

Award No. 19
Case No. 19
NMB Case No. PLB-07602-000019

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

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

Carrier File No. 11-12-0213
Organization File No. B-M-2536-M

Claimant — Daniel Josef Baranyai

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed upon Mr. Daniel Josef Baranyai by letter dated February 28, 2012, for alleged violation of El 3.1.3 Restoring Derailments, MOWOR 1.13 Reporting and Complying with Instructions, MOWOR 1.3.1 Rules, Regulations, and Instructions, and MOWOR 1.6 Conduct, theft of lading products during cleanup days following the Bainville Derailment at MP 163 Glasgow Subdivision sometime between the dates of January 17, 2012 and January 18, 2012, by information made known to this office from the Special Agent-Havre, MT on January 20, 2012, while he was assigned as a Sectionman working on the Montana Division North.
2. As a consequence of the violation referred to in Part (1) above, Claimant Daniel Josef Baranyai shall now receive the remedy prescribed by the parties in Rule 40(G).

BACKGROUND:

The Claimant entered service with the Carrier on April 11, 2011, as a Trackman. At the time of his termination, he was working as a Machine Operator based in Havre, Montana.

On January 17, 2012, there was a derailment between Bainville and Culbertson, Montana. At some point, the Roadmaster at Havre, David Nilsen, who was also Claimant's supervisor, went to the site, where Maintenance of Way employees had already been dispatched to start the clean-up. At the site, Nilsen encountered the Claimant, followed him in his truck back to Culbertson, and then drove the Claimant back to the site. According to Nilsen's testimony at the hearing, the Claimant asked him what happened to the lading material at the site of the derailment. Nilsen explained that the material still belonged to the customer shipping it and was subject to processing by the Claims Department. None of the material at the site should be picked up by employees or contractors. Nilsen dropped Baranyai off at one of the work groups and went on his way. A day or two later, according to Nilsen, he was contacted by Tom Anderson, a Special Agent in Havre, about suspicions that the Claimant had removed items from the derailment site. Anderson had gotten a hotline tip that the Claimant had taken a coat and some books from the site. Anderson went to the site of the derailment and found a small pile of clothing, which he picked up and removed. Anderson interviewed the Claimant on January 25, 2012, and asked him about his actions on the evening of January 18. The Claimant stated that after going to the Culbertson section house at the end of the day, he returned to the derailment site to look for his PPE face shield and water bottle. He was approached by BNSF Police Special Agent Mark Barthel, who asked what he was doing. Barthel accompanied Claimant until he found his items and they left. The Claimant stated that during the day, he had picked up several items of clothing, which he commented on to his co-workers, who told him to put them down because it would be considered theft if he took, so he set them on the ground. He also found a book on trains that he also set down. Anderson showed Claimant the clothing he (Anderson) had removed from the site and asked the Claimant if he recognized it. Some items he did, others he did not. Mr. Baranyai admitted taking a two-pack of pencils from the site, and gave them to Anderson. Anderson asked if he could search Claimant's car and house. Baranyai readily agreed to the search of his car but told Anderson he was staying at the house of a friend, who gave her permission for Anderson to search her home. The searches revealed nothing.

The Carrier issued a notice of investigation by letter dated January 27, 2012, "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged theft of lading products during cleanup days following the Bainville Derailment at MP 163 Glasgow Subdivision sometime between the dates of January 17, 2012 and January 18, 2012,..while you were assigned as a Sectionman working on the Montana Division North."

Following mutually agreed postponements, the investigatory hearing was held February 16, 2012. Roadmaster Nilsen, Special Agent Anderson and the Claimant testified, Nilsen and Anderson consistent with the facts outlined above. The Claimant had a different recollection of his conversation with Mr. Nilsen, and did not recall Nilsen being specific about not taking lading material from a derailment. Claimant also stated that he had initially forgotten about the two pencils

when he returned the other items he had initially taken to the site of the derailment because he had picked them up earlier. He gave them to Special Agent Anderson when Anderson interviewed him.

At the conclusion of the investigation, by letter dated February 28, 2012, the Carrier found the Claimant guilty of violating EI 3.1.3, Restoring Derailments; MAOWOR 1.13, Reporting and complying with Instructions; MOWOR 1.3.1, Rules, Regulations and Instructions; and MOWOR 1.6, Conduct, and terminated his employment effective immediately. The Organization filed an appeal, and the parties having failed to resolve the matter mutually, it has been appealed to the Board for decision.

According to the Carrier, it takes theft very seriously. The Claimant admitted to stealing pencils from the site of the derailment, and that is enough to put him in violation of Carrier rules and regulations, in particular EI 3.1.3, Restoring Derailments. He had been given specific notice by Roadmaster Nilsen on January 17 that employees could not remove any lading from the derailment site. But Claimant admitted taking a two-pack of pencils after that conversation. There is no dispute that the Claimant removed the pencils from the derailment site. That was an act of theft against the Carrier and its customers and cannot be tolerated in this industry. Theft is a stand-alone dismissible offense under the Carrier's PEPA policy. Regardless of the Claimant's tenure, theft has been recognized by numerous Boards of Arbitration as an irreparable harm to the employer/employee relationship warranting summary termination. The value of the lading taken is irrelevant: theft is theft.

