

Award No. 4
Case No. 4
NMB Case No. PLB-07602-000004

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 10-12-0228
Organization File No. C-12-D070-6

Claimant — Ronald L. Sedersten

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The discipline (dismissal) imposed upon Mr. Ronald L. Sedersten by letter dated February 13, 2012, for alleged violation of MOWOR Rules 1.25 "Credit or Property" and 1.6 "Conduct," in connection with charges of attempted theft of BNSF property, that occurred on January 7, 2012, at approximately 0200 hours on the Hastings Subdivision, approximately three miles west of Fairmont, Nebraska, as disclosed by the Filmore County Sheriff's office.**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant Ronald L. Sedersten shall now receive the remedy prescribed by the parties in Rule 40(G).**

BACKGROUND:

At the time of his termination, the Claimant had worked for the Carrier for some 37 years. At about 2:00 a.m. on January 7, 2012, a Filmore County (Nebraska) Deputy Sheriff stopped at a highway rest area about three miles west of Fairmont, Nebraska. While he was there, he thought he heard voices near the BNSF railroad tracks located nearby across the highway. When he drove over to investigate, he saw four individuals (three men and a woman) in and around a white pickup truck. Attached to the pickup truck was a flatbed trailer, on which a railroad signal lay. The Deputy approached the group and observed that the men all appeared to be intoxicated. The Claimant identified himself as a BNSF employee and explained that the signal had been replaced and was scrap. He wanted to take it home and rewire it to use as an ornament on his lawn. The evidence in the record is in conflict as to whether the Claimant told the Deputy that he had already contacted his supervisor, Indy Sandoval, for permission to take the signal, or (as the Claimant testified) he merely suggested that the Deputy could contact Sandoval as his supervisor. While the Deputy was talking to the group, he received a call for immediate assistance elsewhere. He took the names of the individuals and told them to unload the signal and leave the area, which they did. The Deputy subsequently contacted the BNSF Railroad Police and informed them what had happened. One of the Special Agents investigated, going to the scene and locating a used signal laying next to the railroad tracks. Its number matched the one given to him by the Deputy. Employees are not generally permitted to remove any material or equipment from BNSF property, and the Agent contacted the MOW Engineering Department to see if the Claimant had permission to take the signal. He could not recall at the investigation if he heard back from anyone. The Special Agent forwarded his findings to the Assistant Roadmaster. No one in management contacted the Claimant to ask him about the incident before issuing the notice of investigation, for alleged attempted theft of BNSF property.

The Claimant testified at the investigation that he indeed had wanted the signal to display in his yard. The signal had been laying in the ditch for some four to five months at the time of the incident, waiting to be scrapped. He had asked someone (not Indy Sandoval) about taking it home but never heard anything back. On the evening in question, he and some friends happened to be driving past the tracks. He stopped to

take a look at the signal and on a momentary impulse decided to take it home and get a release for it after the fact. He acknowledged that he and his friends had loaded the old signal onto the trailer but stated that he had never intended to be dishonest. He stated that he has been under a great deal of stress for several years, caring for his elderly mother while her health declined, and that he realizes his judgment was poor. He apologized profusely. No charges were ever filed against Claimant by the County.

Following the investigation, the Carrier issued the Claimant a letter of dismissal, dated February 13, 2012, for violation of MOW Operating Rule 1.25 and Rule 1.6, Conduct.

FINDINGS AND OPINION:

The Public Law Board, upon the whole record and all the evidence, finds that the carrier 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 Public Law Board has jurisdiction over the dispute involved herein.

The Claimant was dismissed for violating MOW Operating Rule 1.25 and Rule 1.6, Conduct, specifically #4, Dishonesty. However, Rule 1.25, Credit or Property, was not referenced or discussed at any point during the investigation. As a result, the Claimant had no notice or opportunity to defend himself on that charge. It is a matter of fundamental due process that an employee accused of wrongdoing have both notice and an opportunity to defend himself from the charges against him. Discipline may not properly be issued in the absence of those procedural protections, and the charges against the Claimant based on alleged violation of Rule 1.25 must be dismissed.

Turning to Rule 1.6, the Carrier's decision was based on its conclusion that the Claimant had been dishonest. According to the Organization, the Claimant had a spur-of-the-moment thought that he acted on impulsively. His intent was never malicious, but in fact creative, to use a discarded piece of railroad history and turn it into a functional yard ornament. He never had any intent of monetary gain. His idea was not well thought out, and in the end, he left the signal where he found it.

Terminating him for a fleeting thought that did not actually result in any loss to the Carrier is undeserved.

The record establishes that the Claimant had loaded the signal onto his trailer but that he unloaded it and put it back where it had lain in the ditch when told to by the Deputy Sheriff. The Carrier was never deprived of its property, so at most the Claimant was guilty of attempted theft. However, the evidence is also clear that the Claimant was intoxicated at the time, with diminished capacity for rational judgment and decision making. If he had seriously thought to steal the signal, it is unlikely that he and his friends would have been making enough noise to rouse the curiosity of someone clear on the other side of the highway. Moreover, he was candid and cooperative throughout, starting with the Deputy Sheriff. There is no indication that the Claimant sought to mislead anyone about what had happened or his intent to "upcycle" the abandoned signal into a lighted lawn ornament. The Claimant assumed that he would be able to get a release to take the signal, and there is no indication in the record that he could not have obtained a release if he had followed the proper channels. But on a drunken Friday night (actually, Saturday morning), one is not necessarily thinking straight and acting rationally.

It is against this background that the Claimant's actions should be judged. No charges were ever filed against him by the Sheriff's Office. He was an exemplary employee for 37 years, with an excellent work and safety record. His work record establishes that prior to this incident, he was last disciplined in 1980—more than 30 years before. At all times, he openly explained what he was doing both to the Deputy Sheriff and at the investigation. No one in management spoke to him beforehand to get his explanation of what had happened. On the basis of the evidence in the record, it is difficult to conclude that the Claimant was actually "dishonest," as that term is normally understood. He demonstrated extremely poor judgment while intoxicated, but his testimony that he thought he would be able to obtain a release after the fact was credible, and it does not appear to the Board that, at 2:00 a.m. on January 7, 2012, he had the requisite mind set to understand that the Carrier might see his actions in a very different light. At the same time, theft and dishonesty are serious misconduct, and the Carrier is legitimately concerned about employees taking its property, even scrap, under cover of night. Under all of the circumstances, the Board concludes that

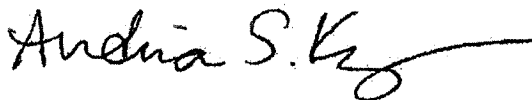
dismissal was not warranted, but that serious discipline was. The dismissal shall be converted to a suspension, and the Claimant shall be returned to work as soon as possible, but with no back pay.

AWARD

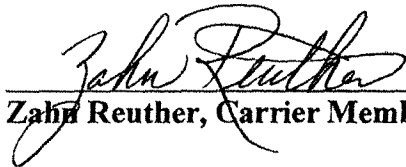
Claim sustained in accordance with the Findings.

ORDER

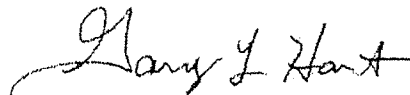
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant consistent with the above findings be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Andria S. Knapp, Neutral Member



John Reuther, Carrier Member



Gary Hart, Organization Member

April 29, 2013

Date