

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33858
Docket No. MW-34365
99-3-97-3-986**

The Third Division consisted of the regular members and in addition Referee Sandra Gilbert Pike when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(The Burlington Northern and Santa Fe Railway Company
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Section Laborer R. J. Almanza for alleged violation of Maintenance of Way Operating Rules 1.5 and Rule 1.1.2 and failure to be alert, attentive, and devote himself exclusively to his duties resulting in his being struck by an oncoming vehicle at Frontage Road near Mile Post 59.0 on July 29, 1996, was arbitrary, capricious, unwarranted and on the basis of unproven charges (System File B-M-495-F/MWB 970204AA BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service, with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers 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 Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On July 29, 1996, Claimant was working with the Conrad Section near Brady, Montana. At approximately 5:00 P.M., Claimant left the truck to pick up yellow/red flags. The truck was parked across a highway from the flags. Claimant headed down the track in the wrong direction. R. B. Robles honked the horn and motioned for Claimant to return to the truck. While crossing the frontage road near Mile Post 59 approximately four miles north of Brady, Montana, Claimant was struck by a motor vehicle. 911 was called and Claimant was rushed to the hospital. It was determined that Claimant had suffered a broken leg and numerous contusions and bruises. Claimant provided a urine sample in the hospital, which showed positive for the presence of cannabinoids (THC). Claimant had over 15 years of service with this Carrier at the time of the incident.

By letter dated August 7, 1996, Claimant was notified that he was being withheld from service and was advised to attend Investigation in connection with "your alleged inattention to duty which resulted in your being struck by an oncoming vehicle while crossing the frontage road" . . . "and alleged violation of Rule 1.5 according to positive results of a subsequent drug screen performed on July 29, 1996."

Following the Investigation which was held on October 9, 1996, a Notice of Discipline was issued on October 25, 1996, notifying the Claimant that he had been found guilty and informing Claimant that he was dismissed from service for violating Maintenance of Way Operating Rules 1. 1.2 and 1.5.

The Organization appealed Claimant's dismissal to the Carrier's highest designated Officer, and the appeal was denied. Thus this claim is properly before this Board for adjudication.

The Organization contends that the investigation was not fair and impartial because (1) the Carrier failed to produce witnesses whose testimony may have been helpful to the Claimant (2) that due to improper handling, the Carrier failed to ensure chain of custody of the Claimant's urine specimen and that the finding of guilt was based

on the positive results of the flawed urinalysis (3) that the Carrier did not produce sufficient evidence to support Carrier's conclusion.

The Carrier contends that the Investigation was fair and impartial. (1)The Carrier contends that it is not responsible to produce witnesses who are not within the control of the Carrier. (2)The Carrier argues that Chain of Custody procedures are intended to safeguard blood or urine samples taken in remote locations by Railroad employees and handled by a wide variety of individuals in route to testing and that such variables did not exist. The urine specimen was taken in accordance with the hospital procedure and sent directly to a testing facility outside the hospital for testing. Further, the Carrier argues that Chain of Custody procedures are irrelevant where no substantive evidence of tampering or mishandling is produced. (3)The Carrier contends that sufficient evidence was produced to support the dismissal of the Claimant.

As to point (1):

Certainly it would have been better for the Carrier to have attempted to produce the driver of the vehicle which struck Claimant and the police officer who investigated the incident. However, the Carrier has no subpoena power and could not, in this case, have ensured the appearance of witnesses over whom the Carrier has no control. For this reason, the Board finds the failure to call these witnesses was not a deciding factor and did not result in an unfair hearing.

