

PUBLIC LAW BOARD NO. 6564

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

And

CSX TRANSPORTATION, INC.

Case No. 46

* * * *

Statement of Issue: It is the claim of the Brotherhood that:

1. The dismissal of B & B Foreman J. C. Noriega for his alleged failure of FMCSA Short Notice Follow-up breath alcohol testing on January 25, 2005 was without just and sufficient cause and excessive and undue punishment.
2. B & B Foreman J. C. Noriega shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

Facts

The Baltimore and Ohio Chicago Terminal Railroad Company, a CSXT predecessor, hired Claimant J. C. Noriega on April 1, 1980. Claimant was assigned as a Bridge and Building foreman on Gang 6K6A in the Chicago, Illinois area when he was instructed to report for short notice follow-up breath alcohol testing on January 25, 2005. Claimant tested positive at a level of 0.036 gms/210 liters, and CSXT's Chief Medical Officer, Thomas J. Neilson, so informed Division Engineer T. S. Thoburn in a memorandum dated January 25, 2005.

By letter dated January 27, 2005, Bridge Supervisor R. M. Peery charged Claimant with violating Rule G and CSX Drug/Alcohol Use Policy. Peery's letter also reactivated a June 22, 2004 Rule G charge, as well as the charge of failure to comply with the terms of a related Bypass Agreement:

As this is your second verified non-agreement test, positive toxicological and/or breath alcohol testing result with the past five (5) years, the hearing which has been held in abeyance as a result of the Rule G, C-2 option (bypass) that you selected on June 30, 2004 in conjunction with your first offense is rescheduled to be held, as well. All aspects of this particular matter, including your failure to comply with the provisions of the Rule G Bypass Agreement and the postponed hearing regarding same will be included in this investigation. (Carrier Exh. B, p. 14).

Following an investigation held on February 23, 2005, Claimant was found guilty of the charges and was dismissed by letter dated March 11, 2005. On March 21, 2005, the Organization requested that this case be listed to this PLB, and following the Carrier's agreement to waive the time limits, the Organization formally appealed the dismissal. A conference was held on May 5, 2005, and on May 16, 2005, CSXT issued its final declination. The matter is now before this Board for determination.

Contentions of the Parties

The Carrier contends that Claimant was given a full and fair hearing in accordance with the terms of the Collective Bargaining Agreement. It further argues that it established Claimant's guilt with substantial evidence. Claimant did not challenge the accuracy or reliability of the alcohol test he underwent. Rather, he acknowledged the positive reading on his January 25, 2005 test and attributed the test result to stress and depression. Given Claimant's admission, the Carrier submits that it met its burden of

proof. Moreover, inasmuch as this was Claimant's second violation of the Drug/Alcohol Use Policy, CSXT was within its rights in discharging him.

The Organization emphasizes that Claimant had over 25 years of service with the Carrier, and during much of the last decade, he was coping with serious personal problems. Testifying on his own behalf, Claimant recounted that following his divorce in 1996, he took custody of his children. Thereafter, he suffered substantial stress and depression. While he acknowledged participating in the Employee Assistance Program (EAP) in conjunction with his 2004 Bypass Agreement, he stated that "there wasn't sufficient time for me to get professional help." (Carrier Exh. B, p. 11). Compounding his problems was the fact that he also was diagnosed with hepatitis and was going through weekly therapy for that illness during the eighteen months prior to his dismissal.

In sum, Claimant contends that his physical and emotional problems contributed to what happened on the job. He admitted that he needs professional help. Based on his testimony, the Organization submits that with additional counseling, Claimant can become a valuable employee. Therefore, he deserves another chance.

Opinion

The transcript of the investigation clearly shows that Claimant's due process rights were protected, and the hearing was conducted in a fair and impartial manner. Claimant was afforded proper notice of the charges, sufficient time to prepare a defense, and the opportunity to produce, examine and cross-examine evidence and witnesses.

With respect to the merits of the case, it is undisputed that on June 30, 2004, Claimant entered into a Bypass Agreement after testing positive for cannabinoids (marijuana metabolites). As a result of entering into that agreement, Claimant's hearing

on the Rule G/CSX Drug/Alcohol Use Policy charge was held in abeyance. It was understood, however, that any non-compliance with his after-care plan within a five-year period would result in reinstatement of the Rule G/CSX Drug/Alcohol Use Policy charge.

The Record developed during the investigation held on February 23, 2005 revealed that Claimant tested positive for alcohol on January 25, 2005 with a reading of 0.036 gms/210 liters. Neither he nor the Organization challenged the accuracy or reliability of the test. Moreover, Claimant virtually admitted guilt when he testified as to his personal problems, which he believed were a contributing factor in his alcohol/drug use.

Undisputedly, Claimant's positive alcohol test on January 25, 2005 was his second positive toxicological and/or breath alcohol test within five years. By testing positive a second time, Claimant violated Rule G, the Carrier's Drug/Alcohol Use Policy, and the provisions of his Rule G Bypass Agreement.

Arbitrators have long recognized a carrier's right to discharge an employee who twice violates its drug and alcohol rules. As was stated by Arbitrator Peter Meyers in *PLB No. 5896, Award No. 187*: "Given the fact that this Claimant is a two-time drug offender, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated Claimant's employment.:

This Board also has upheld the same principle in several cases. See, for example, *PLB No. 6564, Award No. 11*, wherein it was stated: "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, it is universally understood that in the transportation industry, there is no third chance."

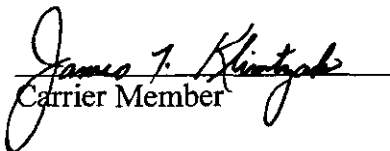
Claimant was afforded a second chance when he entered the EAP in June 2004.

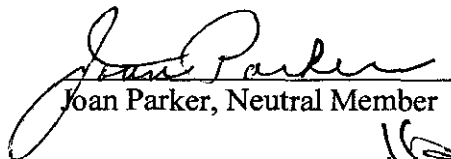
Barely six months later, he threw away that second chance, as evidenced by his positive breath alcohol test on January 25, 2005. The Board appreciates that Claimant had 25 years of service and may have been coping with significant personal problems. However, he had recourse to deal appropriately with his problems through the EAP. Unfortunately, he chose the wrong way to handle his stress by coming to work with alcohol in his system.

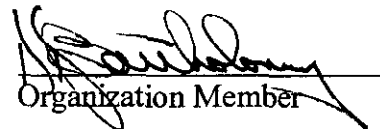
CSXT may not be compelled to continue to employ an individual who refuses to abide by his Rule G Bypass Agreement. In these circumstances, CSXT had the right to dismiss Claimant.

Award

The claim is denied.


Carrier Member
Dated: 01-23-06


Joan Parker, Neutral Member


Organization Member
Dated: 1-23-06