

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 422 – Award No. 422 – Claimant: Llamas
Carrier File No. 14-10-0167
Organization File No. 180-1312-108.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing June 24, 2010, when Claimant, Charles P. Llamas (6583074), was dismissed for refusal to test on June 24, 2010 and his failure to provide a urine specimen without a valid verified medical explanation. The Carrier had first knowledge on August 6, 2010. The Carrier alleged violation 7.4 BNSF Railway Policy on the Use of Alcohol and Drugs.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and wage loss commencing June 24, 2010, and continuing forward 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, Charles P. Llamas, was hired by the Carrier in 1977. On August 9, 2010, the Carrier notified Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged refusal to test, while working as a Maintenance of Way Surfacing Gang Foreman on June 24, 2010 at Pico Rivers, California, and his alleged violation of Section 7.4 of the BNSF Railway Policy on the Use of Alcohol and Drugs, for failure to provide a urine specimen without a valid, verified medical explanation. The Notice stated that the

Carrier's first knowledge of this event was provided by Carrier Medical on August 6, 2010. Following the investigation, the Carrier determined that Claimant had violated the applicable Carrier Policy and dismissed him from service.

The Carrier's Policy of the Use of Alcohol and Drugs, dated April 15, 2009 provides, in relevant part:

Section 7. Guidelines for Alcohol and Drug Violations

7.4 Employees refusing to participate in any federal or BNSF drug test will be removed from service immediately and disqualified from service for a period of at least nine (9) months, and subject to dismissal from service with BNSF.

The essential facts of this case are not in dispute. Carrier Roadmaster Andy Trevizo was Claimant's supervisor on October 24, 2010 and scheduled him for random drug/alcohol testing. Mr. Trevizo testified that Claimant informed him he had a couple of beers at lunch, before coming on-duty, and asked how that would work. Mr. Trevizo told him that he would have to take the test and they would go from there.

The Carrier drug/alcohol testing process is governed by Federal Railroad Administration guidelines. The collector arrived at the jobsite and Claimant tested negative on a breathalyzer and then drank some water but was unable to provide a sample. After three hours, the collector contacted her company and Carrier Medical about a possible "shy bladder" situation and the decision was made to allow Claimant another hour. Ultimately, Claimant consumed 52 ounces of water over a four-hour period, but, according to the documentation included in the investigation record, was unable to provide the required 45 cc of urine. That amount must be produced in a single attempt and multiple specimens may not be combined. It appears from the record that Claimant produced very little urine. At the conclusion of the four-hour period, Claimant was removed from service pending medical evaluation.

Claimant acknowledged that the Carrier sent him to a doctor who examined him, although he maintained the doctor did not say anything. He stated that the evaluation consisted of blood work and a physical examination.

On August 6, 2010, after Claimant had been evaluated by a urologist, the Reviewing Physician for Comprehensive Health Services, Inc., Phong Dong Nguyen, MD, sent the following letter to the Carrier:

This letter is to notify you that, in accordance with applicable federal requirements this urine specimen is a refusal to test.

(Claimant) was called for a random drug screen urine collection on June 24, 2010. He was not able to provide the required 45 cc of urine. He was then given 52 oz. of water over 4 hours. He was still unable to provide the

required 45 cc of urine. As you are aware, (Claimant) underwent a shy bladder evaluation on 8/02/2010 which revealed no medical condition or pre-existing psychological disorder explaining failure to supply a sufficient urine specimen.

The same day, Martin M. Crespín, Carrier Manager Medical Support Services, sent a letter to Adam Richardson, Carrier Division Engineer, informing him of the results of the medical evaluation and instructing him to begin the investigative process and to continue to hold Claimant out of service.

Claimant testified at the investigation that he is a diabetic and that was the reason he was unable to provide a specimen. He stated that his personal physician had informed him that due to his condition he would sometimes be unable to urinate even if he felt he had to. He stated that on the day at issue he tried and tried but simply could not produce much urine, not enough to do a test. At the investigation, Claimant was questioned as to whether he had documentation from his personal physician to support this contention. He replied that he visited his personal physician's office the day before the investigation but his personal doctor was on vacation so he was unable to get a letter from him. Noting that almost two months had elapsed between the date of the incident and the investigation, the Hearing Officer questioned Claimant as to when he could obtain the documentation, and Claimant maintained that he had an appointment in mid-September and could not get in to see his doctor earlier. The Hearing Officer denied the Organization's request for a postponement.

Attached to the Organization's claim is a memo "To Whom it May Concern," dated September 20, 2010, on the letterhead of Loma Linda University Family Medical Group. It states:

It has come to my attention that my patient (Claimant) has been asked to provide documentation regarding his random drug urine tests required by his employer. Unfortunately with his medical condition that is not a possibility for my patient. Thank you for your cooperation with his matter.

Should you have any other questions please contact my office . . . speak to my staff.

Signed Calvin Hagglov MD

The Carrier's Policy for Employee Performance Accountability (PEPA), Dismissible Violations, states, "The ultimate sanction of dismissal may be imposed in response to a single aggravated offense, as listed in Appendix C." Appendix C, Dismissible Rule Violations, provides, in relevant part:

4) Refusal to submit (at any time) to required testing for drug or alcohol use, adulteration of sample, second violation of Rule 1.5 (former Rule G),

second positive test within 10 years, or failure to comply with instructions of the Medical Direction.

