PUBLIC LAW BOARD NO. 5606

PARTIES TO DISPUTE) BROTHERHOOOD OF MAINTENANCE OF WAY EMPLOYES
SPRINGFIELD TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Truck Driver Dennis D. Nelson for his alleged "refusal to test" when he failed to provide an adequate amount of urine to permit a drug test was without just and sufficient cause, excess and undue punishment.

2. Truck Driver Dennis D. Nelson shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered. (Carrier File: MW-03-71)

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. Claimant was present for and provided the opportunity to participate in hearings on his case.

Claimant, a Chauffeur (truck driver), has a commercial driver's license (CDL) and occasionally drives CDL required vehicles for the Carrier. This latter circumstance placed Claimant in a pool of employees who, by reason of working in certain positions, are subject to random drug testing as mandated by Federal (Department of Transportation, i.e., DOT) regulations and Carrier policy. As an employee in the random drug testing pool, Claimant was randomly selected for drug screen on September 2, 2003. Claimant reported as directed for the drug screen. However, Claimant failed to provide a sufficient volume of urine for testing. In this respect, Claimant was notified by letter of September 11, 2003 to report for an investigative hearing in a charge that reads as follows:

> Your "refusal to test" when you failed to provide a sufficient amount of urine to permit a drug test. This occurred when you were required to submit to a random drug test on September 2, 2003.

A formal hearing in the charge was held on September 18, 2003. Claimant was present for the investigation, and assisted in a defense against the charge by both the General Chairman and the Local Chairman of the Organization.

By notice of September 25, 2003 Claimant was advised that he was found guilty of the Carrier's Drug & Alcohol Policy and Federally mandated regulations and that he was, accordingly, dismissed from service.

As presented into the record at the company hearing, the Federal Motor Carrier Safety Administration Standards provide in part as follows:

> Section 382.305 Random Testing
>
> Any employee who holds a CDL, and may be called upon at any time, on an occasional or emergency basis to drive must be in the random testing pool at all times; . . . A drug test must be administered each time the employee's name is selected from the pool.
>
> Section 382.107 Definitions
>
> Refusal to submit (to an alcohol or controlled substance test) means that a driver:
>
> > (5) Fails to provide a sufficient amount of urine when directed, and it has been determined through a required medical evaluation, that there was no adequate medical explanation for the failure (see 40.193(d)(2) of this title);

In consideration of the case at issue, the Board has also given study to the Compliance Manual issued by the Office of Safety of the Federal Railroad Administration, particularly those provisions of Part 4.0, "Specimen Collection—Urine," that read as follows:

> 4.7 DIFFICULT COLLECTION PROBLEMS
>
> 4.7.1 Determine that the collector is capable of handling a shy bladder collection.
>
> Current regulations allow a donor three hours to provide a specimen. DOT regulations (40.193) require the clock to start only after the donor's first attempt. The donor's verbal statement that they can't provide is insufficient to initiate shy bladder procedures. The collector must ensure that the donor is physically in the collection area with collection materials readily available before it is permissible to be

notified by the donor that they can't yet produce a specimen. The collector must document the time at which the three hour period begins and ends on the "Remarks" line of the CCF.

Every effort must be made to get the donor to provide an acceptable specimen. The collector must make fluid available, and permit the donor to drink up to 40 ounces of liquid. A collector may not terminate a shy bladder collection because a donor refuses to drink. Regular reminders that the donor should drink, however, are strongly recommended.

The donor may not leave the collection area unescorted or be sent back to work during the waiting period. In all cases, the donor should be monitored during this time by either the collector or some other designated person. The donor's behavior while waiting (how much they drink, etc.) would be valuable information for the collector to record. During the monitoring period, the collector is permitted to conduct other collections as long as someone else is monitoring the shy bladder donor. The monitor does not have to be a qualified or trained collector.

At least once during the three hours, it would be beneficial for the collector to encourage the donor to make another attempt. The collector may extend the collection deadline briefly beyond the three hours only if it appears that the donor may be able to shortly provide an acceptable sample. When possible, the collector should obtain the carrier's concurrence for a time extension.

Once three hours have passed, the collector is to terminate the collection and report the situation to the carrier. After consultation with the MRO, the carrier must have the donor evaluated by a physician acceptable to the employer. The role of the referral physician is to examine the donor and determine whether there is a legitimate medical or pre-existing psychological reason not to have provided an acceptable specimen volume.

