CORRECTED

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 24198
Docket No. R-43869
92-1-92-1-3-1901

The First Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union
(
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Claim of United Transportation Union in behalf of L. D. Boynton for immediate return to service with all seniority rights and benefits associated therewith unimpaired, pay for all time lost from April 4, 1990, until returned to active service, pay for attending investigation April 2, 1990, pay for time lost when Carrier withheld Claimant from service April 2 and 3, 1990, and complete record clearance of dismissal for alleged violation of Burlington Northern Railroad Safety and General Rule 564."

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

March 14, 1990, was a "special day" at Carrier's Portland, Oregon Roundhouse. Claimant, with a number of other employees, was engaged in an event with members of the Operation Shop Committee, referred to as a Chili Feed and Safety Marathon. Claimant reported for work at 1:00 P.M. that day, for a light power run, Portland to Vancouver. During the course of the Chili Feed (at which he consumed four bowls of

chili) Claimant, at approximately 4:30 P.M. became engaged in a conversation with a female train crew member. One of the topics discussed by the two was women's breasts. (Claimant, apparently making references to the size of his wife's breasts and the other train crew member making references to hers before she lost weight.) During this conversation, Claimant allegedly pulled down the other crew member's tanktop or tee shirt (the record is uncertain what apparel she was wearing) looked at her breasts and made a remark concerning their size. Apparently, at the time the other crew member indicated that Claimant did not know her well enough to "say some of the things he was saying" to her.

Two days after the alleged incident, on March 16, 1990, the other crew member mentioned the matter to a Carrier Trainmaster. The next day, March 17, 1990, she contacted her union about the incident and was told she would have to write something up. Some time during the next eight days Claimant and the other crew member met again. What actually occurred on this second encounter is not known, except he bought her a cup of coffee. Ten days after the incident, March 23, 1990, she orally reported the incident to Carrier's Assistant Terminal Superintendent. That date Claimant was notified of an investigation for the purpose of:

> "... ascertaining the facts to determine your responsibility, if any in connection with your alleged sexual harrassment of fellow employee _____ on March 14, 1990, at or around 4:30 PM at the Portland Roundhouse."

Following the Investigation at which the accuser and Claimant both testified, the charges were sustained and Claimant was disciplined with dismissal. The dismissal has been appealed to this Board on both procedural and substantive grounds.

The Organization seeks to have the discipline set aside or modified because:

> 1. Claimant was denied protection under Schedule Rule 44 of the SP&S Agreement.
>
> 2. Claimant was denied protection and rights under Schedule Rule 67 of the SP&S Agreement.
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> 3. Claimant was denied due process through the prejudicial treatment of Carrier officers prior to, during and after the Investigation.
>
> 4. With respect to the merits, even if Claimant was found to be in violation of Rule 564, the discipline assessed was harsh, excessive and considering similar problems, violations and associated discipline.

5. Even if Claimant were culpable, it must be mitigated by his background.

Carrier denies that there exists any procedural basis which flaws the discipline assessed. It maintains that sexual harassment of a coworker falls under the purview of Safety Rule 564 and that the evidence adduced at the Investigation adequately demonstrates that Claimant did indeed sexually harass a coworker.

Carrier maintains that sexual harassment is a particualarly insidious form of misconduct. It creates an uncomfortable work environment as well as attacking the dignity of the person being harassed. It maintains that the infraction in this case was extremely serious and warrants extreme discipline.

The Board notes that, while other industries and the public sector have had occasion to review management imposition of discipline in matters of sexual harassment of a coworker, this issue is relatively new to this industry. Nonetheless, the Board is of the firm belief that procedures developed for other types of disciplinary matters involving breaches of the applicable disciplinary rules of the parties collective bargaining agreement must be satisfied.

The Board agrees with Carrier that sexual harassment is an insidious form of misconduct and is at odds with Federal law. However, it is not more serious that many other types of violations of Federal law or Carrier Rules, operating a train while under the influence of drugs or intoxicants, theft from the company or a fellow employee, or inflicting physical injury on a coworker, for example. Discipline involving established instances of sexual harassment ought not exceed parameters and guidelines for discipline in other similar violations. Penalties imposed must take into consideration the totality of the occurrence, its seriousness, and other contributing factors, including mitigation. Additionally, simply because it is a sexual harassment charge, Carrier is not excused from compliance with procedural requirements of the Agreement.

