

PUBLIC LAW BOARD NO. 6564

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
IBT RAIL CONFERENCE**

AND

CSX TRANSPORTATION, INC.

Case No. 42

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The dismissal of Scrap Loader Operator S. R. Mims for his alleged violation of CSXT Safe Way General Safety Rules – Substance Abuse Rule 21 on July 21, 2004 was without just and sufficient cause and in violation of the Agreement.
2. As a consequence of the violation referred to in Part (1) above, Scrap Loader Operator S. R. Mims shall now be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered.

Facts

Claimant S. R. Mims was hired by the former Louisville and Nashville Railroad Company, a predecessor of CSXT, on July 10, 1978. At the time of his dismissal, he was assigned as a Machine Operator on a System Production Gang in the Cincinnati, Ohio area.

On November 19, 1999, Claimant underwent a drug test and tested positive for cannabinoids (marijuana metabolites). On December 21, 1999, he signed a Bypass Agreement and returned to service with the stipulation that he remain alcohol and drug free for a five (5) year period.

On July 21, 2004,¹ Claimant was instructed to report for short notice, follow-up toxicological testing, and he tested positive for cannabinoids. By letter dated August 4, J.P. Crutchfield, Manger SPT Ties Teams, charged Claimant with violation of CSX Transportation Operating Rule G. Based upon further review of Claimant's employment record, however, on August 13, Crutchfield issued a "replacement" letter, which maintained the Rule G charge for the July 21 positive test and also served to "reinstate the original Rule G charge dated December 3, 1999, which was held in abeyance in accordance with the provisions of [Mims'] election to opt for handling in the Employee Assistance Program, which was signed by [Mims] on December 21, 1999." (Carrier's Exhs. A, pp. 3-4 and B, pp. 59-67).

The August 4 letter directed Claimant to report for an investigation of the charges on August 31. However, on August 25, Crutchfield and BMW Vice Chairman L. A. Buckley mutually agreed to postpone the investigation from August 31 to September 28. CSXT confirmed that agreement in a letter to Claimant dated August 26, with a copy to Buckley. (Carrier Exh. A, p. 5).

An investigation was held on September 28, following which Claimant was found guilty of the charges and dismissed from service, by letter dated October 11, 2004. BMW Vice Chairman Andrew H. Shelton appealed the dismissal by letter dated November 7, in which he did not cite any substantive issues, but instead contended that CSXT had improperly scheduled and conducted Claimant's investigation more than twenty (20) days after management's knowledge of Claimant's involvement. The appeal was processed through the grievance procedure and conferenced on November 16.

¹ All dates shall refer to 2004 unless otherwise indicated.

Following CSXT's final declination in December 2004, the matter was submitted to this Board for adjudication.

Contentions of the Carrier

The Carrier contends that Claimant was properly dismissed based upon substantial, credible evidence in the Record and a fair, impartial hearing.

With respect to the procedural issues, CSXT submits that Manager J.P. Crutchfield had no knowledge of Claimant's July 21 test results until August 2, when he was so advised by the Carrier's Chief Medical Officer, Thomas J. Neilson. Crutchfield promptly issued charges, but had the right to issue a subsequent letter on August 13 once he learned that Claimant had been subject to Rule G charges within the previous five years and had signed a Bypass Agreement.

According to CSXT, the scheduling of the August 31 hearing was timely pursuant to Rule 25(d), as amended in 1999, which provides as follows, in relevant part:

RULE 25 – DISCIPLINE, HEARINGS, AND APPEALS

* * *

- (d) An Employee who is accused of an offense shall be given reasonable prompt advance notice, in writing, of the exact offense of which he is accused with copy to the union representative. The hearing shall be scheduled to begin within thirty (30) days from the date management had knowledge of the employee's involvement and such hearing shall not begin less than ten (10) days from date of notice. A hearing may be postponed for a valid reason for a reasonable period of time at the request of the Company, the employee, or the employee's union representative.

According to CSXT, any delay in conducting the investigation after August 31 was by mutual agreement of the parties.