Claimant's personal record shows a 10-day Level S record suspension, with a one-year review period, issued July 22, 2008 for failure to report to the Roadmaster's office, a Level S suspension in 1996 for an altercation with another employee, a conditional suspension in 1995 for a vehicle accident involving extensive damage, a suspension in 1995 for AWOL, a formal reprimand in 1993 for absent without authority and a 10-demerit notation in 1990.

With respect to the Organization's procedural argument, the Carrier states that it did not violate Agreement Rule 13(a) as Claimant underwent a shy bladder evaluation after having been removed from service on June 24, 2010 and failing to produce an adequate sample. It was Claimant's need for a medical evaluation, the Carrier states, that postponed the requirements of Rule 13(a) and it only after receiving the medical evaluation that the Carrier initiated an investigation. Thus, the Carrier urges, there was no procedural violation which denied Claimant his right to a fair and impartial investigation.

On the merits, the Carrier states that the record is clear that Claimant did not furnish a proper urine sample, even though he received more water, 52 ounces, and more time, four hours, than the required 40 ounces in three hours. Claimant, the Carrier notes, admitted that he never provided such a sample. Although Claimant claimed "shy bladder," the Carrier states, the medical evaluation determined his claim was not legitimate. Notably, the Carrier states, the testimony of Roadmaster Trevizo establishes that Claimant had been drinking alcohol prior to his shift.

The Carrier also states that between the time Claimant was withheld from service, commencing June 24, 2010, and the Carrier's first knowledge on August 6, 2010, Claimant could have contacted a physician of his choosing to acquire medical documentation to support that he had a medical condition. However, the Carrier stresses, Claimant waited until the day before the hearing to attempt to seek a medical opinion, and he did not furnish a valid or verified medical explanation for his violation.

The Carrier states that it will never know why Claimant did not provide a sufficient sample, but there was no evidence that there was any valid medical reason. The Carrier also notes that generally claims of shy bladder present themselves when the employee knows he will test positive for a prohibited substance, and testing would be critically compromised if the sample could be provided at the employee's convenience rather than at the required time. The Carrier concludes that it followed all FRA policies and procedures, and refusal to submit for testing is a dismissible offense under its PEPA. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. In particular, the Organization notes that Rule 13 of the parties' Agreement requires that a disciplinary investigation must be held promptly

following the incident, and in this case 54 days elapsed from the time Claimant was removed from service and the hearing was conducted. The Organization asserts that the Carrier was well aware of the instant situation and was required to move much more quickly to resolve it. As a result, the Organization urges, all charges against Claimant should be dismissed.

On the merits, the Organization first points out that Claimant is a 53-year-old employee with 33 years of service and only one minor disciplinary incident in the entire course of his employment. The Organization states that Claimant has a medical history of high blood pressure, sugar diabetes and shy bladder condition. The Organization notes that Claimant was called for a random drug test, and, it contends, attempted to comply. The Organization points to the testimony of a Carrier witness that Claimant made six attempts to produce an adequate amount of urine, and simply could not produce the required 40 ccs, even though he drank 54 ounces of water over a four-hour period. The Organization also notes a letter from Claimant's physician indicating that due to Claimant's medical conditions it was not possible for him to provide the urine sample.

The Organization stresses that Claimant never refused to provide a specimen; he simply could not provide the required amount at one time. The Organization states that there would have been a sufficient amount had the Carrier combined the samples Claimant did produce. The Organization adds that the Carrier's MRO never examined Claimant, but merely asserted that there was no medical reason that he could not produce an adequate sample.

The Organization argues that even if the Carrier had been able to prove its charges, the discipline assessed is extreme, unwarranted and unjustified. The Organization stresses that there was no flagrant Rules violation sufficient to warrant such a penalty, and urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no merit to the Organization's procedural argument, as it is apparent that the Carrier afforded Claimant a medical evaluation to consider his shy bladder claim and made the decision to charge him only after the medical evaluation found no support for it. The charge and investigation ensued promptly thereafter. Thus, Claimant was afforded a fair and impartial investigation.

On the merits, we find that the Carrier has proven Claimant's guilt by substantial evidence. It is undisputed that Claimant, after being told he was going to be tested, informed his supervisor that he had been drinking before coming to work. He then did not provide a sufficient urine sample for his random drug/alcohol test. It is undisputed that he underwent a medical evaluation which determined that there was no medical reason for this failure and classified his action as a refusal to test. His defense is that he could not provide the sample because he was a diabetic and the condition could cause him problems in urinating. However, he made no reasonable effort to establish this. He waited months to see his doctor, and after the investigation produced a letter that is vague to the point of saying nothing. Thus, his guilt has been proven.

This Board is mindful of the compelling interest that the Carrier and its employees have in insuring that no one is working while impaired. Testing is a crucial tool in achieving that end, and the Carrier is entitled to treat refusals as a serious offense. Under the specific and unique facts of this case, and in light of the mitigating factors argued by the Organization, the Board concludes that the Carrier's interest in enforcing this rule can be served by a penalty less than termination. Instead, we order that Claimant be treated as if he was guilty of a first failed test, that he be reinstated subject to passing a drug and alcohol test administered by the EAP, that he participate in any counseling and follow-up directed by the EAP, and that his reinstatement be without back pay from the date of his termination through the date of his return to duty. This determination is based on unique facts, and we accordingly direct that this Award not be cited for any purpose in any future proceeding.

AWARD

**Claim partially sustained in accordance with the Findings.
The Carrier is ordered to comply with this Award within 45 days.**


DAN NIELSEN
Neutral Member


JOY MENDEZ
Carrier Member


DAVID TANNER
Organization Member

Dated this 22nd day of May, 2013.