

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 437 – Award No. 437 – Claimant: Smith
Carrier File No. 14-12-0359
Organization File No. 170-1313-125.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 16, 2012, when Claimant, Norman Smith (1742808), was dismissed for his alleged misconduct associated with the withholding of information and dishonesty in the false reporting of information regarding his report of activity restrictions following his report of injury on June 8, 2012. The Carrier alleged violation of MOWOR 1.1.3 Accidents, Injuries and Defects, MOWOR 1.2.5 Reporting, MOWOR 1.2.7 Furnishing Information, MOWOR 1.4 Carrying Out Rules and Reporting Violations and MOWOR 1.6 Conduct.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing August 16, 2012, continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Norman Smith, had been employed by the Carrier since 2007. On July 12, 2012, the Carrier notified Claimant to attend an investigation "for the purpose of ascertaining the facts and determining (his) responsibility, if any, in connection with (his)

alleged misconduct associated with the withholding of information, and possible dishonesty in the false reporting of information regarding (his) BNSF Report 51662 (Employee Personal Injury Occupational Illness Report) of June 8, 2012, and the subsequent report of activity restrictions.” The letter stated that the Carrier’s first knowledge of the alleged violation was July 9, 2012. It also stated that the investigation would determine possible violation of Maintenance of Way Operating Rules (MOWOR), 1.1.3 Accidents, Injuries and Defects, 1.2.5 Reporting, 1.2.7 Furnishing Information, 1.4 Carrying Out Rules and Reporting Violations and 1.6 Conduct. Following the investigation, on August 16, 2012, the Carrier determined that Claimant had committed the misconduct alleged and dismissed him from employment.

The applicable MOWOR provide, in relevant part:

1.0 General Responsibilities

1.1 Safety

1.1.3 Accidents, Injuries, and Defects

Report by the first means of communication any accidents, personal injuries . . .

1.2 Personal Injuries and Accidents

1.2.5 Reporting

All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed.

* * *

If an employee receives a medical diagnosis of occupational illness, the employee must report it immediately to the proper manager.

1.2.7 Furnishing Information

Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations.

1.4 Carrying Out Rules and Reporting Violations

Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of

trains, passengers or employees and any misconduct or negligence that may affect the interest of the railroad.

1.6 Conduct

Employees must not be:

4. Dishonest

Steven Hedemann, Carrier Manager of Structures for the Southwest and California Divisions, testified at the investigation that on the day at issue, June 4, 2012, he learned from a front line supervisor who reported to him that Claimant had been involved in an accident, had requested emergency medical attention, and was transported to a hospital. He and other Carrier Officers traveled to the hospital and later interviewed other employees, who had not witnessed the incident but had heard Claimant cry out in pain.

Mr. Hedemann learned that Claimant had been seen climbing into the cab of a boom truck shortly before the injury and had apparently fallen, so he went to the site, examined the truck and found nothing amiss. He stated that he also observed the ground and found no evidence of major disturbance.

Mr. Hedemann stated that he remained at the hospital while Claimant underwent several hours of medical testing, but no source for the pain was discovered. Claimant was airlifted to the University of New Mexico hospital, from which he was discharged the next day. Mr. Hedemann stated that he learned from the Carrier's Medical Department that the paperwork they had received did not indicate any source for Claimant's pain.

Mr. Hedemann added that Claimant related to his supervisor that he had a walker and pain medication. Mr. Hedemann stated that three days later, on June 8, 2012, a Carrier Officer traveled to Claimant's home, and Claimant filled out an injury report, but he did not return to work. The report was entered into evidence at the investigation. In it, Claimant stated that he had slipped on the boom truck's side steps. He recounted that he was in three point contact at the time and his hand slipped off the grab bars.

Structures Supervisor Dante Zuniga testified at the investigation that he was Claimant's Acting Supervisor at the time of the incident. He stated that he had a conversation with Claimant in the hospital emergency room, and Claimant explained that he had slipped as he climbed into the boom truck and had landed on his back. He added that Claimant maintained he was in so much pain that he could not move. Mr. Zuniga also visited Claimant the next day at the University of New Mexico Hospital and Claimant related that he was still in a lot of pain and the doctors were attempting to ascertain the cause. Mr. Zuniga traveled to Claimant's home on June 8, 2012 to obtain the injury report because Claimant informed him that he was in too much pain to travel to the Carrier's facility and could not move around much. Mr. Zuniga confirmed that

Claimant told him he was using a walker, and stated that he knew Claimant had been given prescription drugs but did not know what they were.

