

P.L.B. No. 7585
Case No. 23
Award No. 23

PUBLIC LAW BOARD NO. 7585

CARRIER FILE NO. 10-13-0203

ORGANIZATION FILE NO. C-13-D040-9

CLAIMANT: Michael D. Baker

Parties To Dispute:

Brotherhood of Maintenance of Way Employees Division – IBT
& BNSF Railway Company

Statement of Claim: *The Carrier violated the Agreement on December 28, 2012 when it assessed Michael D Baker (7520455) a Level S 30-day record suspension, with a 3 year review period, for alleged violation of Maintenance of Way Operating Rule 1.6-Conduct, for alleged misconduct involving a BNSF Contractor on November 15, 2012.*

Background Facts:

Hulcher Services is a contractor for BNSF. At the time of the events here concerned, Hulcher had been removing various systems from a building at 711 W. 31st St. and moving them to a new location in preparation for the buyer of the building, RTD, to take possession. November 15, 2012 was the deadline for the building to be completely cleared.

At approximately 4:30 that day, Manager of Structures Edford Ferguson received a call from Hulcher employe Adam Hinkle. Hinkle described an altercation with BNSF

employees and subsequently provided a statement. Hinkle testified there were two out buildings and on the day in question, his team was preparing for the final walk through. When the lock to one of the bungalows was cut off, materials of value were found. He said he was called over to the bungalow because of angry BNSF employees, and saw the Loader Operator pick up a sledge hammer belonging to Hulcher and throw it about six feet. Hinkle claimed he said "Whoa, whoa, what is going on here?" According to Hinkle, the Loader Operator, later identified as Claimant Baker, replied "You motherfuckers are stealing my shit." When Hinkle tried to explain they were cleaning stuff out as instructed, Baker replied "I don't give a fuck who said, you're stealing my stuff." [TR 50] Hinkle said he tried to explain further, but Baker stated "All you guys are is a bunch of fucking scabs and thieves."

BNSF Grapple Truck Driver Kenneth Abeyta testified Claimant got a call advising that the lock had been cut off to a building where he stored supplies. Claimant told Abeyta he needed to get over there, and Abeyta went about four minutes before Claimant. Abeyta said Hulcher employ

es were moving materials out of the building though he did not think they were stealing. He said when Claimant arrived, he "let loose a couple of F-bombs." He did not see a sledge hammer thrown, and the contractors were pitching materials of value into a dumpster.

Claimant testified he got a call that Hulcher had cut the lock off the building he used and was throwing everything out on the ground. He admits he said "This is a bunch of fucking bullshit," and acknowledged he did not contact the BNSF Police Team or Resource Protection about a possible theft. [TR 83] "I did not say anything about them being a thief until later," he said. [TR 85] He could not remember throwing a sledge hammer and denies saying M-F, that they were "stealing my s—t" or calling them a scab, though he admitted he has done it in the past.

Though other rules were cited during the hearing, the Board will focus on rule 1.6 – Conduct, which prohibits quarrelsome or discourteous conduct.

Opinion of the Board:

As the Organization pointed out, there was a conflict in the testimony about the order to cut the lock on the outbuilding in question. This, however, does not go to the crux of the matter. Rather, the Board's concern is with the verbal exchange between Claimant and Hulcher employees.

Hinkle wrote a statement on November 19, four days after the incident. In the opinion of the Board, this was soon enough after the incident for Hinkle's memory to have been intact. The investigation took place November 29, about two weeks after the incident. The fact that Hinkle could refresh his recollection operates to enhance the reliability of his testimony.

More importantly, Hinkle had no motivation whatsoever to exaggerate or fabricate accusations against Claimant Baker. There was no showing of animosity between the two men, and Hulcher Services has every imaginable reason to maintain amicable relations with BNSF. To complain about the conduct of a BNSF employee is not something their contractor would seek to do. Hence, Hinkle's complaints should be taken seriously.

Hinkle's description of the exchange was apparently found to be more credible than Claimant's. The Board sees no basis in the evidence for overturning this finding. Claimant admitted using profanity, though he characterized it as less vile than that reported by Hinkle, and Abeyta confirmed the launching of "F-bombs," in the plural. The evidence supports a finding of violation of Rule 1.6.

The Organization argues the penalty is far too severe for profanity in a heavy workplace such as a railroad. It points out Hinkle admitted he never felt threatened. The problem is that the language described by Hinkle goes beyond the use of merely profane words and constitutes verbal abuse. Should the sledge hammer have dropped on Claimant's foot, provoking an explicative, the language would be profane, but not insulting to anyone. By contrast, when the profanity takes the form of name calling or personal

accusations, such as "You motherfuckers," "You're stealing my stuff," or "All you guys are is a bunch of fucking scabs and thieves," the language goes beyond the profane and becomes abusive. In that situation, disciplinary action is justified.

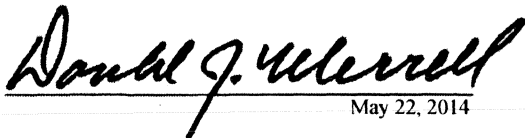
AWARD:

The claim is denied.

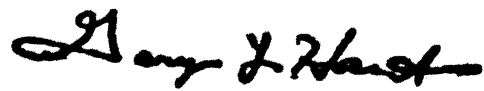


Patricia Thomas Bittel

Chair and Neutral Member


May 22, 2014

Donald Merrell,
For the Carrier



Gary Hart,
For the Organization

Dated: April 8, 2014