

PUBLIC LAW BOARD NO. 6468

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

VS

CSX TRANSPORTATION, INC. )  
(Former Chesapeake & Ohio Rwy.Co. )

) NMB CASE NO. 23  
) Award NO. 23

STATEMENT OF CLAIM:

*J.D. Ross 320595*

Claim for time lost from December 4, 2001. as a result of being found insubordinate for allegedly refusing to provide sufficient urine for FRA Random Toxicological Test on December 3, 2001, and that such lost time is applied to vacation, pension, etc., and that personal record is purged of all notations related to this incident. Further, that claimant is reimbursed for all out of pocket medical, dental and vision expense incurred as the result of loss of Carrier paid insurance.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved. The parties to this dispute were given due notice of hearing thereon.

Claimant was summoned to a formal investigation on a charge of "refusal to provide an adequate urine specimen for toxicological testing on December 3, 2001." Following the investigation Carrier found claimant guilty of violating Operating Rule 501 and dismissed him from service.

This Board has had the opportunity to thoroughly review the transcript of investigation, together with all other documents submitted by the parties.

In its written submission to this Board Carrier has argued that the claim here should be dismissed by this Board in that the decision to dismiss claimant from service was not timely appealed. Carrier notes that the decision was rendered on January 11, 2000, and the formal appeal was not made until April 7, 2002, well beyond the 60 day period specified in the parties agreement.

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The Board notes that the decision to dismiss claimant was rendered by Carrier's General Manager with his letter dated January 11, 2002. With his letter dated April 7, 2002 (approximately 86 days after January 11, 2002) the Local Chairman appealed the dismissal of claimant to Carrier's Senior Director Labor Relations. That officer accepted the appeal and issued his decision denying the appeal on its merits. No mention was made at that time about the appeal being barred for failure to comply with the time limit set forth in the agreement. In fact, based on the record before this Board, it is noted that the time limit issue was first raised in this dispute in Carrier's submission to this Board, such submission having been prepared in October of 2002.

For this record the Board will note that Article XVIII, Section 6(a) of the governing agreement provides in part:

"(a) When discipline has been assessed\*\*\*any appeal must be presented in writing by or on behalf of the employee involved, to the Highest Designated Officer of the Company\*\*\*within sixty (60) days from the date of notification of the assessment of discipline. Failing to comply with this provision the decision shall be considered final\*\*\*."

In this particular dispute it is the finding of this Board that Carrier accepted the appeal dated April 7, 2002, and rendered a decision based on the merits of the claim; therefore, such action must be deemed as a waiver of the provisions of Article XVIII, Section 6(a) and Carrier's argument, raised for the first time before this Board, will not be accepted as a proper disposition of this dispute.

With respect to the merits of this dispute, the record is clear that even though two admitted attempts were made, claimant failed to produce a sufficient urine specimen in a three hour period. A follow-up medical examination failed to find any medical reason for claimant's failure to provide a proper specimen. The record also reveals that claimant cooperated in his efforts, but for reasons unknown to this Board he failed to produce a proper specimen.

It is the opinion of this Board that claimant, an employee with over ten years of service at the time this incident occurred, should not have been dismissed from service, however, his failure to produce a specimen for testing cannot be rewarded by payment for time withheld from service.

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It is the decision of this Board that the decision to dismiss claimant from service be reduced to a suspension from service. Claimant should be returned to active service with all rights unimpaired provided, of course, he passes the necessary rules and physical examination (including a toxicological test) required by the Carrier. Should claimant fail to pass such examinations or tests, he shall revert to a dismissed status.

AWARD

Claim disposed of as set forth in the above findings and opinion. Carrier is instructed to comply with this award within thirty days of the date hereof.

F. T. Lynch  
F. T. Lynch, Neutral Chairman

Patricia A. Madden, Carrier Member

Paul Sorrow CP  
Paul T. Sorrow, Employee Member

Award date \_\_\_\_\_