

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 174

Claim of M. C. Ortiz
Dismissal - Harassment
and a Prohibited
Transmission

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Trainman M. C. Ortiz requesting reinstatement to service, restoration of seniority and fringe benefits and pay for all time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on October 10, 2014, in Washington, D.C. Claimant was not present at the hearing.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts. The Board makes the following additional findings.

On February 5, 2013, Claimant, who was hired on October 17, 1994, was working as a Foreman on the Y-LAC1101-05A at the intermodal facility in Hobart Yard, California. A Parsec ramp contractor, Denise Boles, had been assisting Claimant's crew during a shove movement. Shortly thereafter, Claimant, who was then unknown but was later identified, engaged in a radio conversation with "Tom" in which Claimant said the following to "Tom" (later identified as Thomas J. Gealy): "You got a, you got that turkey leg in your back pocket"; "You want to pull it out and waive it? Maybe she'll leave us"; "She's over here by me, man, I can't stand it"; and "She might find the remote, too." Ms. Boles, at whom the conversation was aimed, heard everything and reported it to her supervisor, Parsec Terminal Manager Kevin Brenson. She told him that she was offended and that she had been harassed by Claimant. Mr. Brenson testified that, at the time of the incident, Ms. Boles was "visibly upset, she had tears in her eyes, and she was pretty shook up."

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of 90.2 Workplace Harassment Policy, GCOR Rules 1.6 (Conduct), 1.9 (Respect of Railroad Company) and 2.11 (Prohibited Transmissions) and GN System General Notice No. 12 and dismissed him from service.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violation of the Rules and the appropriateness of the penalty. It maintains, citing a prior award, that every employee associated with it, including contractors, have the right to work in an environment free of harassment and intimidation and, for that reason, it has rules which prohibit the type of behavior Claimant exhibited in this incident. It contends that Claimant's behavior - Claimant used the radio, a work tool designed to aid in safe railroading, to harass and make jokes - was completely unacceptable and clearly had nothing to do with his work. As such, it was a prohibited transmission and Claimant's comments, despite his protestations to the contrary, were clearly directed toward a contractor who was so upset that she immediately reported the incident.

As to the Organization's arguments - both procedural and on the merits - BNSF asserts that they are without merit. With respect to procedure, it maintains that it cannot force Ms. Boles, as a non-company witness, to testify, but points out that her personal statement was part of the record and the Parsec supervisor who received her complaint was available to answer questions. The Carrier contends, in addition, that the exhibit that the Organization representative was not allowed to enter into the record was a statement from another contractor that had no bearing on what was said on the radio but that, in any case, he was allowed to include it in his closing statement.

As to the Organization's defense on the merits, BNSF asserts that Claimant's contention - that his radio conversation was not aimed at Ms. Boles and that, in any case, she was not located next to him - was an unproven affirmative defense that contradicted every other witness. It maintains that, even if the conversation was directed at someone else, Claimant is still in blatant violation of its rules because he was berating some other co-worker. Finally, the Carrier contends that the Organization's attempt to shift the focus of the investigation to Ms. Boles's conduct and its contention that Claimant was a fall guy are both without merit. As to the former, it asserts that any claim that Ms. Boles was the instigator - because she cursed at Claimant after the radio transmission and on a separate occasion - would have to be dealt with by her employer. It points out, however, that Claimant never complained about her behavior prior to her filing the harassment complaint and, in any case, her swearing does not

absolve Claimant for his actions. As for the latter, it maintains that Claimant cannot possibly be a fall guy, since the contractor reported the incident and identified him as the harasser. BNSF contends that Claimant behaved in a manner unbecoming one of its employees and that it cannot ignore that type of unwarranted behavior.

As to the penalty, the Carrier argues that, at the time of this incident, Claimant already had a prior Level S violation in his record. It points out that PEPA establishes that a second "serious" violation committed within the applicable review period can result in an employee's dismissal.

The Carrier urges that the Claim be denied as without merit.

The Organization argues that the Carrier failed to meet its burden to prove Claimant's guilt by substantial evidence. It contends that, by allowing a Parsec supervisor to relate Ms. Boles' story rather than having her testify at hearing, the Carrier committed a fatal error. It points out that the Carrier officer's testimony was hearsay and the story, as told by the Parsec supervisor, could have been diluted or embellished. The Organization asserts that, without her story, no one will know why a conversation concerning a sandwich and a turkey leg could be offensive. It maintains that, in any case, Mr. Gealy, who was the other person involved in the radio conversation, made it clear at hearing that he and Claimant were not talking about or to Ms. Boles.

The Organization contends, as well, that there were a number of women working in the yard and that Ms. Boles was hundreds of yards away at the other end of the track when the conversation occurred. It asserts that Claimant's statement was senseless garble that was not intended to mean anything to anyone. The Organization maintains that the Carrier merely speculated that Claimant was talking about Ms. Boles but that, since the Carrier did not interview any of the other crew members, including Ms. Boles or other Parsec employees, BNSF proved itself to be unwilling to develop all of the facts.

The Organization urges that the Claim be sustained, that Claimant's termination be rescinded and that he be made whole for wages and benefits lost.

DISCUSSION AND ANALYSIS: The Board is persuaded that the Carrier met its burden of proving that Claimant violated the rules and that the penalty of termination was neither arbitrary nor excessive.

The Carrier's Workplace Harassment Policy prohibits "verbal or physical conduct . . . which harasses, disrupts, or interferes with another's work performance or which creates an intimidating, offensive, or hostile environment." The Board is persuaded that Claimant's conversation with Mr. Gealy was intended to harass Ms. Boles. The Organization's contention that Claimant's statements, to which Ms. Boles objected, were senseless garble that was not intended to mean anything to anyone is not credible and was found by the Carrier to be not credible. It is well established that such determinations are for the Carrier, not this Board to make.

GCOR Rule 2.11 prohibits Carrier employees from transmitting "unnecessary or unidentified communication." Thus, even if Claimant did not harass Ms. Boles, or intend to harass her, he clearly violated Rule 2.11, by using the Carrier's radio equipment to communicate "senseless garble" that was not intended to mean anything to anyone. It is undisputed that misuse of the transmission system is also a serious violation.

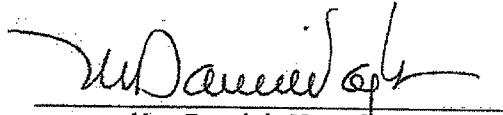
The Board has carefully considered, but is not persuaded by, the Organization's challenges to the discipline imposed. The Board recognizes that there is a fundamental conflict between Claimant's testimony and that of Mr. Gealy, on the one hand, and the rest of the evidence, on the other. As indicated, it is well established that credibility determinations are within the purview of the Hearing Officer and not this Board. In any case, as noted *supra*, Claimant essentially admitted that his conversation with Mr. Gealy was not work-related.

While a single instance of harassment might not rise to the level of a dismissable offense, Claimant already had an active Level S violation on his record, making him subject to dismissal under PEPA.

Given the nature and circumstances of his violations, the Board concludes that Claimant's termination was within the range of reasonableness. The Award so reflects.

AWARD: The Carrier met its burdens to prove Claimant guilty of the charges and to prove his termination to have been an appropriate penalty. The claim is denied.


Dated this 5th day of November, 2014



M. David Vaughn,
Neutral Member



Jason Ringstad,
Carrier Member



D. L. Young,
Employee Member