

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 502 – Award No. 502 – J. LaJeunesse
Carrier File No. 14-18-0557
Organization File No. 2415-SL13C5-1814

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Jeremy LaJeunesse (0041590) Seniority date January 31, 2011 for reinstatement with seniority rights restored and all entitlement to and credit for, benefits restored, including vacation, and health insurance benefits. The Claimant shall be made whole for all financial losses as result of the violation, including compensation for 1) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the Claimant while wrongfully suspended); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; 3) Overtime pay for lost overtime opportunities based on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended; 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly dismissed from service commencing August 01, 2018, continuing forward and/or otherwise made whole. All notations of the dismissal should be removed from all Carrier records.

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, J.L. LaJeunesse, had been employed by the Carrier since 2011. On August 1, 2018, following an investigation, the Carrier found Claimant guilty of misconduct in connection with his approved leave of absence, specifically, dishonesty about (1) his need for leave and/or ability to return to full duty; and/or (2) the extent of any work-related physical limitations or restrictions. The Carrier found that he had violated Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct, and dismissed him from service. Claimant was on medical leave and did not attend the investigation.

The events at issue had their origins on December 20, 2017, when, at 11:37 a.m., Claimant sent an email to supervision, titled "Non-Injury Statement," relating that the Kubota vehicle in which he was riding provided rough conditions, and that a solution would be to provide a different vehicle to avoid any potential back injuries. The message did not state that Claimant had suffered any injury. Claimant thereafter filed an injury report, dated December 27, 2017, alleging that he had suffered a back injury at 10 a.m. on December 20, 2017. The Carrier placed Claimant on medical leave on December 22, 2017.

Claimant thereafter entered upon a course of medical treatment, lasting until about mid-June 2018, for low back pain, mid back pain and bilateral leg pain. A record from Spine Medicine, dated January 10, 2018, indicates that Claimant told the provider he was injured when, while examining track, he hit a large pothole, causing a severe jolt to his spine. It states that any significant force in the lower extremities aggravates the low back and limits strength. The report indicates Claimant stated that any sort of bending caused significant increase in his pain. A January 23, 2018 document from the same provider states that Claimant could not meet the 50 pound weight limit which was part of his regular job. Another medical record dated February 7, 2018 indicates that Claimant had undergone an MRI, and it did not explain the extent of his numbness or pain given that it showed no nerve compression or compression of the lower thoracic spinal cord. There are references throughout the medical records entered into the hearing record that bending at the hip or lower back was one of the primary reasons Claimant could not return to work.

An April 3, 2018 Spine Medicine report stated that Claimant was undergoing physical therapy, gradually building strength, and that his main limitation was difficulty bending without increasing back pain, and that there had been a discussion about Claimant having one more month of exercise before returning to work. An April 19, 2018 record from Paradigm PT and Wellness states that Claimant reported he was feeling better and was able to perform light exercises and weightlifting, but could not perform high intensity work such as heavy lifting. On May 3, 2018, Claimant returned to Spine Medicine to obtain work restriction paperwork, and the doctor set out a set of restrictions under which Claimant could work if they could be accommodated, as he was unable to return to his regular duties. The restrictions included no repetitive lifting over 10 pounds, and no lifting over 20 pounds.

At some point in April 2018, the Carrier hired a private investigator to conduct surveillance of Claimant. The Carrier entered into the record a 15 minute 41 second video taken by the investigator, which was played at the investigation and observed by the Organization representative. At 2:19:12 p.m. on April 21, Claimant can be seen at a Home Depot store in Los

Lunas, New Mexico. He bends at the hip and waist, several times, to retrieve a box from the bottom shelf, notwithstanding that medical records indicate he reported a minimal range of motion. There was no difficulty or discomfort observable on the video, and he is seen smiling and talking to people nearby. Outside Home Depot, the video captures Claimant jumping into the bed of his pickup truck, loading patio furniture and then jumping to the ground, without any assistance.

The next day, April 22, the investigator filmed Claimant at Planet Fitness in Los Lunas, performing squats and lunges. He is seen racking and un-racking weights. He eventually lifts all of the heaviest weights off the bar, and performs his highest intensity workout, a set of squats with two of the heaviest weights on each side along with one of the third-heaviest weights, for a total of approximately 235 pounds.

The Organization contended that Claimant was denied his right to a fair and impartial investigation, arguing primarily that the video file was received into evidence notwithstanding that there was no way for the Carrier to transcribe it, and that the investigation was conducted without Claimant in attendance. We find these assertions without merit, as the Carrier granted two postponements and the fact that Claimant was on medical leave did not preclude him from attending the investigation. In addition, the Organization had every opportunity to view the video.

On the merits, the Carrier points out that Claimant's physical therapy record from April 19, 2018, just two days before the videos were taken, indicate he told the therapist he was feeling better and could do light weightlifting, but still could not perform heavy lifting. The medical records indicate that Claimant repeatedly told his medical providers he had difficulty bending from the waist, and he obtained work restrictions limiting him to very light lifting. The Carrier states that what Claimant was observed doing in the videos was not consistent with the restrictions he obtained some 10 days later, as he was observed bending without difficulty and engaging in weightlifting activity which exceeded his weight restrictions by a great deal.

The Organization contends that Claimant was not dishonest, that he was doing what he could to get back to work, and that the restrictions came from the doctors, not him. The exercises he was observed doing were what he was working on with the physical therapist, the Organization argues.

We do not agree. The Home Depot video shows Claimant repeatedly bending almost to the ground without difficulty, and at Planet Fitness he engaged in heavy weightlifting. Yet just 10 days later he sought, and obtained from his doctor, limitations to very lightweight lifting, limitations which prevented him from performing his regular duties. No one disputes that it was Claimant seen on the video, and there is no explanation for the gap between what he was observed doing and what he told his medical providers, and the Carrier, that he could do, other than that he was dishonest about his physical condition.

It is well established that dishonesty is the sort of severe offense which warrants dismissal, even in the first instance. We see no reason to disturb the Carrier's conclusion that this penalty was warranted here.

AWARD

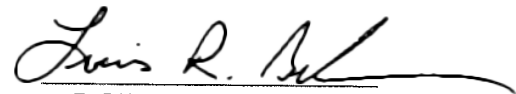
Claim denied.



DAN NIELSEN
Neutral Member



SAMANTHA DAIGLE
Carrier Member



LOUIS R. BELOW
Organization Member

Dated this 9th day of June, 2021.