility's policy.*
 - Employees using Company-provided lodging cannot arrange to pay the difference between the motel rate and the BNSF rate to stay one employee to a room or to stay at another hotel.*
 - BNSF's no smoking policy is in effect at all CLC lodging facilities. All attempts will be made to secure smoking preference, but room type is not guaranteed.*
 - Employees must follow all lodging facility policies, such as not cooking in rooms, showing proper conduct while on hotel property, paying for additional charges (meals, phone, movies, etc.), and paying for room damages (grease on carpet, burns, etc.).*
- Employees must respect the privacy and personal property of roommates and other motel guests"*

Facts:

On August 25 and 26, 2010, the Claimant was staying at the Super 8 Motel in Savanna, Illinois. He was working on a construction gang in the area at the time. The motel room was paid for by the Carrier. In the early morning hours, the Claimant went to the front desk of the motel and spoke with the clerk for some time. The evidence of the clerk is that the Claimant tried to get her to give him a key to a motel room. When she looked it up, she discovered that it was the room of a female co-worker of the Claimant. The motel clerk refused the Claimant that key. He then asked her for a spare key to his room. Upon passing it to him, he grabbed her hand and gave it back to the clerk and indicated it was for her to use. She refused. He then asked her for extra towels for the room. When she went to get them for him, he said no, he wanted her to deliver the towels to his room. She refused. When she questioned him as to whether he really needed the towels, he

responded "Yes, they were for me and you." After the clerk returned the towels to the laundry room, the Claimant accosted her in the hallway, grabbed her hand and asked her to come to his room. She again refused and told him to stop, that she was happily married and to please let go. At some point the Claimant jumped and sat on the desk counter. At one point he appeared to be staring at her name badge. When she straightened it and said her name, he said "Oh, I wasn't looking at that..." He continually commented on her pretty pearly whites and pretty eyes. She told him repeatedly that she was happily married and told him to go to his room by himself. He finally did so. She states that she was sufficiently frightened to lock the door into the front desk area. All of these incidents combined took place over the course of approximately 1.5 hours.

Most of the above actions were caught on videotape by the motel security cameras (without discernible sound), which this Board has had the benefit of viewing.

The Claimant denies all of the above except chatting briefly and asking for towels. He then says that if he did say any or all of the above, he does not remember it. He does not dispute it was him on the videotape.

Organization Argument:

The Organization says that the Claimant was denied a fair and impartial investigation. They say that they were denied a postponement of the investigation, which they allege was required due to a serious health condition. They say the Claimant was working with EAP and was unable to effectively help in his defense. They further say that the Claimant was denied his due process rights when he was instructed by the Human Resources representative to not speak with anyone but his local chairman about the case. They say this precluded him from interviewing potential witnesses and obtaining statements.

With respect to the Carrier's burden of proof, they say that the Carrier has not met it. They say that since the person who was allegedly harassed was never present to be cross-examined, they were denied the right to a fair and impartial investigation. They say that the Claimant never failed to comply with instructions, as the conversation with the motel manager was initiated by the motel manager and was initiated prior to the order to not have and further conversations about the case. They also say that the Claimant remembers none of the allegedly offending conversations or actions, due to "...health issues brought on by working conditions of excessive heat and dehydration during the day, medication he took (smoking cessation medication), and then later, alcohol he drank...", and is therefore not guilty. Upon presenting himself to a medical doctor on September 13, 2010, the Claimant was diagnosed with Amnesia.

The Organization also says that all of the alleged incidents took place in the public area of the hotel – not in the room for which the Carrier was paying, and therefore, it being a public place after work hours, the Carrier rules do not apply.

Carrier Argument:

Procedural Issues

The Carrier says that it gave 2 postponements, that Rule 54I clearly states that postponements must be mutually agreed and that it is not required to extend holding the investigation indefinitely.

They say that the stated reason for the requested additional postponement was because the Claimant wished to see a physician. However, by the date of this investigation, the Claimant had clearly already seen a physician as evidenced by Investigation Exhibit No. 15. When this was pointed out to him during the investigation, the Claimant then stated he wanted to see a doctor through the Employee Assistance Program (EAP) alluding to mental issues and needing to see a psychologist. It should be noted that nothing prevented the Claimant from contacting EAP at any time. Nor is there any evidence that the Claimant could not attend the investigation on the scheduled date due to any appointments with either an EAP professional or a psychologist. The Carrier says that the Claimant provided testimony and presented his defense with no showing of any mental or physical distress. They say there is no evidence that the Company's decision to not agree to an additional postponement adversely affected the Claimant's ability to assist in his defense.

MOWOR 1.6 - Conduct

The Carrier says that contrary to the Organization's interpretation of the motel clerks statement, it is very clear that the Claimant was sexually harassing her and that she felt threatened by him. The Claimant's repeated attempts to get her to come to his room, to deliver towels to his room, statement that the towels he requested were for both of them, inappropriate comments about her appearance, staring at her breasts, following her to the laundry room then grabbing her hand, and his continued refusal to leave clearly constitute sexual harassment. They say that any reasonable person would agree that the Claimant's conduct towards the clerk was obviously sexual in nature, and was in conflict with MOWOR Rule 1.6.

