NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT

Parties to Dispute:	)	
	)	
UNITED TRANSPORTATION UNION YARDMASTER DEPARTMENT	)	OPINION AND AWARD
	)	
	)	Pursuant to Special Board
vs	)	of Adjustment Agreement
	)	
CSX TRANSPORTATION, INC. (former Seaboard Coast Line)	)	Case No. SP-00-03 (CSXT File 11 [00-0168])

STATEMENT OF CLAIM:

"Appeal for Mr. W. E. Nobles to be reinstated to service effective immediately, and have his record cleared of all charges that were brought against him. He also shall be compensated for all lost wages and benefits, due to the Carrier removing him from service on February 28, 2000, and the subsequent dismissal letter dated March 23, 2000."

JURISDICTION:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

PRELIMINARY STATEMENT:

By letter dated March 23, 2000, Carrier terminated the employment of Yardmaster W. E. Nobles for violation of its policy on harassment. Carrier's action was prompted by the complaints of Nobles' fellow employee, 28 year old Clerk Janet L. Hicks, alleging that he had engaged in a protracted pattern of sexual harassment while the two were on duty at Moncrief Yard at Jacksonville, FL. In this Claim the Organization challenges that dismissal as lacking just cause. The parties are in agreement that the matter is properly before the Board.

BACKGROUND:

Prior to his discharge, Claimant had held a Yardmaster position for approximately 29 years, the last three spent serving customers in the Jacksonville Terminal. Before becoming

a Yardmaster, he had also previously served as a switchman and conductor. At the time of his dismissal Claimant had 36 years of overall employment with CSX.

Clerk Hicks had initially been employed with CSX in February, 1998 as a Crew Caller in the Crew Management Office. After working in that capacity for several months she complained of a hostile working environment, citing daily sexual harassment from three male co-workers, and was ultimately transferred to the Coal Business Unit service lane. That assignment proved somewhat problematic for the same reasons, and in August 1998, she transferred to Moncrief Yard as a General Clerk at a lower rate of pay. On October 16, 1999 she commenced a maternity leave of absence. Shortly before the Investigation and Hearing held in this matter on March 7, 2000, her position was abolished.

While crucial facts surrounding Hicks' complaints against Nobles are hotly contested, it is undisputed that she started work at the Moncrief Yard in August, 1998, first met Nobles about six months later, and from approximately February, 1999 until October, 1999 the two worked closely together on numerous occasions. Hicks' general duties on the swing shift included driving crews around, running supplies, booking tracks and other general clerical duties as assigned by the trainmaster and yardmaster at the location. That work brought her into direct, face to face contact with Claimant as she dropped off crews or supplies, or hauled crews from the "B yard shack," where Claimant's office was located.

Mrs. Hicks testified that from the time she first saw Nobles he started making inappropriate remarks to her, including that he intended to give her "a long, wet, passionate kiss;" that she was "beautiful...had beautiful brown eyes;" that he "liked my hair better ...down around my face rather than ...up in a ponytail;" that "if I wanted to use the phone I could come sit on his lap and use it;" and on several occasions that "he could fall in love all over again." He "asked me if there was anything I needed, like a back rub."

Hicks further complained that "on occasions he would hug me and say oh, you feel so good...the one time he hugged me when I was pregnant, he said that that felt even better pregnant." Once, according to Hicks, "he came over and sat right next to me and took my right hand and put it on his leg." According to Hicks' attorney, because she felt uncomfortable with this behavior she stopped going into the shack where Claimant worked

in an effort to avoid him. He then began coming out to her vehicle, however, and on one occasion put his head through the window of her vehicle and kissed her on the lips. Mrs. Hicks' attorney represents that she made no effort to report these incidents to management, fearing retaliation, but did make it clear that "each and every one of his overtures [was] offensive to her." Further, one of her co-workers, Clerk Dave Wester, after observing Claimant hugging Hicks, advised him that "you need to keep your hands off of her or you'll end up in big trouble."

In December, 1999, Mrs. Hicks took her concerns to a local law firm. After her attorney notified the Carrier of her allegations, it interviewed those believed to have knowledge of Claimant's actions. Based upon that investigation, on March 1, 2000 Carrier's District Superintendent H. W. Haga instructed Claimant to appear at an investigation on March 7, 2000 "[i]n connection with report received that you made repeated and unwelcome sexual flirtation, advances and proposition, [sic] unnecessary and unwelcome touching, and unwanted sexual compliments, innuendoes, suggestions or gestures to a CSX clerical employee, J. L. Hicks." Relying upon information developed at that hearing, it determined that Claimant was responsible for the actions complained of, and on March 23, 2000 it dismissed him from service.

