

Award No. 20
Case No. 20
NMB Case No. PLB-07602-000020

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

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

Carrier File No. 11-12-0001
Organization File No. B-M-2445-M

Claimant — Andre C. Kaluza

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed upon Mr. Andre C. Kaluza by letter dated September 8, 2011, for alleged violation of MOWOR 1.6 Conduct, MOWOR 14.12 Voiding Track Warrants, MOWOR 6.28.4 Storing Equipment on Other Than Main Track, MOWOR 8.2 Position of Switches, MOWOR 8.20 Derail Location and Position, and MOWOR 8.3 Main Track Switches, in connection with charges of failure to restore the South Siding Switch at MP 212.94 Gerber, MT to the normal position causing Train M-LAUSHM1 18A to run through the siding and collide with the Georgetown Slot train causing derailment, failure to properly document the position of switch on the Position of Switches/Derail form, and failure to protect men and equipment at approximately 1630 hours on Tuesday, July 19, 2011 while working as a pilot flagman for the Georgetown Slot train working on the Laurel Subdivision.
2. As a consequence of the violation referred to in Part (1) above, Claimant Andre C. Kaluza shall now receive the remedy prescribed by the parties in Rule 40(G).

BACKGROUND:

The Claimant, a Head Maintenance Welder based in Great Falls, Montana, entered service with the Carrier on August 19, 1996. Prior to the incident for which he was terminated, his disciplinary record was unblemished. His normal job duties are limited to various welding tasks. On July 18 and 19, 2011, he was assigned as the Pilot Flagman for the Georgetown Slot Train on the Laurel Subdivision, a position he had not held before and had never been trained to do. Previously, a Flagging Foreman had performed the flagging duties. The Slot Train was being operated by a contract employee, who informed the Claimant that he (Claimant) would have to instruct the operator what to do and check his work at all times. The two men worked alone, without supervision or further assistance.

On July 19, 2011, they were working in and around MP 212.94, near Gerber, Montana. After completing their work, the Claimant forgot to restore the South Siding Switch and Derail to their normal position. As a result, several hours later, at about 2125 hours, Train M-LAUSHM1-18A, operating from Laurel to Great Falls, Montana, ran off the main track and onto the siding, where it collided with the Slot Train. The Train Crew had not observed that the switch was in the wrong position until about five car lengths from the switch. They placed the train into emergency but were unable to avoid the collision. Both trains derailed and sustained damage. Both train crew members were injured, but not seriously. The Claimant was not present at the site when the accident occurred—after completing his flagging work for the day, he had been assigned to weld in Great Falls. On July 18, he had worked over 13 hours; on July 19, he worked from 0730 until after midnight.

The Claimant was charged with failing to return the switch to its proper position, failing properly to document the switch position on the Position of Switches/Derail form, and failing to protect men and equipment.

An investigation was held August 11, 2011. The Great Falls Roadmaster reviewed the incident. The Claimant had not properly filled out his Track Authority form and voided it after the Slot Train had completed its work in the area of the accident. The Dispatcher had had to contact Claimant to remind him to report clear of his authority, which he did at 1948 hours. Under MOWOR 8.2, the employees handling switches and derails must make sure that they are properly lined for the intended route. The track in the area is dark, and the paper Position of Switches/Derails form is the only safeguard against switches not being properly lined. The Claimant acknowledged his failure to return the switches to the correct position. He also noted that he seldom, if ever, has to line switches and document their position in his normal job as a Welder. Most of his work is performed in the Yard at Great Falls and he does not have to fill out a number of forms. The Organization submitted documentation relating to three other MOW employees who, on July 16,

2010, had similarly failed properly to reline switches back to their normal position, as a result of which a collision occurred. However, those three employees were not terminated, but assessed a Level S 30-Day Record Suspension with a one-year review period.

According to the Carrier, Claimant was grossly negligent in the performance of his job duties and caused a significant derailment that had significant damage to persons and property. Termination was entirely appropriate. The Organization argues that there were a number of extenuating circumstances at play that mitigate against dismissal for the Claimant, given his long years' exemplary service. Moreover, the Claimant is the victim of disparate treatment, in that the Carrier has not dismissed other MOW employees who committed the same infraction, with the same result, and it has not explained the basis for Claimant's differential treatment.

FINDINGS AND OPINION:

Public Law Board 7602, 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 Board has jurisdiction over the dispute involved herein.

The Board recognizes the importance of the Carrier's numerous rules and regulations regarding switch positions and the critical need for switches (and derails) to be properly lined at all times. Employees who are negligent in performing these duties are subject to serious discipline, especially where that negligence has resulted in a derailment, as happened here. Nonetheless, this case does present significant extenuating circumstances that explain and mitigate Claimant's actions. First, Claimant was assigned to perform job duties for which he had not been trained and which were significantly different from his normal job duties as a welder. Moreover, he was apparently working without supervision. It is unrealistic and unreasonable for an employer to expect an employee to be able to assume entirely new job responsibilities without any kind of training or oversight. The incident occurred on only the second day that he was working as a Pilot Flagman. In addition to his flagging duties, he had to oversee the Slot Train Operator's work. Again, this is work well outside his normal job duties. The Dispatcher, who had to contact Claimant about voiding his track authority, was aware that Claimant was not properly following protocols for flagmen relative to handling forms, which should perhaps have alerted someone that the Claimant needed some instruction and/or training and oversight.

The more serious problem from the Board's perspective, however, is the apparent disparate treatment to which the Claimant was subjected. The record includes documentation that about a year before, three other employees who forgot to reline a switch, causing a derailment, were not terminated, but were assessed Level S 30-day record suspensions with a one-year review period.

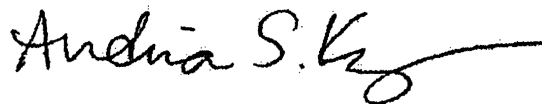
The Organization raised this comparative discipline at the investigation. The Carrier's September 8, 2011, letter of dismissal states: "In assessing discipline, consideration was given to your personnel record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA)." No mention is made of the comparative discipline or why the Claimant was treated more harshly. One of the fundamental principles of industrial justice is that employees in similar circumstances should be treated similarly. Otherwise, discipline is arbitrary. The cases offered by the Organization appear to be remarkably similar to what happened in this case. Claimant is a long-term employee with an unblemished record. Absent any explanation whatsoever from the Carrier for the differential treatment, the Board must conclude that there is no basis for the disparity and will reverse the excess discipline. Claimant's dismissal shall be reduced to a Level S 30-Day Record Suspension with a one-year review period. He shall be returned to work with back pay and benefits restored.

AWARD

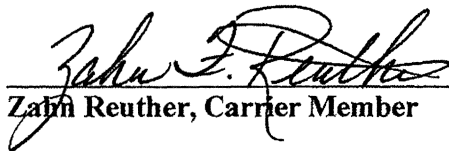
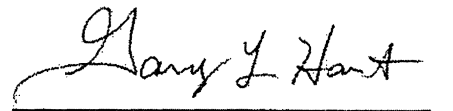
Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant 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


Zach Reuther, Carrier Member

Gary Hart, Organization Member

March 10, 2014