

PUBLIC LAW BOARD NO. 7425

PARTIES) SMART - TRANSPORTATION DIVISION
TO)
DISPUTE) BNSF RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of Pacific Fifth Seniority District (Pasco, WA) Switchman Tyler Christensen for reinstatement to service with seniority rights unimpaired, removal of censure from his personal record and pay for all time lost including but not limited to the following: payment of vacation allowance, health and welfare costs, reimbursement of all expenses related to the pursuit of alternative employment, reimbursement for any damages incurred as the result of discharge from service including proceeds on any property, real estate or financial instruments sold to replace lost compensation, as a result of an investigation held on April 10, 2015. (Organization File No. D977-154-15A; Carrier File No. 50-15-0085D)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The issue that gave rise to the claim stems from the undisputed fact of the Claimant having told Terminal Superintendent Bailey in an October 2014 conversation that he was experiencing an inability to work safely with an RCO (Remote Control Operation) transmitter box; the Claimant asserting the RCO box was aggravating back pain. The RCO box is secured to either a vest or a padded belt which positions it in front of the operator's abdomen. Use of the RCO pack box is a primary function of the job duties of assignments for which the Claimant could be regularly called to work.

It is the position of the Carrier that the above referenced statement of the Claimant gave proper and reasonable grounds to question the Claimant's continued ability to perform his regular duties with safety to himself and fellow employees. Accordingly, the Carrier says it removed the Claimant from active service on October 21, 2014 to ensure the Claimant's safety and the need of a fitness for duty medical evaluation. In this respect, the Carrier says that when the Claimant was removed from active service he was instructed that he need comply with any

instructions from the Medical Department for needed medical records before being considered in an exercise of seniority for a return to service.

The Carrier submits that the Claimant failed to comply with the instructions to provide the Medical Department with needed medical documentation so as to be able to evaluate the Claimant's assertions that work assignments requiring the operation of an RCO box aggravated his back pain.

In the circumstances, the Carrier notified the Claimant by letter dated February 19, 2015 to contact the Carrier's Medical & Environmental Health Department within fifteen (15) days of receipt of the letter; this letter reading as follows:

This letter is in regards to your absence from work since October 21st, 2014 whereby you informed your supervisor that you had a medical condition that prevented you from safely performing the duties of your job. You have not complied with the numerous requests from Medical Environmental Manager, Anthony Frazier. Since October 21st, 2014 he has attempted to unsuccessfully contact you by phone on at least eight occasions. On two occasions, he has been able to discuss the requirements with you by phone for assessing your fitness for duty and necessary medical records that you agreed to provide. He has written to you three times requesting the same information to determine your fitness for duty. You have not responded to any of these requests.

You must provide the following information to Anthony Frazier, Medical & Environmental Health Department, 4510 E. Wisconsin Avenue, Spokane, WA 99212, within 15 days of receipt of this letter.

- Results of a physician's examination conducted within the last 30 days that includes diagnosis of the medical condition for which you are currently being treated.
- Treatment plan or treatment being received.
- An approximate length of time that this treatment will continue.
- Your current functional level – along with your current medical restrictions.

This information is needed in order to authorize your absence from work.

Failure to comply with the above instructions will subject you to discipline up to and including termination from service.

The Carrier says the Claimant having failed to comply with the aforementioned instructions it then notified the Claimant by letter of March 13, 2015 to report for an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with an alleged failure to comply with instructions by not providing pertinent medical documentation for evaluation as outlined in its certified letter dated February 19, 2015.

The investigation, initially scheduled for March 24, 2015, was mutually postponed and conducted on April 10, 2015. The Claimant and his representative were present for and provided opportunity to offer a defense of the Claimant's actions.

By letter of April 23, 2015 the Carrier notified the Claimant that it had determined through testimony and exhibits brought forth during the investigation that he was in violation of GCOR 1.6, Conduct, and GCOR 1.13, Reporting and Complying with Instructions, and therefore dismissed from service effective that same date.

During appeal of the claim, the Carrier, by letter of June 9, 2015, offered the Claimant reinstatement to service based upon his concurrence no later than fifteen (15) days from first attempted delivery of the letter to the conditions set forth in the letter. The listed conditions were that the Carrier would remove the disciplinary mark of dismissal that was assessed on April 23, 2015; back pay would be afforded if the Claimant could show that he was physically capable of working between April 23, 2014 and the date of the letter (June 9, 2015); contact must be made with his supervisor within fifteen (15) days of delivery of the letter to start the reinstatement process; he must be fully evaluated by the Carrier's Medical Department and given a full medical release to return to service; and, once cleared by the Medical Department must contact Terminal Superintendent Bailey to schedule a time to complete the required Rules Examination and Familiarization trips.

It was not until a month later, July 8, 2015, that the Claimant responded to the above June 9, 2015 Carrier's offer of a conditional reinstatement to service. In this respect, the Claimant sent an e-mail message to the Carrier that reads as follows:

This is Tyler Christensen former BNSF employee responding to a letter of reinstatement dated June 9, 2015.

I do not accept under the conditions provided in the letter. Here is my counter offer.

- 1) BNSF Agrees to remove all disciplinary marks regarding the dismissal and failure to comply charges.
- 2) I will receive back pay from the point I was pulled out of service date of Oct 21, 2014.

- 3) Since I never asked or applied for medical leave, nor did I ever give reason to be evaluated, there will be no medical evaluation.

The Carrier maintains that in view of the Claimant having rejected its June 9, 2015 offer of a conditional reinstatement to service, and the Claimant not having responded to the June 9, 2015 offer within the stated fifteen (15) days from the date of first attempted delivery of the letter, that the Claimant forfeited a right of reinstatement and that its discipline decision of a termination of service as issued on April 23, 2015 be recognized as in force and effect. Moreover, the Carrier submits that at the time of the incident the subject of this dispute that the Claimant was on an active Level S thirty-six (36) month probationary review involving a prior failure to comply with instructions in violation of GCOR 1.13.

The Board has reviewed vigorous argument offered by the Organization in defense of the Claimant and does not find them to be of sufficient substance to hold that the Claimant had been denied a fair and impartial hearing or that sound reason exists to sustain the claim. It is also noteworthy that when the Claimant was asked at the hearing if he had willfully disregarded the instructions listed in the above referenced February 19, 2015 letter, the response of the Claimant was: "Uh, yes."

In the opinion of the Board, study and analysis of the record supports the right of the Carrier to have withheld the Claimant from service as a result of the Claimant's contentions that he was suffering back pain as a result of being required to operate an RCO box in the performance of his job assignments. It is also evident that the Carrier had the right to require the Claimant provide needed medical records for an evaluation of his alleged physical disability. The Claimant having failed to comply with the Carrier's instructions and having rejected the reasonable terms of a conditional reinstatement to service, we will not disturb the Carrier's assessed discipline. As stated in First Division Award No. 16430, BRT v. UP, Arbitrator Floyd McGown: "The Carrier would have been derelict in its duty had it reinstated this claimant, thereby again placing him in jeopardy of still another and possibly more serious injury to his back."

AWARD: Claim Denied.



Melissa A. Beasley-Coke
Carrier Member



Robert E. Peterson
Chair & Neutral Member



J. Michael LaPresta
Organization Member

Fort Worth, TX

Dated: 9/25/17