

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 534 – Award No. 534 – J. Walker
Carrier File No. 14-20-0002
Organization File No. 2407-SL13C5-1956

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of James Walker (1675214) seniority date October 8, 2007, for the reinstatement with seniority, vacation, all rights unimpaired, pay for all wage loss including lost overtime earnings, and reimbursement for all medical expenses incurred including medical coverage purchased commencing December 4, 2019, 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, J. Walker, had been employed by the Carrier since 2005. On December 4, 2019, following an investigation, the Carrier dismissed Claimant from service for failing to comply with instructions when he was smoking in a Company vehicle on November 14, 2019. The Carrier found that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 1.5.6 Smoking and 1.13 Reporting and Complying with Instructions.

At all times relevant, Claimant was working as a Truck Driver near Lamar, Colorado. At the investigation, Division Engineer William Forbes testified that he received a DriveCam video from the Carrier lowboy truck Claimant was driving on November 14, 2019; it had triggered when Claimant braked behind a semi-truck. Two screenshots from the video were entered into evidence at the investigation.

In the first shot, Claimant has his hand to his mouth, holding a lit cigarette. The second screenshot shows Claimant a few seconds later, with the lit cigarette still in his mouth and his hand back on the steering wheel, as he approaches the back of the semi-truck. Mr. Forbes explained that the screenshots show Claimant in the cab of a Carrier vehicle smoking a cigarette, which directly violates MOWOR 1.5.6.

Mr. Forbes also testified that he had a previous conversation with Claimant, in May 2019, clearly instructing him that he was not allowed to smoke in a Company vehicle. He stated that he told Claimant if he needed to smoke, he should pull over and find an area to do so. According to Mr. Forbes, Claimant's failure to comply with this instruction violated MOWOR 1.13. and constituted insubordination under MOWOR 1.6. He further testified that during this May 2019 conversation, he provided Claimant information for the Employee Assistance Program (EAP) to pursue options to quit smoking.

Claimant admitted the screenshots were accurate, that he was smoking in his vehicle, and that he had previously discussed not smoking in his vehicle with Mr. Forbes. He further stated that he was not insubordinate and did not mean to violate his instructions from Mr. Forbes, citing his decades long addiction to nicotine and prior unsuccessful attempts to quit. Claimant also testified that he contacted EAP around November 18 or 19, 2019 and was receiving assistance to quit smoking as of the date of the investigation. Claimant described his smoking in the vehicle as a habit, but further testified that he could have made a choice not to smoke in the vehicle and he had previously stopped his vehicle to smoke outside.

Claimant previously received a 30-day Record Suspension with a one-year review period for improperly using an electronic device while operating a Company vehicle on April 30, 2019. He then received a Formal Reprimand with a one-year review period on May 29, 2019, for smoking while operating a Company vehicle.

The Carrier argues that it provided substantial evidence of Claimant's guilt. Indeed, Claimant admitted he knew the rules and that he broke them by smoking in the vehicle. Claimant also had a previous disciplinary mark on his record for the same violation in May 2019, just six months before this incident. The Carrier acknowledges that its Policy for Employee Performance Accountability (PEPA) classifies smoking as a standard rather than serious violation, but, the Carrier stresses, Claimant already had another disciplinary event on his record for this same exact violation and admitted he knowingly violated the rule again. This was also Claimant's second serious violation within an active review period. Under these circumstances, dismissal was appropriate. The Carrier urges that the claim be denied.

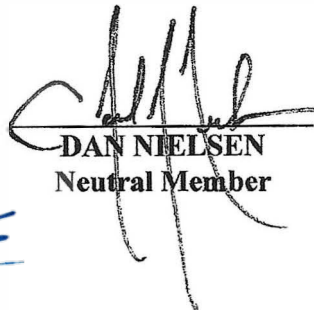
The Organization asserts that Claimant's smoking is a habit and an addiction, and that he did not even realize at the time that he was smoking in the vehicle. The Organization maintains that the monotony of sitting in a truck all day, coupled with Claimant's addiction, set him up for failure, and Claimant has since contacted the Carrier's Employee Assistance Program to help him quit smoking. Claimant has been a good employee who takes pride in his job, and he never intended to violate any of the Carrier's rules. As such, the Carrier's discipline was excessive, and Claimant should be returned to service and made whole.

We have reviewed the record in its entirety and find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. Claimant admitted that he was smoking in his vehicle after having been told specifically not to, and it is well settled that such an admission is sufficient to meet the Carrier's burden. That Claimant has an addiction to nicotine and a habit of smoking does not change the fact that the Carrier put him on notice of the rules and recommended he contact EAP at least as early as May 2019. However, he failed to abide by his supervisor's instructions and did not contact EAP until after the November 2019 violation at issue here.

With respect to the penalty, however, we find that the Carrier's decision to dismiss Claimant represents an arbitrary and excessive exercise of its discretion to determine the disciplinary sanction. Claimant is a long-term employee with a minimal disciplinary record. As the Organization notes, smoking is classified as a standard, not a serious offense. The instant violation was classified as serious because of his failure to follow instructions, but we note that Claimant was not found guilty of insubordination as charged by his supervisor, but only of the milder offense. Claimant was within the review period for another serious offense—using his cell phone—at the time of the instant violation, but the sum total of these offenses falls far short of what is required to justify dismissal of a long-time employee. The dismissal will be reduced to a 60-day actual suspension.

AWARD


Claim sustained in accordance with Findings. The Carrier shall immediately reinstate Claimant to his previous position and make him whole for his losses beyond a 60-day actual suspension. The Carrier is directed to comply with this Award within 45 days.



DAN NIELSEN
Neutral Member



LOGAN MCKENNA
Carrier Member



JEFFERY L. FRY
Organization Member

Dated this 31 day of August, 2023.