

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38352
Docket No. MW-38749
07-3-05-3-156

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(CP Rail System (Soo Line Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [removed and withheld from service on October 31 through December 1, 2002 and additional five (5) day suspension from work beginning December 2 through 6, 2002] imposed upon Mr. R. Severson for his alleged refusal to provide a specimen and alleged violation of Company policy regarding drug testing following track car collision in connection with his leaving the property for medical attention following a collision in which the ballast regulator he was operating collided with a Model 26 Spiker on October 30, 2002 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-02-390-002/8-00439).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Severson shall receive the remedy prescribed by the parties in Rule 20(g)."

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.

The Claimant, a Machine Operator, was operating a ballast regulator on October 30, 2002, at approximately 3:20 P.M. when it collided with a parked, unmanned anchor spiker. After the accident the Claimant stated that he saw that the machine ahead of him had stopped, and he reached for the brake, but hit the throttle instead. The ballast regulator then ran into the back of the spiker. As the vehicles collided, the Claimant was thrown forward and hit his forehead on the windshield of the ballast regulator. He was wearing his hard hat at the time. The Claimant got out of his vehicle under his own power. He approached B. Nilson, Crew Equipment Maintenance Supervisor, and explained what had happened. The Claimant and Nilson walked together to the scene of the accident, and Nilson observed that both plow pins were broken on the ballast regulator, and the frame above the towing hitch was bent into the bulk bin on the spiker. The turntable hanging on the back was also broken. The Claimant told Nilson that prior to the collision he was having trouble getting the ballast regulator into travel gear and keeping it in gear. According to the Claimant, this diverted his attention and contributed to the accident.

Nilson testified that while he had his head down by the machine, looking at the transmission, he mentioned that they needed to wait for Track Program Supervisor D. Balmer to do a follow-up incident report and a test. Nilson examined the ballast regulator a little while longer, and when he looked up, he saw that the Claimant was walking away. Nilson acknowledged that it is possible that the Claimant did not hear what he said about taking a test. By "test Nilson explained, he meant a drug test.

Nilson called Extra Crew Foreman D. Keller, who was at the front of the crew, and told him that when the Claimant got there to tell him that he had to stick

around because Balmer wanted to talk to him. Previously the Claimant had come up to the Foreman and told him that he was sick and was leaving. The Foreman saw that the Claimant was in his vehicle at a crossing. He stopped the Claimant and told him "you have to stay here" because Balmer "wants to talk to you." The Foreman watched the Claimant go down to the end of the block and assumed that he was going to stop. Later the Foreman was told that the Claimant had left.

The Carrier's Drug and Alcohol Testing and Awareness Programs includes what the program calls Unexplained Human Response Testing (UHR). It is distinguished from "Reasonable Suspicion" testing, which is done when "an employee exhibits behavioral or physical signs or symptoms." The UHR program provides that "Testing will be done after the following:

"The employee has been involved in an accident/incident and the supervisor/manager has reasonable belief, based on specific facts, that the employee['s] acts or omissions contributed to the occurrence or severity of the accident/incident. "

Employees are informed during orientations and in the Machine Operator refresher training that any collision will result in a drug test. Earlier in 2002 there had been a collision where a Spiker ran into the plate broom. The employees involved were tested. Following that incident the Maintenance Supervisor covered the incident with the Claimant's crew in their morning safety meeting wherein employees were informed of the event and that the employees were brought in for a test.

The Claimant, an employee of the Carrier since 1991, testified that he saw spots after he hit his head and did not remember some things. He told Assistant Foreman R. Miller that he was sick and that, "I'm leaving now." According to the Claimant, he also told Keller, "Dave, I'm sick, I'm leaving." The Claimant also acknowledged that the Foreman told him prior to driving away in his car that he had to wait until Balmer got there. According to the Claimant, he waited a few minutes and then "started driving and I was having trouble with driving, like I couldn't keep the car on the road. . . ." The Claimant stated that he decided to go see the doctor, stopped at a gas station for directions to the nearest hospital, and then drove to the hospital.

When asked at the Hearing whether he asked to see a physician when the Foreman and Assistant Foreman came up to him immediately after the collision, the Claimant testified, "No, there was no one to ask." Questioned why he did not mention to the Maintenance Supervisor or the Extra Crew Foreman that he needed medical attention instead of taking it upon himself to drive to the clinic, the Claimant stated, "Because no one offered it to me, they never offered to drive, they were busy, everyone was working doing their thing, I just figured it was time for me to just go get some medical attention." According to the Carrier's testimony, the Claimant did not request medical attention.

The Claimant denied that any Carrier representative told him that he had to take a drug test. Asked if it was possible that the Maintenance Supervisor told him that he had to be tested and that he did not remember it, the Claimant testified, "There's a possibility." The Claimant was asked, "Have you ever been informed or been told that if you have been involved in a track vehicle collision that you would be tested." He answered, "I realize that now, and I'm sure that I did then, but at, when push comes to shove, Rory got to worry about Rory first. . . ."