POSITION OF THE CARRIER:

Carrier maintains that termination was fully appropriate under the circumstances. At his hearing, Claimant conceded that he was in the habit of hugging Mrs. Hicks and that he did on occasion make comments to her that may have been unwelcome and inappropriate. This conduct continued even after Mr. Wester warned Claimant that his behavior was unacceptable. Based upon the credible testimony of the following people, Claimant's guilt is evident: Mrs. Hicks, who testified that she discussed the problem with numerous coworkers; Engineer Hinton, to whom Hicks had complained; Yardmaster Middleton, who witnessed Nobles tell Hicks that she could "sit on his lap and use the phone if she wanted to" and heard him offer to rub her shoulders; Crew Caller Miller, in whom Hicks confided her concerns about Claimant "clinging to her;" Clerk Sauls, who observed the hugging and to whom Hicks disclosed that she found it embarrassing; checker Wester, to whom Hicks complained about inappropriate hugging, triggering his conversation with Claimant; and

electrician Errol Joshua, who spoke with Hicks after seeing Claimant hug her and was told "it was a growing thing," and that she was afraid to come forward even though he had attempted to kiss her and "she really didn't know how to deal with it." Claimant acknowledged that he was well aware of Carrier's policy on sexual harassment and had attended training classes in that connection. The behavior at issue can only be described as sexual aggression. It is inexcusable, flatly inconsistent with Company policy and, as confirmed by numerous prior awards on the property, need not be tolerated. Carrier's action in terminating Claimant should not be disturbed.

POSITION OF THE UNION:

Carrier's dismissal action faces serious procedural hurdles. First, Claimant was removed from service without a timely, fair and impartial hearing. He was taken out of service on February 28, 2000 and notwithstanding the fact that Rule 21 requires written notice of the precise charges and a hearing within ten days thereafter, no hearing was held in this instance until 25 days from the time he was removed from service.

Second, Claimant was deprived of a fair and impartial investigation, as manifested by the following irregularities: the charges against him were not precise; Claimant was never interviewed during Carrier's investigation; and Carrier refused to turn over to the Union the statements it had collected during its investigation, thus depriving him of the opportunity to adequately defend against the charges. Additionally, the evidence strongly suggests that Carrier may have improperly leaned on potential witnesses to get the story it wanted.

On the merits, the Organization argues that Carrier simply failed to establish its case. Of all the allegations put forth by Mrs. Hicks' attorney, the only ones that were observed by others involved Claimant hugging her and on another occasion advising her that if she wanted to use the phone she could sit on his lap. As to the first, it is Claimant's nature and practice to "hug a lot of employees," an innocent, well meaning effort to boost morale. As to the phone incident, the way the office was laid out it was literally true that Claimant could not leave his desk, and Hicks' sitting on his lap was the only reasonable option. Claimant is an excellent worker. By nature, his demeanor is friendly and he often expresses affection

for co-workers with hugs and compliments. He is a long-time, exemplary employee and the discipline is wholly disproportionate to the charges. He should be reinstated with back pay.

OPINION:

For the reasons set forth below, the Board's review of this record leads it to conclude that Claimant Nobles should be returned to service.

First, except to the extent that failure to interview Claimant is one of several factors relied upon by the Board in concluding that Nobles' interests were compromised in the investigatory phase, the Organization's procedural arguments have been considered and found to be unpersuasive.

On the merits, the Board gives away no classified information when it notes for the sake of context that about 21 years ago the Equal Employment Opportunity Commission published its guidelines on sexual harassment, concluding that such conduct falls within the unlawful sex discrimination forbidden by Title VII of the Civil Rights Act of 1964. For the past two decades, the courts, the EEOC and its state and local counterparts have outlawed unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when, among other conditions, such activity unreasonably interferes with an employee's work performance or creates an intimidating or offensive working environment.

While the outer boundaries of the law on aspects of the issue are still developing, as to conduct between co-workers it has been clear for some time that where the employer knows, or should have known of the harassment, it is responsible for acts of sexual harassment in the workplace. Broadly speaking, it may avoid liability by taking immediate corrective action after first knowledge.

Against that backdrop, and acknowledging that in matters of gender, romance and sex there is room for all sorts of misunderstanding, the Board's obligation in this dispute is to determine whether the evidence of record supports a finding of sexual harassment or whether Hicks overreacted to what Conductor Hass described as just a friendly management style that included giving people a hug and a big "How are you doing!"

In evaluating the evidence as to "welcomeness," our focus is upon the totality of the circumstances, with a view in the first instance toward determining the alleged victim's

behavior toward the alleged harasser. A careful review of this record forces the conclusion that the conduct of the Claimant was unwelcome in the sense that Mrs. Hicks did not solicit or incite it and at all times regarded it as undesirable and offensive. Nobody here—least of all Hicks--was "sending out mixed signals." Although it is apparent that Hicks at no time delivered a strong, forceful request for Nobles to stop, the cases make it clear that an employee often may not resort to more emphatic means of communicating the unwelcome nature of the conduct for fear of retaliation, and such failure to verbally reject sexual advances does not make the conduct welcome. Nor does evidence of the victim's past experiences in other work units have any probative value in the analysis.