Mr. Zuniga testified that at the time of the investigation Claimant had still not returned to work. He added that he had not received any documentation showing that Claimant was not able to perform his duties.

Claimant testified at the investigation that on the day of the incident he performed his pre-trip checks and was talking to a co-worker and getting into his truck. He explained that he opened the door, and put his hand on the grab bar, his left hand on the door handle, and then both hands on the bars as he climbed up. His left foot slipped on the side step and he lost his grip and fell backwards to the ground. He was knocked out and a co-worker told him they had called an ambulance. He explained that when he came to his right leg was tingling and he could not really move it because it hurt so much. He stated that the medical personnel braced his leg and put him on a gurney to go to the emergency room.

Claimant stated that at the hospital he told a doctor what had happened and received intravenous pain medication. He confirmed that he was later transferred to the University of New Mexico hospital where X-rays, MRIs and other diagnostic tests were performed. He stated that the medical personnel did not tell him the cause of his pain, but gave him some paperwork, apparently with a name for his condition. He did not recall the name and did not bring the paperwork to the hearing. He added that he was released with a walker and pain medication.

Claimant testified that the doctors did not give him any instructions concerning returning to work. He acknowledged that he received a paper stating that he was released to return to work within seven days. He also acknowledged that he did not return.

Claimant stated that during the course of his injury his primary Carrier contact was Kevin Vaudt, the Carrier's Medical Care Manager. Claimant explained that he came home on June 5, 2012, and on June 8 called Mr. Vaudt and stated that he was still in a lot of pain and the medication was giving him a rash. He added that his pain continued and, on or about June 12, after follow-up by Mr. Vaudt, a doctor changed his pain medication because he was apparently allergic to it. Claimant stated that he got an appointment for June 22, and at that time was in too much pain to do anything and was just taking medication. He maintained that at the appointment the doctor informed him he had a pinched nerve. Claimant maintained that he had surgery on June 30, 2012 and continued to take pain medication. He stated that the doctors gave him a 10-pound lifting restriction, and a projected return to work date of December 2012.

Claimant testified that from June 6 until June 22 he was not able to do anything and simply stayed home and took medication. In response to questions from the Hearing Officer, he testified that he had never hidden any information from the Carrier and had told nothing but the truth.

Carrier Claims Representative Josh Gore testified at the investigation that his responsibilities include investigating employee injuries in his territory. He stated that he attempted to call Claimant on June 8 and June 11, 2012, but received no answer. He spoke with Claimant on June 15, 2012. They met face-to-face on June 18, 2012, at which time Claimant informed Mr. Gore that he had received pain medication, was using a walker and had been advised not to drive. He added that Claimant told him he was unable to work. He stated that on June 22, 2012, he had another conversation with Claimant, during which he updated Mr. Gore on his treatment, but had not spoken to Claimant since that time.

Steve Brockwell, Carrier Manager of Claims, Southwest Division, testified at the investigation that he was concerned by inconsistent reports concerning Claimant's injury, so he conducted a background check. He learned that Claimant had been convicted of driving under the influence on May 29, 2012, a few days before the incident at issue. Mr. Brockwell stated that the Carrier also decided to obtain a field observation of Claimant's movements to determine whether his physical limitations were as he maintained, since the Carrier had received inconsistent and inconclusive reports concerning his restrictions.

Mr. Brockwell described various photographs depicting Claimant's movements, which were entered into the investigation record. The record also includes a detailed typed narrative concerning Claimant's movements from June 12, 2012 to June 28, 2012; it is identified only by the notation "Sedgwick" at the bottom of the pages. There are 25 photographs, and, except for two, they are undated. However, as Mr. Brockwell explained, they correspond to the specific events described in the narrative. The photographs all appear to show the same individual, but several are taken from the back or side and the face is not visible in the majority of the photographs. The photographs show the individual walking, standing, getting into vehicles, reaching into a vehicle, lifting a bag, dragging a trash can, operating car wash equipment, climbing steps, sitting on bleachers, and walking through what appears to be a supermarket. Mr. Brockwell testified that he could identify the face in the photographs as Claimant's.