By letter dated November 27, 2002, the Claimant was notified as follows:

"Testimony developed during the investigation clearly established that you fled the property before Supervisor Balmer could request that you provide a specimen. While you did not literally state that you would not provide a specimen, testimony clearly establishes that you were instructed to wait for Supervisor Balmer to arrive before vacating the property. While you stated the reason you ignored the instructions from Foreman Keller and Supervisor Nilson to wait for Supervisor Balmer to arrive as you felt you needed to seek medical attention, you did not communicate this to any of the Foremen or the Supervisors who were at the job site at the time of the incident."

As discipline, the Carrier assessed a "suspension from service for a period of 5 days in addition to the time you have been held out of service." In addition to the suspension, the Claimant was required to meet with the EAP Administrator for a fitness to return-to-duty evaluation.

The Organization contends that the Claimant received a head injury resulting in a concussion. Therefore, he cannot reasonably be held responsible for his actions that day or immediately thereafter. At no time, the Organization argues, did the Claimant refuse a urine specimen since he was never asked to provide one. Further, the Organization maintains that there was a variance between the charge against the Claimant and the violation found. The Claimant was charged by the Carrier, the Organization asserts, with the "alleged refusal to provide a specimen for testing following a collision in which [the Claimant was] operating a Ballast Regulator. . . ." The basis given in the disciplinary letter for assessing discipline, however, the Organization contends, was for failure to wait for the Track Program Supervisor to arrive before vacating the property. Further, the Organization argues, the disciplinary letter itself conceded that the Claimant did not refuse to provide a specimen.

The Claimant provided no credible explanation for leaving the Carrier's property when he did. He stated, "Then I started driving and I was having trouble with driving, like I couldn't keep the car on the road, you know and I thought that maybe I out [sic ought?] to go see the doctor" It makes no sense that an injured person who could not keep his car on the road would decide to drive his car by himself many miles to a hospital when medical help was available to him for the asking right where he was. All he had to do was ask a Foreman or Supervisor on the premises for medical help, and an ambulance could have been called, or someone could have driven him to a hospital or clinic for medical treatment. As an 11-year employee, the Claimant was aware that if he was injured in an accident at work the Carrier would have to provide medical assistance to him if he requested it. His explanation for leaving the property is not believable. The fact that it took between four and five hours (depending on which testimony is credited) from the time the Claimant left the property until he arrived at the hospital makes it unlikely that he even went to the hospital directly from the work site.

In a letter to the Carrier dated March 19, 2004, the Organization asserts, in an effort to explain the lapse of almost five hours from the time of the incident, to the arrival of the Claimant at the hospital, "As Claimant explained in his personal injury report and transcript Claimant waited around for over an hour for TPS Balmer" Actually, the Claimant gave contradictory testimony on how much time elapsed from the time of the incident until the time he left. Toward the latter

part of his testimony, he stated that it was approximately an hour because he waited to talk to Nilson to make sure that someone could run the regulator into the hole and to make sure that things were taken care of. Earlier, however, he testified that he waited only a couple of minutes after the Foreman told him to wait for Balmer before he drove away. In that testimony he said nothing about talking to Nilson before leaving. Nor, in his testimony, did Nilson say that he saw the Claimant again that day after the Claimant walked away from him.

Contrary to the Organization's argument, the medical evidence does not establish that the Claimant suffered a concussion. The Claimant was given a sheet called "Concussion in Adults." It described what a concussion is and how it is treated. The Emergency Room medical report, however, gave a diagnosis or "Assessment" that stated, "Left forehead contusion from a work related injury." No part of the medical report states that the Claimant received a concussion.

The Claimant gave no credible explanation for leaving the property after being explicitly instructed by the Foreman to stay because the Track Program Supervisor wanted to talk to him. The Claimant acknowledged that he understood that instruction. He further acknowledged that he knew that someone involved in a track vehicle collision will be tested for drugs. Under these circumstances, the Carrier was entitled to conclude that the Claimant's leaving the property after the collision without providing a reasonable explanation for doing so and after being instructed that he had to stay until the Track Program Supervisor could talk to him was for the purpose of avoiding being tested for drugs.

The violation found was consistent with the alleged violation charged. The November 5, 2002, notification to the Claimant of a formal Investigation/Hearing stated that its purpose was "to develop all facts and circumstances in connection with your alleged refusal to provide a specimen for testing" The letter dated November 27, 2002, to the Claimant imposing discipline on him in essence gives the reason for the discipline as being that the Claimant, "fled the property before Supervisor Balmer could request that [he] provide a specimen." The gist of the statement is that the Claimant left to avoid being asked to provide a specimen. The next sentence reinforces that interpretation because it states, "While you did not literally state that you would not provide a specimen, testimony clearly establishes that you were instructed to wait for Supervisor Balmer to arrive before vacating the

property.” The juxtaposition of the observation that the Claimant did not literally state that he would not provide a specimen with the assertion that the Claimant was instructed to wait for the Supervisor before leaving the property conveys the contrast between the absence of actual words of refusal and the presence of action of refusal. The thought communicated by the November 27, 2002 letter of discipline to the Claimant is that although he did not literally say that he would not provide a specimen, by his actions of disobeying the instruction to wait for the Supervisor and leaving the property he refused to provide a specimen for testing. There was no variance between the charge against the Claimant and the violation found.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 5th day of September 2007.