The physician's final report must specifically answer the question at issue without equivocation. There must be a direct link between a medical condition or disease, a medication, or an anatomical problem and the inability to provide a sufficient sample. Dehydration is <u>not</u> an acceptable medical explanation. Situational anxiety is <u>not</u> an acceptable psychological explanation. The physician's report is to be submitted to the employer via the MRO, who may comment but not

over-ride the referral physician's report. The employer is responsible for making the final decision on whether the incident was a refusal.

4.7.2 Determine that the collector is capable of handling a refusal to test.

Every effort should be made to encourage a recalcitrant donor to provide an acceptable specimen, including asking for assistance from the carrier whenever possible. If the donor will not provide an acceptable urine specimen, it is to be considered a refusal, and must be reported to the railroad.

If the donor will not sign the CCF but has provided what appears to be bona fide specimen, the collector is to proceed normally and note the donor's unwillingness to sign in the Step 2 "Remarks". The same procedure should be followed if the donor will not initial the specimen label. In both circumstances, the specimen is acceptable and is to be sent to the carrier's laboratory for testing.

The collector cannot require that the employee sign a release of liability form. The donor's refusal to sign would not constitute a Federal refusal, nor may the collector terminate the collection on that basis.

It is extremely important that an incident not be called a refusal when it does not meet the full requirements of the FRA Rule for that determination. FRA will take very seriously any carrier or service agent misapplication of the refusal regulations.

Once a refusal determination has been made, the regulations do not provide an opportunity for the carrier to ignore a refusal. Instead, the carrier must seek a waiver of compliance from FRA if they feel that extenuating circumstances do not warrant an automatic nine-month removal from covered service.

It is the position of the Carrier that in a failure on the part of Claimant to provide a sufficient amount of urine for a drug screen that this was equivalent to a refusal to submit to a test, and that Claimant was therefore guilty of the charge as issued against him. Further, the Carrier maintains that no adequate medical explanation was presented for Claimant's failure to provide a sufficient volume of urine when directed to do so. Thus the Carrier maintains that discipline as administered is in full accordance with its Drug & Alcohol Testing Policy, wherein it states in part that "Failure to provide specimen without documented medical condition" is considered a "Refusal To Test," which, in turn, is "Prohibited Conduct."

The Organization maintains that the record developed at the formal investigation does not support the assessment of discipline against Claimant. It also says that even assuming, *arguendo*, Claimant was guilty of culpability in the incident, that discipline as assessed is arbitrary and excessive.

Study of the hearing record shows that after reporting for duty at 7:00 a.m. on September 2, 2003, and attending a job briefing, Claimant was directed to report to the Workplace Health Clinic of the Maine General Medical Center in Waterville, Maine for the purpose of submitting to a random drug screen. While at the Clinic, Claimant made five separate attempts to provide the requisite 45cc of urine for a drug screen between 8:45 a.m. and 11:45 a.m. During this time frame, Claimant drank five cups (600cc) of water, but was only able to provide 15cc of urine. The Carrier, upon being contacted by the Clinic about such matter, in a good faith attempt to allow Claimant a reasonable opportunity to provide the required amount of urine, permitted Claimant to remain at the clinic beyond the three hour limit established by Federal regulations. During this additional time Claimant reportedly drank two 20-ounce cans of soda and another five or six cups of water, but again failed in another five attempts to provide 45cc of urine. Claimant was still only able to provide 15cc of urine. Claimant left the Clinic at 4:40 p.m.

Notwithstanding that Claimant was at the Clinic for more than three hours, or a total of eight hours, and did provide some urine, albeit an insufficient amount for testing, the report as filed by the Clinic, under the remarks section stated: "He was here for 3 hours and was unable to provide any urine." The Board also finds it significant that although testimony at the company hearing revealed that Claimant had, in fact, offered to provide a catheter specimen or permit the drawing of blood for the purpose of the drug test, no mention was made of this in the Clinic report.

Claimant's personal physician provided a statement, under date of September 2, 2003, in which he said that Claimant was under his care and has a "medical condition which makes it difficult for him to urinate on command."

