

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers  
(  
(Burlington Northern Railroad Company

STATEMENT OF CLAIM: "Claim for immediate reinstatement of Engineer Gary C. Ferderer with full seniority unimpaired, pay for all time lost and removal of censure from claimant's personal record relative to this incident."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The Claimant was notified by the Carrier that he was dismissed from the Carrier's service by letter dated April 28, 1986 as follows:

"Investigation was held in the office of the Trainmaster/Road Foreman at Wenatchee, Washington on Monday, April 21, 1986 to ascertain the facts and determine your responsibility in your alleged violation of Rule 'G' and alleged failure to comply with instructions from proper authority when you refused to release the results of your urinalysis that was taken on April 14, 1986 as a result of an on-track impact accident at Switch #1, East end Wenatchee Yard, between your train, #51991, and a motor car, while assigned as the engineer.

The investigation clearly established that you were in violation of Rule 702(B) of the Consolidated Code of Operating Rules and Rule 'G', as modified by Bulletin #28, effective March 1, 1986.

For your failure to comply with the aforementioned rules, you are hereby dismissed from the services of the Burlington Northern Railroad effective Tuesday, April 29, 1986...."

I

The Carrier's Drug Testing Program requires that employees to be tested be read a statement (which the parties refer to as "Miranda" statement) as follows:

"This is to advise that this incident may involve operating rule violations (or, as appropriate, abnormal behavior). Under BN's existing policy guidelines, we are requesting that you give a urine sample to BN, or to a designated medical facility, in order to exonerate yourself from an alleged Rule 'G' violation. The urine will be used to detect the possible presence of any drugs or alcohol in your body. We should also advise you that a refusal to give a urine sample will be considered a violation of Rule 'G' and 702(B) of the Maintenance of Way Rule, or Maintenance Rule 502(B). Do you understand? Will you provide the sample?"

From the above statement it is clear that the Carrier will test where there is an incident that may involve (1) an operating rule violation or (2) abnormal behavior.

On Page 5 of the Submission the Carrier informs the Board that it requires mandatory testing of seemingly involved parties following major wrecks. And, in addition where "unusual behavior is manifest." It is also evident from page 5 that the Carrier has a "threshold" damages figure for "mandatory testing." And it appears that the policy applies in the case of personal injuries. From the transcript of the investigation it appears that BN's property damage threshold for "mandatory testing" would be \$4900 (and \$50,000 for major wrecks under FRA policy in effect at that time.)

The Carrier also refers to the incident as a "bona fide human factor incident" and "human failure accident." The Carrier cites Award No. 6 of PLB 4107, BN and UTU, January 30, 1987, wherein it is stated therein that the Carrier has a policy on "Human Factor Accident-Minor." That decision makes

reference to the Carrier's use of drug tests "for probable cause" (Page 15), and states on page 5: "The Carrier argues that the policy of testing an operating employee when that employee has culpable responsibility for an accident is entirely reasonable."

The Organization cites two Carrier BN Awards, PLB 3139, Awards 86 and 87, (LaRocco, October 12, 1987) from which this Board is informed of the Carrier's probable cause policy as follows:

"When the Carrier restated and amplified its existing probable cause policy (on November 5, 1984), the Carrier's Senior Vice President declared:

'We want to emphasize that BN intends to continue implementing this policy in a common sense manner. For example, where individual responsibility is clear and other crew members are not involved in the action causing the incident, a urinalysis test should only be required of the individual crew member having such exclusive responsibility for the action triggering the incident. The Division Superintendent must have close involvement and it is mandatory that he sanction these tests. It is also essential that the "probable cause" requiring the urinalysis test be adequately documented along with the identity of the supervisory official requesting it.

'It is to be emphasized that continued implementation of BN's existing policy in this regard will be fairly and equally applied. Further, no employees submitting to a urinalysis test will be removed from service pending test results unless there are other circumstances requiring their removal from service. If the urinalysis tests are positive, the employee should be removed from service pending investigation.'" (Emphasis added.) (Award 87, page 6)

The Referee then stated:

"The above quotation shows that the Carrier itself did not intend for its policy to be applied in a perfunctory, mechanical fashion. It is vitally important for the Carrier to implement its policy in a fair and equitable manner as contemplated by the Senior Vice President. The Carrier may not require a urinalysis merely because an accident occurred. In this particular case, the Carrier failed to show a rational relation between the accident and the employee who was compelled to submit to a urinalysis. Probable cause was not 'adequately documented'...."