Mr. Brockwell described the events recounted in the document. He stated that on June 12, 2012, Claimant was seen leaving his residence and proceeding to a Walgreen's store as a passenger in a vehicle. Mr. Brockwell explained that a photograph showed Claimant getting into the vehicle at the Walgreens location. Mr. Brockwell added that on June 13, 2012, Claimant was seen exiting his residence, taking a trash can to the back of his home, and then driving himself to a pawn shop. Mr. Brockwell stated that Claimant was also seen leaving his home on June 14, 2012, walking in a normal manner from his home to a Chevy pickup, lifting a small child into the pickup and then driving to a gas station and then away. Mr. Brockwell added that later that day Claimant was observed at a rodeo, walking up stairs into the stadium and sitting in the bleachers for two hours with no noticeable problem. Mr. Brockwell stated that on June 16, 2012, Claimant left his residence and proceeded to a car wash, where he personally washed his car using the facility's equipment. Claimant was next observed on June 22, 2012, when he had three medical appointments and walked freely, in an unrestricted manner, the entire time. Mr.

Brockwell stated that it was only when Claimant was inside a medical facility that he hunched his shoulder as though he was in discomfort.

Mr. Brockwell testified that Claimant was also observed on June 26, 2012, driving himself to a local cable company, where he paid his bill, and at a flea market. He was also observed at a gas station/supermarket carrying an ice chest and pushing a cart inside the market. On June 27, 2012, Claimant was observed in Grants, New Mexico at a court, where he apparently had a hearing, driving his vehicle and walking in an unrestricted manner. Mr. Brockwell testified that he concluded that Claimant's actions were completely inconsistent with the physical limitations he claimed to be suffering from.

Following Mr. Brockwell's testimony, Claimant made a statement that with respect to the photographs, he was on medication and feeling a lot better, although he could not state the particular days that that was the case. He added that he was doing okay and the medication helped, but he could not really do anything himself.

The Carrier's Policy for Employee Performance (PEPA), Appendix B, includes a non-exhaustive list of stand-alone dismissible offenses. They include, "Dishonesty about any job-related subject including, but not limited to, falsification or misrepresentation of an injury . . ." Claimant's personal record shows no previous discipline.

The Carrier states that this case involves an alleged incident on June 4, 2012, when Claimant requested, and received, emergency medical attention as the result of a fall when he was attempting to climb into his boom truck. The Carrier points out that while Claimant was being treated, Carrier Officers inspected the boom truck, and the steps and grab bars were found intact, and the ground around the truck's steps was undisturbed. The Carrier adds that the next day Claimant was discharged from a hospital, without diagnosis as to the cause of his asserted pain, and with doctor's orders indicating he could return to work. However, Claimant said that he continued to suffer pain and did not return. Claimant, the Carrier states, contended that he suffered from severe pain throughout the month of June 2012, and that he went nowhere from June 6 to June 22.

The Carrier adds that on June 8, 2012, Claimant's supervisor traveled to his home and obtained an injury report; in it, Claimant claimed a back injury and stated that he had slipped on the side steps of the boom truck. The Carrier states that on June 18, 2012, Claimant met with a Carrier claims representative and told him his medical restrictions required the use of pain medications and a walker, and he was not able to drive.

The Carrier further states that due to inconsistencies in the information received, the Carrier retained a third-party contractor to engage in surveillance of Claimant. The surveillance revealed that Claimant engaged in numerous activities inconsistent with his claims of medical incapacity, including normal walking, driving, lifting, carrying trash, sitting in stadium bleachers for more than two hours, and washing his car in a self-service car wash. The Carrier stresses that after Claimant heard this evidence at the investigation, he changed his prior testimony that he remained in extreme pain

throughout June and asserted instead that the observations had been made while his pain was controlled with medication.

The Carrier urges that the charges against Claimant are proven by substantial evidence, as he was observed engaging in activities inconsistent with his injury claims. The Hearing Officer, the Carrier notes, was charged with determining Claimant's credibility, and his determination that Claimant was not credible should not be disturbed by this Board.

The Carrier concludes that there is no merit to the Organization's excuses for why Claimant should not be held accountable for his actions. With respect to the penalty, the Carrier points out that Claimant's misconduct was a stand-alone dismissible offense under the PEPA and should not be disturbed by this Board.