The Board finds the evidence of record to be strongly aligned against Claimant's position. Nobles admits he hugged Mrs. Hicks "five or six" times. Although he denies many of the other incidents and remarks she cites, the Board is bound by Carrier's determinations in regard to the relative credibility of the parties. We conclude the evidence supports Carrier's findings with respect to the other activities. In brief, Claimant's conduct toward Mrs. Hicks was both verbal and physical; it was frequently repeated; it was patently offensive; and, importantly, it took place during a period when Claimant occupied a supervisory role over her. In short, the Board has no confidence in Claimant's assertion that Hicks' complaints arose from his installation of speed bumps; that he meant no harm; that he just showing appreciation; that he is simply a good 'ol boy for whom hugging and touching come with the pedigree papers. Fish gotta swim, but there are big differences between being nice and kissing on the lips.

As suggested, Carrier has a serious obligation as a matter of law to provide its employees a safe and sane working environment, and may face heavy liability for laxity in failing to deal with inappropriate behavior. Claimant's behavior was inappropriate, and Carrier's reaction was suitably firm. On the other hand, the Board questions whether it took sufficient account of the victim's failure to utilize Carrier's internal processes for addressing problems of this type, in this case its "Complaint Procedure for Sexual Harassment." That policy requires that:

> "[a]ny employee who has a complaint of workplace sexual harassment against a supervisor, co worker, visitor or other person is <u>expected</u> to bring

> "[a]ny employee who has a complaint of workplace sexual harassment against a supervisor, co worker, visitor or other person is expected to bring the problem to the company's attention. If you feel that you have been harassed or if have observed harassment against another individual, you should immediately report the incident to your immediate manager, the next level of management, the appropriate Employee Relations Representative, or the Employee Relations Department's Toll Free Hotline..." (Emphasis in original.)

Mrs. Hicks had available to her an effective avenue of complaint and redress. Fully sympathetic to her concerns in not wanting to be tagged as a troublemaker, we nevertheless sense strongly that in bypassing internal administrative procedures, she inadvertently deprived Claimant of the opportunity to state his case at an early stage. Additionally, landing on Claimant with a strong letter from outside counsel ratcheted up the seriousness of the matter early on, and preempted the benefits of what District Superintendent Teeter described as the CXS "Buddy System." That policy, known as TAPS—"tap on the shoulder"–provides that if one employee observes another behaving in a manner that could put himself or someone else in danger, he or she has an obligation to "tap him on the shoulder" and talk to him or her about it. Surely, neither the CSX Harassment Policy nor TAPS were Hicks' exclusive remedy. But in this particular instance it is clear that her failure to pursue her claim either informally or at the administrative level had the effect of denying Mr. Nobles the opportunity to stop, reexamine his actions and consider that they might be causing needless anxiety, embarrassment and other emotional problems for a coworker.

David Teeter, District Superintendent, Jacksonville Division, testified that Nobles was "a trustworthy, dependable, conscientious employee that enjoyed his job and took great pride in being successful in his position and making sure that the customer that was served by his jobs out of B yard were well taken care of." Trainmaster Michael Montgomery described Nobles as a "top rate" employee. "I wish I had 100 more just like him." Trainmaster Terry Bright testified that Claimant "really does a good job. I have never had...problems and he does a good job, produces." Terminal Manager C. P. Acree described Claimant as "an excellent employee, probably the best yardmaster I have." Lee Roberts, Terminal Trainmaster, described him as "a very good employee, very

knowledgeable of his job, very dedicated employee, he is a very professional employee..." Terminal Trainmaster Hillard Oglesby described Nobles as "one of our top yardmasters." Betty Ann Nelson, a clerk at Moncrief Yard, testified that she did not believe the things she had heard about Hicks' charges. "I know of his character that he's not like that."

In view of Claimant's long and responsible service, as attested to by the solid support of his confreres, and the somewhat unusual circumstances attending the manner in which the investigation into his conduct developed as a result of initial notice from private counsel, depriving him of input, the Board concludes that termination for the offenses at issue is unduly severe. Claimant shall be reinstated to his prior position as soon as practicable, but not later than thirty (30) days following execution of this award by a majority of the Members of the Board. In view of the nature of the charges, Carrier's potential liability in connection therewith, and Claimant's time out of service, his reinstatement shall be subject to whatever physical examination requirements are normally imposed as a precondition to return in such cases, and such "sensitivity training" as Carrier may deem warranted under the special circumstances presented. It is the intention of the Board that Claimant be returned to pay status prior to commencement of such training program. The Board shall retain limited jurisdiction of this matter solely for the purpose of resolving disputes that may arise from the foregoing terms and conditions of reinstatement.

AWARD

The Claim is sustained in part in accordance with the above Opinion. Claimant shall be reinstated to his former position as soon as practicable following execution of this Award by a majority of the Members of the Board, without backpay, but with seniority unimpaired, and subject to the terms and conditions outlined herein.

James E. Conway
Chairman and Neutral Member

Jerry D. Martin
Employee Member

Steven R. Friedman - Dissent
Steven R. Friedman
Company Member

July 30, 2000