MOWOR 1.9 - Respect of Railroad Company

The Carrier says that both the Motel Manager and the Motel Clerk knew that the Claimant worked for BNSF and was being lodged there as an employee of BNSF. Moreover, the Motel Manager actually called BNSF to report the Claimant's conduct. Therefore, they say, the Claimant is guilty of violating MOWOR 1.9

MOWOR Rule 1.13 Reporting and Complying with Instructions

Regional Director of HR Ms. McGee testified that she simply informed the Claimant that this was a confidential matter and instructed him not to discuss this case with anyone who did not have a legitimate need. She even provided an example of someone meeting this definition, a union representative. The Claimant stated that he understood and would comply with her instructions, yet failed to do so. The Claimant called motel Manager Sullivan on August 30, four days after being instructed not to do so by Ms. McGee. In defense, the Organization attempts to tie this call to a conversation that occurred between motel Manager Sullivan and the Claimant before he was instructed not to discuss this case. However, a review of motel Manager Sullivan's statement clearly shows that the August

30th call was a completely separate conversation. Manager Sullivan stated that during the August 26th call, she informed the Claimant that his behavior would not be tolerated. His response at the time was that he was just kidding around. (The Carrier says that on August 26th the Claimant admits to "kidding around" yet conveniently claims amnesia regarding these events when charged with sexual harassment.) Manager Sullivan told him she didn't think it was funny and neither did her employee, the Claimant then apologized and said ok. That conversation was over and complete at that point. Thus, the defense that the August 30th call was simply a continuation of a previous call has been proven false, says the Carrier. They go on to say that whether the Claimant had been communicating with someone prior to receiving instruction not to discuss this case does not constitute permission to continue discussions after being told otherwise.

Finally, the Carrier says that Engineering Instructions 21.2 clearly deal with conduct within a hotel or lodging facility provided by them, and that the Claimant is guilty of violating said Instructions.

Result:

Procedural issues:

Postponement

There were 2 postponements in this case through mutual agreement of the parties, totaling some 2 weeks. The Union requested a 3rd, for at least another month, in order to have the Claimant attend an EAP doctor. He had, however, already consulted his own doctor. He also had ample opportunity during the nearly 1 month period prior to the investigation to consult with EAP, or indeed in the 2 years prior to that if he truly had a problem. There is no evidence that he was unable to secure such an appointment in the month before the investigation. This Board finds that the refusal of a 3rd postponement was not unreasonable in the circumstances. There is also no evidence that the Claimant was truly unable to assist in his defense, nor was there any claim that he was mentally or physically incompetent to be investigated. The Organization has a burden to show that such a postponement was necessary. It has failed to meet that burden.

Third-Party Witness

The Organization first states that the Carrier's instructions to "not talk to anyone", issued through their head of Human Resources, impeded the rights of the Claimant in such a way as to render a proper defense impossible. There is conflicting evidence on what those instructions were, precisely. This Board finds that the Carrier said simply that this was a confidential matter and instructed him not to discuss this case with anyone who did not have a legitimate need. This Board finds nothing offensive in those instructions. Indeed, the union representative could have interviewed the witnesses in question without violating this instruction in any way and could therefore have done anything required to aid in the defense of the Claimant.

The Organization also claims that they have a right to confront the accuser in the Carrier investigation, and failure to do so indicates the lack of fairness in an investigation. This is not so. Unlike a criminal trial, or perhaps even an arbitration hearing outside the rail industry, the railway is charged with conducting a fair and impartial investigation, on property. It has no ability to compel a non-company witness to attend this internal

investigation. They asked for, and received, a statement from the witness. The testimony of that witness, through her statement, may be subject to a weighing of credibility, but there is no absolute right to cross-examine in this forum. In this instance, this Board finds that the Carrier had no reason to doubt the credibility of this independent third-party witness. The Organization could have attempted to call her if they so chose. They did not do so.

In the final result, this Board finds that there were no fatal procedural errors in this case.

Rule Violations

It is clear to this Board that the Carrier has proven its charges of inappropriate behavior, harassment and sexual harassment by the Claimant against the motel clerk. These actions were clearly in violation of the Carrier Rules quoted above. The fact that the actions occurred in the hotel lobby and hallway are of no consequence. Not only does the Carrier Instruction clearly include off-duty behavior in such lodgings, this Board finds that this type of behavior conducted in the lobby or hallway is also prohibited by the Carrier Rule.

Discipline

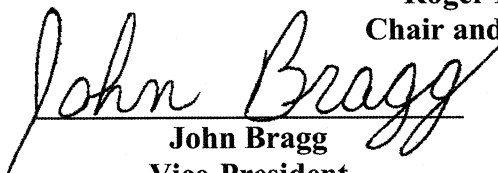
The Claimant has no discipline on record and is, by all accounts, a good employee when on the job. However, he has a very short tenure with the Carrier. Also, the Carrier has no option but to treat proven charges of sexual harassment very severely. In the end, this Board does not see fit to alter the discipline imposed by the Carrier.

AWARD

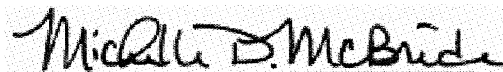
The Claim is denied.


Roger K. MacDougall

Chair and Neutral Member



John Bragg
Vice-President
Employee Member



Michelle McBride
Director Labor Relations
Carrier Member

Dated:

August 2, 2012

At: Chicago, IL