

PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

CSX TRANSPORTATION, INC.

Case No. 44

* * * *

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

1. The dismissal of B & B Mechanic W.L. Stevens for his alleged violation of CSX Transportation Operating Rule G and CSX Safe Way General Safety Rule 21 – Substance Abuse was without just and sufficient cause and excessive and undue punishment.
2. B & B Mechanic W.L. Stevens shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

Facts

Claimant W. L. Stevens was first hired by the former Louisville and Nashville Railroad, a CSXT predecessor, on August 2, 1974, and he established seniority in the Maintenance of Way Department on December 13, 1975. He had a clean disciplinary record and was working as a B & B Mechanic at the time of his termination.

On November 2, 2004, Claimant underwent FMSCA SHORT NOTICE FOLLOW-UP breath alcohol testing, which resulted in a positive reading for alcohol. By letter dated November 12, 2004, Claimant was directed to report for a formal investigation:

“...to determine the facts and place responsibility, if any, in connection with the SHORT NOTICE FOLLOW-UP breath alcohol test that you underwent on November 2, 2004, and afterhaving been reviewed by the Carrier’s Medical Review Officer, Officer, the results of which were verified positive at a level of 0.046 gms/210 liters.

In conjunction with the aforementioned toxicological test results, you are charged with a possible violation of CSX Transportation Operating Rule G and CSXT Safe Way General Safety Rule 21 - Substance Abuse.” (Carrier Exh. B, p.26)

The investigation was held on December 14, 2004, during which BMW Vice Chairman L.C. Smith objected to the introduction of Chief Medical Officer Thomas J. Neilson’s memorandum of November 4, 2004, in which he reported Claimant’s positive alcohol test and noted that Claimant was “currently under a Rule G Bypass for a refusal on June 23, 2004.” (Carrier Exh. B, p. 29)

By letter dated December 28, 2004, Claimant was found guilty of a “second” violation of CSXT Operating Rule G and Safe Way General Rule 21 based upon his “failure to follow the terms of [his] bypass agreement....” (Carrier Exh. C) Vice Chairman Smith appealed the dismissal by letter dated January 13, 2005. The matter was conferenced on February 1, 2005, and the Carrier issued a declination on February 7, 2005. The grievance remained unresolved and was ultimately submitted to this Board for adjudication.

Contentions of the Carrier

The Carrier asserts that while Claimant’s personnel data report contains no disciplinary entries, he did, in fact, opt for a bypass arrangement and voluntarily submitted to an Employee Assistance Program (EAP) after-care plan for a five-year period, beginning July 10, 2004, after being charged with a Rule G violation on July 7,

2004. Consequently, Claimant was working under a Rule G bypass arrangement when he tested positive for alcohol on November 2, 2004. Pursuant to this Rule G bypass arrangement, Claimant was subject to dismissal based upon any reported non-compliance with his after-care plan. Given Claimant's status as of July 10, 2004, CMO Neilson correctly referred to the Rule G bypass arrangement in his November 4 memorandum. Moreover, it was likewise legitimate for the hearing officer to do so during the investigation.

In the Carrier's view, regardless of the genesis of Grievant's Rule G bypass arrangement, the fact is that Claimant was voluntarily participating in an EAP plan based on a drug testing incident when he tested positive on November 2, 2004. Additionally, although it is true that the same CSXT officer served as the charging and disciplinary officer, there is no evidence in the Record demonstrating that Staff Engineer White's dual roles had a negative impact on Claimant's rights under the Collective Bargaining Agreement.

As to the merits of the case, CSXT argues that Claimant was guilty as charged. His claim that he had applied some tooth ache medicine to his teeth prior to the test, which could have contributed to his positive reading, was purely speculative. Furthermore, there is ample arbitral precedent that recognizes an employer's right to discharge an employee who fails to abide by the terms of his EAP plan.

Contentions of the Organization

The Organization contends that the Carrier denied Claimant a fair and impartial hearing. It bases this contention on its belief that Claimant never refused to submit to a prior alcohol or drug test. Therefore, he should not have been considered as being under

a bypass agreement when he was tested on November 2, 2004. CSXT also erred procedurally, asserts the Organization, by permitting staff Engineer White to serve as both the charging officer and discipline officer in the case.