Upon review of all the facts in this matter, the involvement of Claimant and the role of the female coworker in the alleged incident, even if the entire case is portrayed in its best light for Carrier, which for reasons stated below no determination is made, discipline or dismissal appears inappropriate. However, because of procedural violations the merits of this matter need not be decided.

Paramount of the procedural defects in this case is Carrier's failure to insure that the requirements of Rule 44 were satisfied. Rule 44 provides:

> "Any complaint against a trainmen by another employee must be made in writing to receive consideration; all papers shall be open for inspection."

The transcript of the hearing indicates that the female coworker's complaint against Claimant was oral. The transcript further reveals that Claimant's Representative noted that it had never been given a copy of the complaint to the Federal Government. Further, there is a comment in the transcript which indicates that the coworker was advised that before Carrier would take action "she should file a formal complaint," which suggests that Carrier was aware of the requirements of Rule 44. No written complaint was attached to and made a part of the Investigation transcript.

Rule 44 does not operate only in other than sexual harassment cases. The Rule, by its simple uncomplicated terms, is operative when "any complaint against a trainman by another employee" is to receive consideration. The broad term "any complaint" must also include complaints of sexual harassment. The coworkers sexual harassment complaint against Claimant received consideration by Carrier even though it was not made in writing. Claimant was denied benefit of a Rule which was placed in the Agreement for his protection. Discipline resulting from a flawed charge cannot stand. It must be reversed.

Claimant is to be restored to service and compensated for all wage losses incurred, as provided by the Agreement and the practices of the parties.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of December 1992.

CARRIER MEMBERS' DISSENT
TO
FIRST DIVISION AWARD 24198, DOCKET 43869
(Referee Fletcher)

The Referee in this dispute has been selected for many First Division dockets and on-property PL Boards because the Carriers, as well as the Organizations, trust him to decide their disputes. Of course, we have not agreed with every single Award he has issued, but his Awards have consistently displayed thoughtful analysis, solid reasoning, comprehensible findings and sound guides for future action.

Also, we recognize that deciding cases of this type is an unusually challenging task. Prevailing attitudes and even applicable legal standards are evolving with unusual rapidity. Several of the authorities cited here were not mentioned in the Carrier's Submission and, in fact, could not have been: the Submission preceded them. More than most claims before this Division, cases arising from sexual harassment charges necessitate, first, a consideration of both legal and contractual authority and then a sometimes difficult synthesis at a time when there is a certain tension between the two domains. It follows that no one can bat 1,000 all the time: Babe Ruth had 1330 strikeouts during his career, and this Award is in error, as contrary to public policy.

First, some facts. Operation Stop Committees consist of employee volunteers who work to encourage an alcohol-and drug-free workplace by promotional efforts. On March 14, 1990, the Committee put on a Chili Feed at the Portland Roundhouse. Mrs. K. L. Tutor, a Brakeman/Switchman with a little over a year's seniority, was putting on a "safety marathon," —a sort of continuous safety reinforcement discussion. Mr. Boynton, a Switchman/Brakeman with 20 years' experience and, at one time, Yardmasters' seniority (CX4), reported for work a little early to attend the safety marathon before going out on his run (Tr.

Q29). Mr. Boynton talked with Mrs. Tutor (Tr. A14). There is no evidence, not even in Mr. Boynton's testimony, that there was any conversation of a sexual nature before he, in the words of a corroborative, uninvolved witness, a Carman (Tr. A136):

> "...grabbed her tee shirt and he pulled it open and there was something said about nubbers or something to that effect."

Only Mr. Boynton, in his testimony, described any subsequent discussion of a sexual nature (Tr. A72); neither Mrs. Tutor nor the Carman did so, and her testimony was that "I was shocked" (Tr. A18). Mrs. Tutor's clothing at the time of the incident was the same as she wore to the Investigation, and was fully described in the record (Tr. Q&A 196-7). As for why he acted as he did, Mr. Boynton's testimony recalls the notorious "Twinkie" defense (Tr. A72):

> "...I went back there and had some chili and I'm a big guy and like to eat and I had about four bowls of chili and the sun was shining on me and there was this lady standing there with her shirt half unbuttoned and the perfume going across the air into my nose and she wasn't wearing a brassiere and I walked over there and leaned up to her and I says 'little ones are nice....'"