The Organization asserts the Carrier denied Claimant his right to a fair and impartial investigation, as the Hearing Officer required Claimant to testify before all of the Carrier witnesses had testified. It is clear, the Organization contends, that the Hearing Officer knew about the last two witnesses and intended to call them only after Claimant testified.

As for the evidence presented, the Organization contends that the Carrier attempted to establish that Claimant had certain medical restrictions, when in fact those were only recommendations from his physicians. Moreover, the photographs entered into evidence, purportedly showing Claimant engaging in activities inconsistent with his restrictions, are of such poor quality that Claimant cannot be identified, the Organization maintains. Moreover, the individual who took the photos and reported on Claimant's activities did not testify, and his account was only presented second hand by another individual, whose testimony was shaky and confusing at best. The Organization concludes that the photos simply show a man walking, sitting and driving, so, even if they were of Claimant, he was not doing anything wrong. The Organization stresses that Claimant did not violate any physician-imposed restrictions. The Organization concludes that the Carrier has failed to meet its burden of proving that Claimant did anything wrong, and urges that dismissal was extreme and unwarranted. The Organization requests that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. The Investigation Notice made it clear that Claimant was charged with dishonesty, and the Hearing Officer specifically gave him the opportunity, at the conclusion of his testimony, to avow that he had been completely truthful. The Carrier's contrary evidence was in the nature of rebuttal and impeachment of Claimant's testimony as to his injuries and activities, and, until Claimant testified, there was nothing for the Carrier to rebut. The Organization's argument that the Carrier was required to present this evidence in the first instance amounts to an assertion that the Carrier was required to give Claimant an opportunity to conform his testimony to the Carrier's proof, which would be inconsistent with the nature of the Carrier's burden in this case, which was to

prove Claimant guilty of dishonesty. The Carrier did not deny Claimant a fair and impartial investigation.

On the merits, we find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. We first note that Claimant was dismissed for dishonesty, being untruthful with the Carrier about his condition, not for engaging in activities inconsistent with his medical restrictions. The Carrier's witnesses testified that during the relevant time period Claimant told them that he was in too much pain to do anything, could not drive, and needed a walker to move about, testimony Claimant initially confirmed. Claimant testified that from June 6 until June 22, 2012 he was not able to do anything and simply stayed home and took medication. The Carrier hired a contractor to engage in surveillance of Claimant, and the contractor's report and accompanying photographs directly contradict Claimant's testimony, as they indicate that during the relevant time period Claimant left his home on numerous occasions, walked without assistance, drove a car, engaged in physical activities such as car washing, and climbed steps and sat in bleachers at a public event.

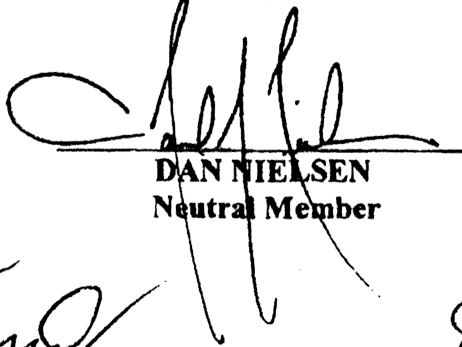
It is true, as the Organization contends, that this evidence of guilt was hearsay, as the investigator did not testify, either by telephone or in person, as to the events described in the report. Hearsay is admissible in these proceedings, with the question being the weight to which it is entitled. Here, the evidence consisted of a detailed report by an uninvolved third part, supported by documentary evidence, the correlating photographs, of an individual a Carrier witness was able to identify as Claimant.

Most significantly, Claimant essentially admitted his guilt when, immediately following the presentation of this evidence, he attempted to explain the photographs by stating that during the relevant time period he had been taking medication which helped his pain, notwithstanding his earlier contrary testimony. Upon consideration of the entire record, we conclude that the evidence is sufficient to meet the Carrier's burden of proving Claimant's guilt by substantial evidence.

Dishonesty of this nature is well recognized as a dismissible offense, and is listed as such in the Carrier's PEPA. It is not too strong to say that Claimant either fabricated, or overrepresented to a very significant extent, his injury. The Carrier did not abuse its discretion by determining that dismissal was the appropriate penalty.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this *20th* day of *Feb*, 2014.