As to point (2):

As to the lack of a chain of custody in the urine specimen, the Organization argues that the specimen was improperly handled and that the proper chain or custody procedures were not followed. The Transcript reveals that the specimen was taken in the hospital and sent outside the hospital for testing. In a letter dated October 7, 1996, the Director of Toxicology of the lab that performed the testing stated that the urine specimen "was collected as a clinical specimen, not a legal or forensic one. This means the specimen was not protected by forensic seals, and was not collected using a chain of custody." This statement indicates that this lab is familiar with tests conducted for legal or forensic purposes and could have collected the specimen "using a chain of custody" if so instructed. There is nothing in the record to indicate that a request was made for the proper handling of the specimen for legal or forensic purposes. The Federal Railroad Administration and the Department of Transportation require chain of custody

safeguards in the collection and handling of employees' blood and urine samples. These requirements for evidence are important since it is often difficult to prove that the evidence was mishandled or tampered with, and the evidence may be utilized to determine whether discipline will be assessed. Claimant raised the issue of mishandling and has proven that the required procedures were not followed in this case. This Board finds that the urine sample should not be considered as substantive evidence in this case because the required procedures for the collection of specimens to be used as evidence were not followed.

As to point (3):

The issue, then, is whether or not there was sufficient evidence adduced in the Investigation, to support Carrier's conclusion that Claimant violated Rule 1.5 and Rule 1.1.2 on the date of the incident.

Rule 1.5 states:

"The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property.

The use or possession of intoxicants, over-the counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property."

Rule 1. 1.2 states:

"Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury."

The Carrier argues concerning Rule 1.5 that Claimant admitted to Roadmaster Sherman that he had used marijuana two days prior to the accident. The Carrier argues on Rule 1.1.2 that the testimony of R. B. Robles states that Claimant was going to pick up the wrong flags, did not look both ways and was inattentive. The Carrier argues that Claimant failed to exercise caution, thereby rendering Claimant responsible for his injury.

The Organization contends concerning Rule 1.5 that Claimant denies having made any confession of drug use and that the Carrier cannot rely on the uncorroborated testimony by a Carrier Official that Claimant admitted using marijuana two days prior to the accident. The Organization contends concerning Rule 1.1.2 that the Claimant was alert and aware but could not avoid the accident. Finally, the Organization argues that even if Claimant was found to be in violation of Rules 1.5 and/or Rule 1.1.2, the discipline is unwarranted and excessive.

This Board does not review factual findings de novo and generally defers to findings made on the property. Those findings must be based on the evidence in the record and cannot be based on speculation or conjecture. The fact that an employee was injured does not alone establish that the employee operated without proper caution or in an unsafe manner. See e.g., Third Division Award 22986. "The burden of proof is on the Carrier to prove, by direct relevant evidence, that the Claimant was in violation of some rule or order in order to justify taking disciplinary action against him. Special Board of Adjustment No. 924, Award 82.

The Police report states that the driver of the vehicle saw the pedestrian (Claimant) walking east from the railroad tracks. "Pedestrian looked south and walked onto the road. Driver attempted to stop, but was unable to and struck the pedestrian. . . . Small hill just north of the accident scene could've reduced visibility for pedestrian." The police report makes no mention of drugs and is inconclusive regarding whether the Claimant could have avoided the accident.

Testimony indicated that the truck was parked across the road from where flags were to be retrieved. There was conflicting testimony as to the clarity of the instruction given to the Claimant regarding which flag to retrieve. Mr. Zahn testified that all he heard Mr. Roble say was to take down the flag. Thus, the evidence did not clearly indicate that picking up the wrong flag was a result of inattentiveness. The transcript indicated that after looking in one direction, Claimant locked eyes with his supervisor.

Mr. Robles testified that he did not see the oncoming vehicle before Claimant was struck because his eyes locked onto those of the Claimant. Roadmaster Sherman testified that Claimant seemed "very, very alert" to him in the hospital shortly after the accident. This evidence combined with the police report offer no clear evidence of inattentiveness.

Roadmaster Sherman testified that Claimant had confessed to him that Claimant had used marijuana. Claimant testified that he had not used marijuana for several years prior to the accident and that he had not confessed to Mr. Sherman that he had used marijuana. The testimony of Roadmaster Sherman is uncorroborated by other evidence.

We are forced to conclude that the dismissal of Claimant was not supported by substantial evidence. Carrier has not met their burden of proof. The dismissal was based upon a urinalysis for which proper procedure was not followed, a confession, which Claimant denies having made and is otherwise uncorroborated, and circumstantial evidence which is insufficient to establish that Claimant is guilty of misconduct. The claim is sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of December 1999.