March 16 was the first day thereafter that Mrs. Tutor came back to work. She had an off-the-record discussion (Tr. A51) with a Trainmaster "to know what my options were and what would happen" (Tr. A33). At the Trainmaster's suggestion, she tried "going through my union first" (Tr. A34). She called the Organization's Assistant General Chairman that night, and in response to his request (Tr. A35-6):

> "I mailed a letter to the Union March 17th and when a week later had received no response or any word that anything had been said, I called Mr. Stephens because I felt some action needed to be taken." (Tr. A55).

At the Investigation, the Local Chairman tried to suggest that "everything has been oral," but Mrs. Tutor's reply was (Tr. Q&A 46):

"There is a copy of my complaint. It has not been mailed to the woman in Seattle because I'm not satisfied with the wording."

The Assistant Terminal Superintendent, Mr. Stephens, also testified (Tr. A251): "I do have a letter from Ms. Tutor in my possession outlining the events of the day of March 14th." During the claim handling, the Assistant General Chairman acknowledged the existence of that letter (EX. 4): "A letter addressed to M. Townsend was presented and purported to be such a complaint..." (See also Employees' Exhibit 7, a transcription of some off-the-record questions and answers about this complaint.) Interestingly, it was not until April 27, more than three weeks after the dismissal, that the Organization even asked to see the the complaint, and not until May 7, more than a month later, that they actually reviewed this written complaint (EX 8). The Assistant General Chairman's reaction (EX 9): "Further Ms. Tutor's letter made open accusations aimed at Mr. Boynton without specifically citing him, 'guilt by association.'"

The determinative holding in the Award arose from a finding of "Carrier's failure to insure that the requirements of Rule 44 were satisfied." Such a holding was not factually necessary: the harassee did make a "complaint...in writing," as detailed above. It was "open for inspection," but the Organization did not want to see it until much later, long after the Investigation was concluded. Thus, no prejudicial effect can be shown or inferred.

Such a holding was not contractually necessary: The Organization never put forward a comprehensible explanation of how, or in what respect, Rule 44's dictates went unmet. There is nothing in the text of Rule 44 which mandates a particular remedy, and no authority was cited, not even in the Organization's Submission, for dismissal of the charge, a counterpart to the quashing of an indictment, and nullification of the discipline.

Most important, such a holding may not have been legally correct, for it rests on the view that "Rule 44 does not operate only in other than sexual harassment cases." At 29 CFR § 1604.11(d), the Equal Employment Opportunity Commission has ruled:

> "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."

We have to wonder if the EEOC or a court would regard the Division's reading of Rule 44 as superseding the requirements of that regulation, let alone rendering it nugatory. Essentially, this Award imposes a rather formidable procedural hurdle for the complainant/harassee, without, as shown on this record, affording the Claimant any additional protection or preventing any prejudicial effects.

By making the holding on Rule 44 determinative of the result, the Division did not issue a ruling on the merits. That, too, may not have been legally correct, particularly in this setting. In United Paperworkers International Union v. Misco, 484 U.S. 29, 108 S. Ct. 364, 373 (1987), the Supreme Court held:

> "A court's refusal to enforce an arbitrator's award under a collective bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.... We cautioned, however, that a court's refusal to enforce an arbitrator's interpretation of such contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"

The EEOC regulations (29 CFR § 1604.11(a)) provide:

> "Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances...and other verbal or physical conduct of a sexual nature constitute sexual harassment when...such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

In Newsday v. Long Island Typographical Union, 915 F.2d 840, 845 (2nd Cir. 1990), it was held: "In sum, there is an explicit, well-defined, and dominant public policy against sexual harassment in the work place." Moreover, in Stroehmann Bakeries v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1442 (3rd Cir. 1992), cert. den. 113 S.Ct. 660 (1992), which is on all fours with the instant case, the court held:

> "It is clear that there is a well-defined, dominant public policy against sexual harassment in the workplace and that behavior such as that alleged by Wiegand is considered sexual harassment under the law.
>
> "In addition to the public policy against sexual harassment in the workplace, a well-defined dominant public policy favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace exists....
>
> "Under the circumstances present here, an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy. Therefore, Arbitrator Sands construed the Agreement between the parties in a manner that conflicts with the well-defined and dominant public policy concerning sexual harassment in the workplace and its prevention. His award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether the harassment occurred. Certainly, it does not discourage sexual harassment. Instead, it undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace. For these reasons, we conclude that the reinstatement of this employee without a determination of the merits of the allegation violates public policy."