The Medical Review Officer (MRO) for the Carrier (Health Resources of Woburn, MA), after contacting Claimant's physician, issued a report to the Carrier under date of September 5, 2003 that reads:

> I spoke by telephone with Mr. Nelson's primary care physician, John Baker, MD. I asked Dr. Baker for a medical diagnosis that would explain why Mr. Nelson could not provide an adequate urine specimen over a three hour period. Dr. Baker informed me that Mr. Nelson said that he could not "urinate on demand." In addition, Dr. Baker said that Mr. Nelson had no known kidney disease and was not on any medication that would affect his ability to urinate.

> **After this conversation with Dr. Baker, it was my medical opinion that Dennis Nelson did not provide a reasonable medical explanation for his failure to produce an adequate urine specimen at the time of his urine drug screen collection on 2 September 2003. Therefore, his urine drug screen should be interpreted as a "refusal to test."**

On September 12, 2003 Claimant's personal physician, Dr. Baker, addressed a letter to the Carrier MRO (Dr. Morris) that reads as follows:

> **I am a licensed physician in the State of Maine and the regular provider of care to Dennis D. Nelson. He has been a regular patient in the office for more than 15 years. At no time during our years of interaction have I had any impression of illicit drug use.**
>
> **Dennis reports to me that he has had problems in the past with voiding on demand in testing situations and this has bothered him as far back as 1968. I believe he had a "shy bladder" situation during his time of testing, which precluded him voiding during the required timeframe.**
>
> **I believe that there is a high degree of probabilities that this condition precluded him providing a sufficient amount of urine.**
>
> **Dennis has agreed that in the future, if he is requested to provide a random urine sample that permission is granted to catheterize him if he is not able to void. I can't think of any reason why a catheter specimen would not be adequate for evaluation.**
>
> **Please consider this information in your decision-making.**

In regard to Claimant having offered to undergo catheterization or subject himself to a blood test, the Director of Occupational Health at Health Resources testified as follows at the company hearing:

> **Actually the DOT (Department of Transportation) does not acknowledge blood testing for this circumstance, and we tried to find something regarding catheterization, and it only addressed individuals if that's how they would normally void. So we did place a call to the Office of Drug and Alcohol Compliance in Washington and we posed that question to them about having the ability to catheterize somebody. And we spoke with Ken Edgell who is one of the individuals that actually helps to write the new regulations . . . I'm**

> sure you're familiar with Ken . . . and he stated that the only way that catheterization can be used is if that's their normal way of voiding.

The Director of Occupational Health at Health Resources also testified that she had spoken with their Dr. Morris, who was in Philadelphia at the time, about the letter that Dr. Baker, Claimant's personal physician, had addressed to Dr. Morris under date of September 12, 2003, *supra,* as concerns Claimant having "a shy bladder." The Director said that Dr. Morris told her that he remained of the belief that he "did not feel it is a medical condition." The Director also said that Dr. Morris had checked three past drug screens in their records involving Claimant, and that the Clinic was not aware of any past voiding problems being experienced by Claimant. The Director did not have present at the hearing support documentation pertaining to any past test, but asserted that Claimant had a collection on February 25, 2002, and had provided a sufficient urine sample within one hour and five minutes after reporting to the Clinic.

Contrary to testimony of the Director of Occupational Health that Claimant had not exhibited any past problem in voiding for a drug test, and that the letter from Dr. Baker to Dr. Morris did not establish a medical problem, the Board finds it worthy of note that the Carrier hearing officer recognized Dr. Baker's letter as having provided an explanation for why Claimant could not urinate. In his questioning of Claimant, the hearing officer said to Claimant: "And the exhibits testify to the fact that your doctor did . . . did provide an explanation for why you couldn't urinate, to our doctor." Claimant, in turn, said the following:

> He tried. But . . . I've had this problem since I went in the service in 1968. Even though she says maybe I did go once in an hour. If I had urinated, say, a half an hour before they tell me, I always have big problems. And that's why that day Jeff mentioned that I went and got coffee. 'Cause all of a sudden there's something that clicks on here . . . I believe it probably is a psychology thing, that's what happened, but . . . Numerous times I've been in those hospitals three or four hours. I know it was three hours, and no one's ever told me I was gonna be done after three hours. They just told me I could not leave.

The hearing officer then asked Claimant if, up to this point, he had ever told anyone that he had this problem, and Claimant responded: "No, because to me it's a little bit embarrassing, you know. And I always have gotten through it. This time I didn't."