## II

The Carrier has not presented its full drug testing policy to this Board, and we must therefore consider and apply the policy as extracted from the entire record as set forth in Part I, above.

The BN's property damage threshold apparently requiring mandatory testing appears to be \$4900. The property damage in this case was \$3000. On its face, the testing of Claimant is not permissible under this Carrier policy.

No personal injuries were referred to at the investigation, and any policy triggered by personal injury is not applicable in this case.

Claimant was not charged with any operating rule violation (other than Rule G) in relation to the occurrence of the incident; and that aspect of the "Miranda" statement summarizing Company policy is not applicable to the testing of Claimant. (The Rule G charge sprung not from his actions or behavior at or after the incident, but from his failure to allow the test results to be released).

The "abnormal behavior" or unusual behavior aspect of the Carrier's policy and the "human factor accident" referred to in Awards of PLB 4107, the Vaughn Award, or a part of the Carrier's policy, is the basis for the Carrier's case before this Board. Limited to the facts before the Board where no operating rule was violated, no personal injury was involved and the property damage did not exceed the Carrier's mandatory testing threshold of \$4900, we find that the Carrier must have probable cause to require testing under the "abnormal or unusual behavior" policy or its "human failure or factor accidents policy."

Trainmaster Brose testified that he went out to investigate the accident and "because of the circumstances" he brought the Claimant, a brakeman and a section man back to the office. Below we set forth, in part, Mr. Brose's testimony which does not develop for the benefit of the Board, the facts, information and circumstances of the accident and Claimant's actions, which were related to the Superintendent, and which formed a basis for probable cause for testing Claimant.

- "Q. Mr. Brose? When you called the Superintendent's Office, was it for more than one purpose of notifying them of the accident?
- A. Yes it was. Because of the unusual circumstances and the collision being on-track, I called Mr. Isenberg, the Superintendent, to notify him of the accident and see if there was a reason...or if he deemed it necessary for a probable cause urinalysis to be given.
- Q. In your conversation with the Superintendent's Office, did they instruct you as to who was to be tested?
- A. Yes they did. Mr. Isenberg indicated Engineer Ferderer, Brakemen Hertzog and Sectionman Smith be taken up for a urinalysis test."  
(Emphasis added) (Tr-2)

The mere fact of an on-track collision is not probable cause; and the "unusual circumstances" are not identified for the Board.

"QUESTIONS BY MR. STEVENSON - ANSWERS BY MR. BROSE

- Q. You indicated after this incident took place that you went down and interviewed the crew. Is that correct?
- A. Yes sir.
- Q. Was there...at that time, did you make the determination that it would be necessary to test this crew or was there something about this crew that indicated to you they should be tested?
- A. I didn't make the determination, Mr. Stevenson. As I indicated in my testimony, Mr. Isenberg made the determination in Spokane.
- Q. Do you know what basis Mr. Isenberg made this decision on?
- A. He named that probably...I'm only...I'd have to surmise why he wanted the test, but I would surmise because of probable cause and unusual occurrence.

Q. Well, a summation is not of much value to us at this investigation. That...for some reason, if he's the individual that made the determination, I don't understand why he's not here to testify as to why he made this determination. I would ask the investigation officer that I suggest that this is improper...he's the one that made the determination, yet he's not here to be cross-examined, therefore I request at this time that the investigation be closed."

(Emphasis added) (Tr 5-6)

This Board is not told what was the unusual occurrence or probable cause -- what were the facts, information and circumstances reported by the investigating officer to the superintendent which formed the basis of the probable cause for testing?

"QUESTIONS BY MR. STEVENSON - ANSWERS BY MR. BROSE"

Q. The...being that you didn't make the determination, are you aware of anything in the FRA/BN book on testing that would require testing in this particular situation?

A. I told Mr. Isenberg of the occurrence out there and the situation involved and he deemed it necessary that a urinalysis be given.

Q. Yes sir. But that doesn't answer the question. Is there in the book that you are aware of that would require testing in this situation.

A. I will answer the question again, I apprised Mr. Isenberg of the situation...of the collision...and I was guided by his instructions.

Q. Was there...did you note any abnormal behavior on Mr. Ferderer's part that led you to believe that he may be under the influence of any alcohol or drugs?

A. No real unusual mannerisms, no."

(Tr-6)

The above discussion does not demonstrate probable cause for drug testing.