Given the Division's ruling on the procedural issues, the recitation of facts at the outset of the Findings appears not to have been necessary to the

result, and so could be taken as dicta. Nevertheless, the recitation is somewhat surprising, because it follows, without exception, the harasser's testimony, and, to the extent of conflict on the matters of unwelcomeness and context, fails to credit, or even mention, the testimony of the harassee and the corroborative testimony of a witness to Mr. Boynton's actions. In Award 5 of Public Law Board No. 3584, UTU v. CR (Sickles, 1985), it was held:

> "However, as has been noted on numerous occasions, it is not incumbent upon a Board such as this to substitute its judgment for that of the carrier concerning credibility determinations and there is evidence of record from which the carrier can base its determination."

Besides the apparent credibility determination, there is also the discussion of discipline parameters applicable to sexual harassment cases. However, in its March 19, 1990 Policy Guidance on Sexual Harassment, 405 FEP Manual 6690-1, the EEOC said:

> "A 'hostile environment' claim generally requires a showing of a pattern of offensive conduct....
>
> "But a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical....
>
> "The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment....
>
> "When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found."

The incident in this case was of that character. To understand exactly what happened here, and the truly offensive, inexcusable character of the

Claimant's conduct, male readers are invited to consider their own likely reactions if someone came up to you, grabbed your pants, pulled out the waist of your pants, inspected the resulting view and then made comments about what that person had just seen. The "penalty" presently imposed for this conduct is reinstatement with full backpay and complete record clearance. In his article on Reinstatement of the Sexual Harasser: The Conflict between Federal Labor Law and Title VII, 18 Employee Relations L.J. 617,622 (1993), Thomas J. Piskorski, after discussing the various Court of Appeals decisions that have addressed arbitrators' modifications of disciplinary assessments, presented his conclusions:

> "In certain circumstances, the 'appropriate sanction' may require the sexual harasser's termination of employment. For instance, a serious single act of harassment may require such disciplinary action....
>
> "What does this mean to whether a court should overturn as inadequate an employer's or an arbitrator's choice of disciplinary action? So long as the employer's disciplinary action falls within the range of 'appropriate sanctions' contemplated by the regulations, then the employer's action does not violate the public policy against sexual harassment. Similarly, so long as the arbitrator's penalty falls within the range of 'appropriate sanctions,' then the arbitrator's award does not violate the public policy against sexual harassment. However, if the arbitrator's penalty falls below the minimally acceptable 'appropriate sanction,' then the award violates public policy and should be vacated."

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 63, 106 S.Ct. 2399, 2405 (1986) was the first occasion for the Supreme Court to consider the issue of sexual harassment in the workplace. In his opinion for the Court, Chief Justice Rehnquist observed:

> "In concluding that so-called 'hostile environment' (i.e., non quid pro quo) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and

> EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult....
>
> "Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in Henson v. Dundee, 682 F.2d 897, 902 (1982):
>
> > 'Sexual harassment which creates a hostile offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.'"

In his role as Discussant of Arbitration of Sexual Harassment in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators (Washington, BNA Books, 1992), at 118, Tim Bornstein observed:

> "The federal judiciary's demonstrated sensitivity to male-female differences in the workplace is becoming the law of the land. Federal judges have said, in effect, that the goal-posts governing relations between men and women in the workplace have moved. Sexual jokes, posters, propositions, and the like that were loosely tolerated as the workplace norm 20 years ago are unacceptable and illegal today. That same sensitivity to the legitimate expectations of women workers under national policy must also be embraced by arbitrators as part of today's law of the shop."

Too many recent Awards, like those reviewed in the Stroehmann and Newsday decisions among others, have failed to embrace that new sensitivity, have shown that the arbitrators in those cases "just don't get it." By reversing

discipline assessed for admitted conduct constituting egregious sexual harassment, this Award, not by design, but surely in effect, makes the work environment more hostile for women employees in general and for the woman harassed in this case in particular, and so is contrary to public policy. We must regretfully, but respectfully, dissent.

Robert L Hicks

R. L. Hicks

Martin W. Fingerhut

M. W. Fingerhut