In the opinion of the Board, difficult as it may be to comprehend Claimant not being able to provide 45cc of urine for a drug screen in consideration of the volume of fluids that he drank over an eight-hour period of time, it seems evident that Claimant made an earnest attempt to provide a specimen for the random drug test,

including his volunteering to do so by means of a catheter specimen or blood sample. At the same time, it must be recognized that Claimant's personal physician only expressed a belief that Claimant had a "shy bladder" situation during the time of testing. He did not specifically state that Claimant had been diagnosed as having a shy bladder problem. Thus it would seem to the Board that the Carrier MRO had reason to conclude that the mere contention of a shy bladder problem did not support a legitimate medical or pre-existing psychological reason for Claimant not to have provided an acceptable specimen volume.

The above observations notwithstanding, the Board finds nothing of record shows that a formal medical evaluation had been made of Claimant by a physician acceptable to Carrier to determine whether there is a legitimate medical or pre-existing psychological reason for Claimant not to have provided an acceptable specimen volume, as mentioned in the Federal regulations, *supra*.

In the absence of a formal medical evaluation, the Board finds of interest several published articles that the Organization offered into evidence involving what is called the shy bladder syndrome or psychogenic urinary retention problem.

One article referenced by the Organization, states that there are around 17 million Americans with this problem. Moreover, that in workshops conducted by a professor of social work at the University of Maryland (Steven Soifer, MSW, PhD, author of The Shy Bladder Syndrome: Your Step-By-Step Guide to Overcoming Paruesis, and president of the International Paruresis Association), Dr. Soifer has "talked to people who've held their bladder for 12, 16, 20 hours because they could not find a 'safe' bathroom, and that unless you've experienced it, it's difficult to understand how this can be." Dr. Soifer is also reported to have said: "People [with SBS] get anxious and fear that others may be watching, listening, or waiting. It's a classic mind-body problem. If you perceive danger, your body reacts in certain ways. For people with paruresis, the internal sphincter shuts and urination is impossible."

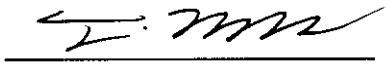
Claimant has been an employee of the Carrier for over 34 years. He has what appears to be an exemplary record of service, save but for a reprimand in 1996 and a three-day suspension in 1999. Moreover, as concerns the instant dispute, nothing of record shows that Claimant had ever tested positive in the past for either drug or alcohol abuse. Claimant's immediate supervisor described him as an excellent, qualified, very knowledgeable, safe and conscientious employee, who had never reported for work in an unfit condition. And, as concerns this supervisor having been dispatched to the Clinic when it was reported that Claimant was experiencing a problem, when asked if Claimant had offered an explanation as to why he could not produce a urine sample said: "Just that he has trouble providing samples when he goes to these things and this time it's a bigger problem than in the past."

In view of the particular mitigating circumstances of record, the Board finds discipline as imposed by the Carrier, i.e., termination of service, to be harsh and unreasonable. The Board will, therefore, direct that discipline be modified to a suspension from service in the amount of time that Claimant will have served to the date of adoption of this Award, with seniority and other benefits unimpaired, but without payment for time lost. This reinstatement to service will be subject to Claimant successfully passing a return to duty physical and toxicological testing. In this latter regard, should Claimant again exhibit an inability to provide a sufficient urine specimen for a drug screen, the Board will hold that the Carrier MRO have the option of either directing Claimant for examination by a physician acceptable to the Carrier for a determination as to whether Claimant has a legitimate medical or psychological reason for not being able to provide a sufficient void for a drug screen, or, as Claimant and his personal physician have offered, that the drug screen test results be determined from a catheter specimen or blood sample. Further, as concerns those provisions of the Compliance Manual, *supra*, that proscribe an automatic nine-month removal from covered service for a refusal to test, the Board will direct that the time Claimant has been out of service be counted as a part of the nine-month period of time.

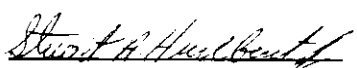
AWARD:

Claim sustained to the extent set forth in the above Findings.

Robert E. Peterson
Chair & Neutral Member



Timothy W. McNulty
Carrier Member



Stuart A. Hulburt, Jr.
Organization Member

North Billerica, MA
Dated February 5, 2004