As to the merits of the case, CSXT asserts that the Organization did not challenge the evidence against Claimant, who, in fact, admitted his guilt. Therefore, CSXT has carried its burden of proof. Moreover, the dismissal penalty was appropriate, given Claimant's failure to adhere to his Bypass Agreement.

Contentions of the Organization

The Organization contends that Claimant was denied due process because CSXT conducted an untimely investigation on September 28. Citing Rule 25(d), the Organization emphasizes that the investigation should have been held "within thirty (30) days from the date management had knowledge of the employee's involvement."² According to the Organization, the Carrier had knowledge of Claimant's involvement at least by August 4. Therefore, it was required to begin the hearing by September 3.

Given the Carrier's violation of the time limits set forth in Rule 25(d), the Organization submits that the Board has no authority to reach the merits of the case. In support of this position, the Organization cites several arbitral awards, including *NRAB First Division*, Award 20031, *NRAB Third Division*, Award 19974, *NRAB Fourth Division*, Award 3953, and *Public Law Board No. 1760*, Award 21.

Opinion

The Record reveals that SPG Manager Crutchfield had no knowledge of Claimant's positive drug test until August 2, and that by August 4, he had issued charges stemming from Claimant's positive test on July 21. Thereafter, he was within his rights in issuing his replacement letter on August 13 once he learned that Claimant had been subject to

² Vice Chairman Shelton, in his correspondence, argued that the investigation should have been held within twenty (20) days from the date management had knowledge of the employee's involvement. Before this Board, however, the Organization correctly cites the current language of Rule 25(d) but still asserts that the investigation was untimely.

Rule G charges in 1999 and had signed a Bypass Agreement at that time, which arguably was violated as a result of the second positive test within five years. Moreover, the scheduling of the August 31 investigation was within thirty (30) days of management's knowledge of Claimant's involvement and, therefore, was timely under Rule 25(d).

As to the rescheduling of the investigation for September 28, the credible evidence in the Record demonstrates that the delay in holding the hearing after August 31 was pursuant to a mutual understanding between CSXT and BMW Vice Chairman Buckley. A letter confirming this understanding was offered into evidence at the investigation and was properly received by the hearing officer. Consequently, the Organization's procedural arguments concerning the timeliness of the investigation must fail.

With respect to the merits of the case, the Organization has not challenged the Carrier's proofs as to the validity of the drug test conducted on July 21. Furthermore, Claimant, in effect, admitted guilt when he stated: "I want to apologize to CSX for my wrongdoing and to my best and to my knowledge I want [sic] do that anymore because I've got too many years out here...." (Carrier Exh. B, p. 11). Thus, Claimant's guilt has been conclusively established by his admission and, as a result, CSXT has met its burden of proof.

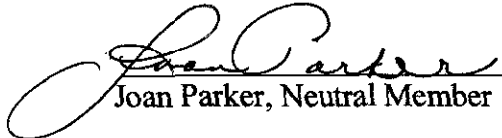
Given these facts, Claimant's dismissal must be upheld. The case law clearly recognizes a carrier's right to discharge an employee who violates his EAP agreement. As this Board has previously held: "Employees who misuse alcohol or drugs may get the opportunity for a second chance through a substance abuse treatment program such as that provided by CSXT. However, there is no third chance." (*Public Law Board No. 6564, Award 11 (Parker)*). See also *Public Law Board No. 5896, Award 188 (Meyers)*).

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Here, Claimant was given a second chance when he was allowed to sign a Bypass Agreement and enter the Carrier's Employee Assistance Program in December 1999. He chose to violate that Agreement in July 2004 by testing positive for drugs. While this Board is mindful of Claimant's 25 years of service, his seniority did not excuse him from adhering to the Carrier's rules and observing the Agreement he signed following his prior drug violation.

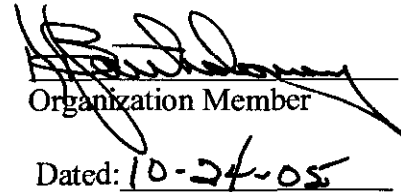
Award

The claim is denied.


Joan Parker, Neutral Member


Carrier Member

Dated: 10-24-05


Organization Member
Dated: 10-24-05