The Organization contends that the Carrier has not proven that the Claimant is guilty of theft. This was the first derailment he ever worked on and he was unfamiliar with the protocol. He was honest and forthright during the Special Agent investigation and at the investigatory hearing. He had taken some items of clothing but replaced them when his co-workers told him that it could be considered theft. The Carrier has had numerous suspicions about the Claimant, but none of them were corroborated or proven. He simply forgot about the pack of pencils that he had previously put in the side pocket of his jacket. He was honest and forthright throughout the investigation into his actions, even returning the pencils when he could have kept their existence to himself. Discipline is meant to be corrective, not punitive, and a dismissal from service because the Claimant forgot to leave a two-pack of pencils valued at \$2.95 at the derailment site after he left other items there when his co-workers told him that it was theft and a violation of the rules is improper, unreasonable and excessive. In addition, numerous procedural violations during the investigation call into question the "fair and unbiased" nature of the process.

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.

Engineering Instruction 3.1.3, Restoring Derailments, includes the instruction "Do not appropriate lading involved in a derailment." This is simple common sense: the Carrier is engaged in shipping material that belongs to its customers, who would like as much of that material as possible returned following an accident. The Carrier recovers as much material as it can, but unfortunately, in the process of clearing a derailment site, typically some lading material is pushed out of the way and destroyed. It may appear to be nothing more than trash at that point; it is certainly unidentifiable as to owner. Nonetheless, the Carrier has the right to require that its employees refrain from removing any material from a derailment site: it is up to Claims, not individual employees, to determine what can be salvaged and what cannot. A rule against removing lading from a derailment site turns such removal into theft, an offense generally recognized in industry as providing just cause for immediate termination. Theft, however, requires a specific state of mind: an intention to deliberately and wrongfully deprive the employer of its (or its customers') property.

The evidence in this case is insufficient to meet the Carrier's burden of proving that the Claimant engaged in deliberate theft of lading materials. No one testified to seeing the Claimant take anything. The items of clothing that someone contacted the hotline about the Claimant's taking were actually found at the site of the derailment. A search of Claimant's car and the mobile home where he was lodging revealed no items from the derailment, and his landlady expressed surprise to Special Agent Anderson when he suggested that Claimant might have taken something because she had seen nothing new in the trailer.

The case comes down to the two-pack of carpenters' pencils that the Claimant had picked up before being informed by his co-workers that taking anything was considered theft. (Claimant and Roadmaster Nilsen had different recollections about their conversation on January 17, which suggests to the Board that Nilsen may not have been as clear in his communication as he thought he was.) Claimant was a relatively new employee, inexperienced with derailments. Initially, he picked up a variety of items and showed them to the crew he was working with. After his co-workers told him that it would be considered theft, he left the items at the derailment site, where they were later found by Special Agent Anderson. The Claimant testified credibly that he forgot about the two pencils, which he had picked up earlier and put in a side pocket of his jacket. When Claimant was interviewed by Special Agent Anderson, he was straightforward and honest, admitting to taking the pencils and returning them when he could easily have kept silent about them. In that respect, the Claimant has been punished by being too honest and forthcoming.

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The Carrier is right to insist that there is no room in the workplace for theft. But there should be room—clemency—for an honest mistake, candidly admitted and brought to light by the accused employee. The evidence is that the Claimant picked up the pencils before he was cognizant of the fact that employees were prohibited from taking *any* lading material, no matter how small or how damaged, from a derailment site. There is no reason for him to have deliberately held on to them when he returned the other items he had picked up. The Claimant made a mistake in not returning the pencils immediately when he realized that he still had them, but that fact alone does not turn his original forgetfulness into deliberate theft.

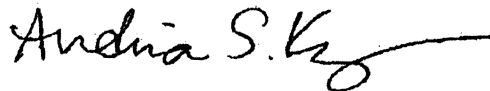
The Claimant bears some responsibility for not returning the pencils once he realized he still had them, but the facts of this case, considered under all the circumstances, do not support the conclusion that he engaged in theft. The Claim is sustained in part and denied in part. The Claimant shall be returned to work with full back pay and benefits, but for a 60-day suspension without pay.

AWARD

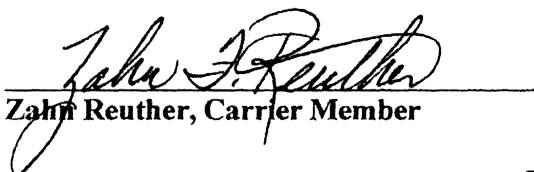
Claim sustained in accordance with the Findings.

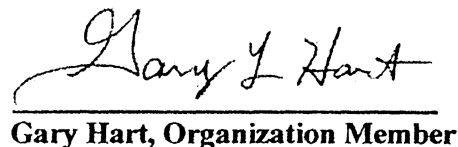
ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made, in that he shall be returned to work subject to a sixty-day suspension without pay. 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


Zahn Reuther, Carrier Member


Gary Hart, Organization Member

May 30, 2014
Date