

PUBLIC LAW BOARD NO. 5902

**PARTIES) UNITED TRANSPORTATION UNION-YARDMASTERS DEPT.
TO)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim on behalf of Chicago Terminal Yardmaster Curtis J. Terry for payment of all time lost and restoration to service in connection with dismissal assessed for conduct unbecoming an employee. (File: RM-CGO-00-1)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

Before proceeding to the merits of the dispute, the Board will note that it has given study to various procedural arguments advanced by the Organization but does not find these arguments to be of sufficient circumstance to set the discipline aside.

The Claimant was dismissed on August 14, 2000 following a company hearing at which it was determined that he was guilty of having engaged in conduct unbecoming an employee in connection with having, after completing a second trick tour of duty as a Yardmaster on an unspecified date in August 1999, engaged in a sexual encounter with another employee, a female switchtender, who was on duty.

The allegations proffered against the Claimant were the result of Carrier investigations into a general complaint by the female switchtender that she had been subjected to sexual harassment that had allegedly started right after she had been employed by Conrail in February 1998, with the complaint reportedly being made in a desire to put a stop to rumor and innuendo about her engagement in sexual activities with various employees. The female switchtender became an employee of the Carrier on June 1, 1999 pursuant to the Carrier acquiring a portion of Conrail that included her work zone. She did not present her complaints to the Carrier until on or about June 20, 2000, when she brought them to the attention of a Trainmaster. The latter, in turn, referred the matter to the attention of senior officials, who, together with the Carrier EEO Officer and company police officers, interviewed the complainant and 20 employees about the allegations.

As concerns the Claimant's involvement with the female switchtender, one complaint expressed was that a Yardmaster, who was not at first named, but later came to be

identified as the Claimant, had attempted to rape her on some unspecified date in August 1999

The Carrier determined in its pre-hearing investigation that there did not appear to be any support for the contention that the Claimant had attempted to rape the female switchtender, but may well have engaged in what was termed to be conduct unbecoming an employee. In this respect, it is noted that the female switchtender is not shown on the record to have filed a formal complaint against the Claimant. Further, since interviews with a number of employees were said to have suggested that the female complainant had been aggressive in engaging in inappropriate sexual behavior with other employees, the Carrier says it decided to cite the female switchtender to appear as a principal for a joint investigation together with the Claimant and one other employee.

The Carrier did not charge all employees mentioned in its pre-hearing investigation in a contention that it had not found sufficient credible evidence to proceed with charges against the other individuals, albeit the Carrier did state that it had placed a trainmaster who had had a sexual encounter with the female switchtender on administrative leave.

The Board has concluded that no useful purpose would be served by a detailed analysis of testimony offered at the company hearing. We will therefore record but a brief overview of the situation.

Basically, the Claimant asserts that the female employee invited him to come to her work site when he got off duty. The Claimant denies that he engaged in sexual contact or touched the lower anatomy of the female switchtender in any way. Rather, the Claimant offers, he had only engaged in what he termed, "an adult kiss from her," whereas he maintains that she had groped and fondled a lower part of his anatomy. The contentions of the Claimant, even if they were presumed to have merit, do not overcome the fact that he went to the work site of the female employee, a track shanty, while she was still on duty, and, while there, engaged in some form of sexual contact.

Contrary to the contentions of the Claimant, the female switchtender testified in part here pertinent that their getting together at the shanty followed work related communications during which the Claimant had "stated when he got off he was coming up there," and that she "thought he was just playing but when he go off he did come up there." Further, the female employee denied having sexual contact with the Claimant, but insists that he had tried to kiss her and that the Claimant "was touching on me and we were rocking back and forth." The female switchtender also says that despite her telling the Claimant, "No," that he "had already had my pants unbuttoned and had them down by my, on my hips, and then the only thing happened after that was my mind had just slowed down. The whole world just slowed down for me because he was not hearing me say no and I felt like he was going to rape me." The female switchtender said that when she saw a train approaching the area with its headlight on that she asked the Claimant to leave the shanty and that he did so.

Although there is much disparity in testimony regarding what actually transpired between the Claimant and the female switchtender, study of the record reveals sufficient reason to conclude that the Claimant had engaged in conducting unbecoming an employee. His actions were in violation of Safety and General Rules of Conduct and Carrier's Sexual Harassment Policy, as cited at the investigation, by engaging in conduct considered offensive or inappropriate by co-workers, customers, and the public, as well as conduct that had the effect of unreasonably interfering with another employee's work performance in a craft which he supervised.

Clearly, the Carrier has the right to impose discipline for an offense of the nature here involved in a manner that will hopefully deter future like misconduct and, at the same time, serve to demonstrate to all employees that it is committed to having a work environment in which all employees conduct themselves in a professional manner, treating all persons with whom they come into contact with respect and dignity, and refusing to submit to or to make sexual advances and other physical contact with another employee based on sex.

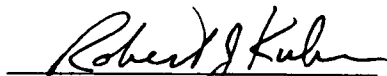
Notwithstanding the gravity of the offense and the fact that engagement in sexual conduct of the nature at issue may well call for imposition of the ultimate penalty of termination from service, the circumstances in this particular case are such that the Board finds the penalty of dismissal from all service to be harsh and unreasonable. We find that a more reasonable penalty would be a suspension from service in the amount of time that the Claimant will have been out of service to the date of implementation of this Board's award. The Board will, therefore, direct that discipline be reduced to time out of service, and that the Claimant be returned to active duty with full seniority rights and other benefits unimpaired, but without payment for time lost.

AWARD:

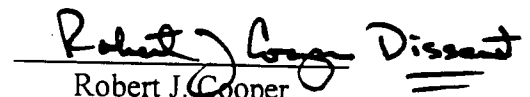
Claim sustained to the extent set forth in the above Findings.



Robert E. Peterson
Chair & Neutral Member



Robert J. Kuhn
Carrier Member



Robert J. Cooper
Organization Member

Norfolk, VA

Dated: July 16, 2001