

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25205

Docket No. 44786

01-1-98-1-S-6779

The First Division consisted of the regular members and in addition Referee Robert E. Peterson when award was rendered.

(United Transportation Union
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Reinstatement of Conductor D. C. Peck from unjust dismissal, pay for all time lost, pay for any lost vacation benefits, pay for any lost medical and dental benefits, pay for all lost productivity trip shares, and expungement from personnel record as a result of investigation held July 23, 1986."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

The Claimant was dismissed from service in a Carrier finding that he had failed to comply with instructions from a Supervisor which had issued on April 22, 1996, in continuing to direct, both on and off company property, inappropriate and unacceptable behavior toward a newly hired female student Brakeman. The female coworker had previously complained to a Supervisory Official about what was asserted to be the Claimant's unrelenting pursuit and sexual harassment of her.

Before proceeding to the merits of the case, the Board will first note that it has given careful and studied review to argument advanced by the Organization in a contention that discipline be set aside on the basis of alleged procedural defects as to the manner in which the notice of charge issued and the company Hearing was conducted. We do not find the substance of the procedural protests as raised, even if it was to be held, arguendo, that some minor flaw existed, to be sufficient to conclude that the Claimant was denied a contractual right of due process.

In defense of the Claimant it is urged that the female coworker had encouraged the relationship and that it was of a consensual nature. The female complainant denies this contention. To the contrary, the female complainant testified that she had confronted the Claimant and had requested that he cease making unwelcome sexual advances and propositions. She asserts that the Claimant was told that although she was willing to be a friend, she had no desire for any other type relationship.

Though testimony of the Claimant and the female complainant is conflicting, the Board is of a belief in study of the rather voluminous transcript that it tends to support a finding that the extent of the relationship was more closely related to that described by the female complainant as opposed to that offered by the Claimant.

However, whether the female coworker did or did not encourage the Claimant, the fact remains that once the Claimant was duly instructed not to have any further contact with the complainant female coworker, and acknowledged an understanding of those instructions, he was obliged to follow such a directive and to respect the right of the complainant to terminate whatever, if any, relationship may have previously existed.

That the Claimant was aware that he had been instructed not to further contact this female co-worker is evidenced by testimony that he gave at the company hearing in relating a conversation that he had with a Carrier supervisory official about such matter. Here, the Claimant said:

"And he [the supervisory official] said, ah, I have talked with * * * and she has filed a formal complaint. And she is very upset about your appearance at her house this past weekend.

And then he said – said she wants to be your friend and coworker, but that's all. And I just sat there, a couple of people in the room with me, so I just kept sayin' yes to everything he was saying.

And he said don't try to contact her to apologize or talk to her, he says just leave it go. And he said it won't leave this office, and I said okay. And he told me a little – he kind of – I don't know how to put it, but he said that CP Rail is very stringent on sexual harassment and I'm sure don't want to get involved in something like that, and I said no, I don't. And that's pretty much the end of the conversation."

Six days after having received and acknowledged the instructions that had been given to him by the Supervisory Official, the Claimant admittedly violated them. The Claimant, as brought out at the Investigation, attempted to converse with the female complainant on at least four separate occasions by means of long distance telephone calls.

As the Carrier points up, it is obvious that the Claimant did not take seriously the admonishment and instructions given to him by a Supervisory Official, but was intent upon pursuing a relationship with the female complainant.

The record also reveals that the Claimant himself has come to recognize his guilt to the charge, albeit he is of a belief that the penalty of dismissal was excessive. In this respect, the Board finds noteworthy the following excerpts from a letter that the Claimant addressed to the District General Manager concerning his dismissal from service on August 1, 1996:

"I am in full understanding of the why's and what for's of my dismissal. Although I feel this discipline was excessive, I am well aware of the company's policies and procedures for dealing with them and I fully respect their decision of discipline. However I cannot become complacent toward a dismissal that I feel is excessive punishment. . . .

I have made some mistakes and I feel that I have paid for them in many ways. Although I have secured employment elsewhere, I am facing the long road of attaining sufficient seniority all over again, not to mention the benefits associated with it, vacation time, etc. . . .

I have learned some valuable lessons from this ordeal and I wouldn't wish the same situation on anyone. It was, without doubt, the most traumatic experience of my life. You are probably well aware that I have completed counseling through the Employee Assistance Program. Many people would have probably discontinued attending counseling upon their dismissal. I chose not to for many reasons, the first being a show of good faith on my part toward the company. . . . Although I still feel victimized by Ms. * * *, I am aware of some poor choices on my part that allowed this to happen. I can honestly say that I will never become a part of any such incident again. I view women from a completely different perspective now. . . ."

Clearly, the Carrier has a right, if not a responsibility, to ensure and maintain a work environment that is free of sexual harassment, and to administer appropriate discipline when it is shown that an employee has openly and knowingly violated its policy pertaining to such matters. However, in the case before us it seems apparent that although the Claimant failed to comply with instructions of a Supervisory Official pertaining to such policy, it remains questionable as to whether the Claimant was fully made aware of the consequences of a failure to do so.

In the opinion of the Board, the Carrier Supervisory Official should have been more sensitive to the overall nature of the situation with which he was confronted. It is evident from testimony that it was not a situation that was to be instantly defused by the mere issuance of a cease and desist declaration to the Claimant. Certainly, since nothing of record shows that the Supervisory Official was trained or skilled in the handling of complaints involving sexual harassment, he should have, at the time that the matter was brought to his attention, have directed the Claimant for counseling or to the Human Resource Department so that a more professional determination could be made as to how to best handle what appears to have been an extreme personal and emotional situation for both the Claimant and the complainant female.

In the circumstances, the Board finds that although the Claimant was deserving of rather extreme discipline, dismissal from service is excessive. The Board will, therefore, modify the discipline to time served and direct that the Claimant be reinstated to service with seniority and other benefits unimpaired, but without payment for time lost. Upon a return to service, the Carrier shall have the right to determine whether any further counseling is necessary, the Board here noting that the Claimant said in his

aforementioned letter of August 1, 1996 to the District General Manager that despite his being dismissed from service that he had completed counseling through the company Employee Assistance Program.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 14th day of May, 2001.