Agent/Asst. Trainmaster D. G. Verity testified in part:

"QUESTIONS BY MR. STEVENSON - ANSWERS BY MR.  
VERITY

- Q. Mr. Verity? Did you have any part in determining whether there was probable cause for testing?
- A. No, I did not.

\* \* \*

- Q. Was there anything about his actions that lead you to believe that he was under the influence of alcohol or drugs?
- A. I did not notice anything out of normal."  
(Tr-11)

This testimony does not provide probable cause for testing.

Further testimony of Mr. Brose as questioned by Mr. Stevenson states:

- "Q. Well, part of the supervisors handbook states on page 62, Item 8 regarding BN policy: 'The policy will be implemented in a common-sense manner and applied fairly and equally. Action should be taken to send either the (1) entire crew or (2) individuals, when responsibility is clearly identified to a BN designated medical facility. The 'reasonable cause' which triggers the urinalysis test should be adequately documented, including the identity of the supervisors requesting it.' Was there any type of document to comply with this particular rule?
- A. We are required, at the end of the month, to submit to the Superintendent's Office, all urinalysis conducted under his instructions and for what cause.
- Q. Then, at this time, there is no document that specifies what the 'reasonable cause' was in this case for testing.
- A. Not at this time. Only the verbal information I gave the Superintendent and, like I say, a written explanation of the 'probable cause' will be submitted to his office at the end of the month.

- Q. Well, if you weren't the investigator...or the officer authorizing the testing, would it be your place to submit this, or would it be the supervisor who requested it? It would be his place to document the 'probable cause'. If I understand this.
- A. The investigating officer makes a written statement at the end of the month of any unusual occurrences where a urinalysis is requested by the Superintendent's Office. All field officers are required to do this at the end of the month."

(Emphasis added) (Tr-21)

It was not developed at the investigation what were the full facts, information and circumstances given to the Superintendent, to enable this Board to determine if he had probable cause for testing.

The Carrier in its Submission to this Board asserts in part:

"...In the case now at bar, this Board can certainly understand that the act of colliding with a motor car, which is in full view, and the weather clear and dry, would be unusual behavior ...."

(Carrier's Submission, page 5)

The Carrier also asserts in part:

"...Testimony at the investigation established, without exception, that an on-track collision occurred, in broad daylight with excellent visibility, and that the cause was human failure...."

(Carrier's Submission, pages 15 and 16)

The Carrier has the burden of proof in this case, and must support its assertions by substantiated evidence of record. This Board does know from the transcript that Claimant, while operating Work Train 51991 on April 14, 1986 hit a motor car at Switch #1 at the east end of Wenatchee, according to Mr. Brose's and Claimant's testimony. Claimant's testimony was in part as follows:

- "Q. And it was your impression that the carrier lacked reasonable cause for testing the crew in the manner in which they did?
- A. Yes I do. The track inspector was clearly someplace he should not have been."

(Tr 17)



Contrary to the assertions in the Carrier's Submission quoted above, we don't know from the transcript if the motor car was in full view and if the weather was clear and dry. Such was not developed at the investigation. This Board does not know anything about the visibility at the time of the accident. The only testimony supporting "human failure" was by that of Claimant quoted previously, that the "track inspector was clearly someplace he should not have been." No testimony of record developed human failure on Claimant's part or culpable responsibility on Claimant's part for the accident. Nor was Claimant shown to be in violation of any operating rule at the time of the accident or when it was investigated by Mr. Brose. This Board was not presented with facts, information and circumstances that would indicate unusual behavior on Claimant's part in the transcript of the investigation. It would appear from a statement in the investigation that the Carrier may have conducted a separate investigation for the on-track collision (Tr 3). But such does not relieve it of its obligation to show probable cause for the testing in this particular case.

This Board agrees with the determination in Award No. 86 of PLB 3139, that before the Carrier may impose discipline on an employee who defies the Carrier's demand for a urine sample, the Carrier must show probable cause for issuing the order. We find that the rationale set forth in Award 86 is also controlling in this case where the employee failed to allow test results to be released. We caution, that our determination is strictly limited to the facts of this case. And, Award No. 86 cautioned as follows:

"... Employees declining to supply a urine sample are guilty of insubordination provided the Carrier's order was premised on probable cause."

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of First Division

Attest:

  
Nancy J. Defer - Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1988.