The Organization urges the Board to sustain the claim based on the Carrier's procedural violations. If the Board reaches the merits, however, the Organization further contends that the Carrier lacked just cause to dismiss Claimant. According to the Organization, Claimant testified credibly that he drank only two beers on the evening preceding the alcohol test, which should not have caused a reading of 0.046. The more likely cause of the positive reading was Claimant's application of tooth ache medicine. But in any event, the Organization emphasizes that the supervisor who observed Claimant when he underwent the breathalyzer test, testified that Claimant appeared to be sober and not under the influence of anything.

The Organization also argues that CSXT should have offered Claimant a confirming or follow-up test. Claimant, as most employees, was not aware of any rights he might have had under the Rule G agreement and, therefore, did not demand a urine or blood alcohol confirmation test. But given his insistence that he had drunk only two beers the night before, and had applied medicine which might have left a residue in his mouth, the Carrier should not have dismissed Claimant without more proof of his guilt.

Opinion

The Carrier emphasizes that as of November 2, 2004, Claimant was under a five-year Rule G bypass agreement, which he voluntarily entered into after being charged with a Rule G violation in July, 2004. Significantly, however, when Claimant was charged on November 12, 2004, Staff Engineer White's letter made no mention of a second Rule G

violation. As noted above, Claimant was instructed to report for an investigation, the purpose of which was to determine the facts and his responsibility, if any, in connection with the random alcohol testing he underwent, which produced a positive result. White's letter charged Claimant with a "possible violation of CSX Transportation Operating Rule G and CSXT Safe Way General Safety Rule 21 - Substance Abuse." (Carrier Exh. B, p. 26) It did not charge him with violating a Rule G bypass agreement or the terms of an EAP plan.

Nevertheless, the Carrier's letter of dismissal referred to Claimant's "having been charged with a *second* violation of CSX Transportation Operating Rule G and CSXT Safe Way General Rule 21 – Substance Abuse." (emphasis added) Clearly, this was incorrect. Not having charged Claimant with a violation of a Rule G bypass agreement, the Carrier had no right to accept evidence, or making a finding of guilt, based on this charge.

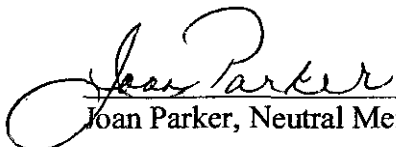
Allowing the Carrier to prevail based upon a charge that was not made would be a serious violation of Claimant's due process rights. Given the procedural error that occurred, Claimant's dismissal must be reversed. He is entitled to reinstatement, back pay, and restoration of his seniority and benefits.

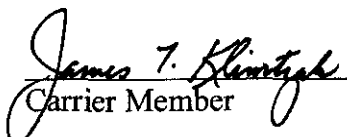
This finding does not, however, fully resolve all of the issues before this Board. While Claimant's dismissal cannot be upheld for the reasons set forth above, there is no doubt that on July 10, 2004, he signed a Rule G bypass agreement, which clearly stated that any reported non-compliance with his after-care plan within five years of his return to service would result in a reinstatement of charges and a hearing on the Rule G Drug/Alcohol Use Policy alleged violations. The finding herein does not nullify this

Rule G bypass agreement, and Claimant must be required to honor the commitment he made in signing that agreement. Having been discharged in December 2004, less than six months after he executed the Rule G bypass agreement, Claimant had hardly fulfilled his obligations in regard to maintaining sobriety and following his EAP program. For this reason, it is the holding of this Board that Claimant must adhere to his Rule G bypass Agreement, including his EAP after-care commitment dated July 10, 2004, for a period of five years following his return to service.

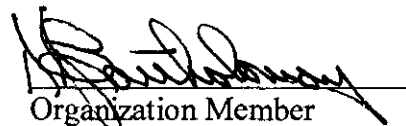
Award

The claim is sustained. However, Claimant's Rule G Bypass Agreement, dated July 10, 2004, will remain in effect for a period of five years following his return to service.


Joan Parker, Neutral Member


Carrier Member

Dated: 01-23-06


Organization Member

Dated: 1-23-06