

BEFORE PUBLIC LAW BOARD NO. 7007

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
MASSACHUSETTS BAY COMMUTER RAILROAD**

Case No. 6

STATEMENT OF CLAIM:

- (a) Carrier's dismissal of Claimant Joseph Munro was without just and sufficient cause, was not based on any clear and probative evidence and was done in an arbitrary and capricious manner, wholly beyond the Scope of the Schedule Agreement.
- (b) Claimant Munro shall be reinstated to his position with the Company with his seniority unimpaired and be compensated for all lost wages and benefits which would accrue to him as provided for in the Schedule Agreement and his record cleared of the charge.

FINDINGS:

By letter dated November 15, 2007, the Claimant was directed to appear at a formal investigation on charges that the Claimant violated Carrier rules when his allegedly negligent actions while operating a hi-rail boom truck resulted in a collision with another, stationary vehicle that then hit a vehicle in front of it, causing damage to all three vehicles and train delays. The notice further charged that post-accident alcohol testing was positive for the presence of alcohol. By letter dated November 28, 2007, the Claimant was notified to appear a formal investigation on charges that he tested positive for cocaine in connection with drug and alcohol testing conducted after the accident. All of the charges were jointly investigated on February 5, 2008. As a result of the investigation, the Claimant was found guilty as charged, and he was dismissed from the Carrier's service in all capacities. The Organization thereafter filed a claim on the

Claimant's behalf, challenging the Carrier's decision to discharge him. The Carrier denied the claim.

The Carrier initially contends that the Claimant has not disputed the result of the drug and alcohol tests. The alcohol test was conducted a full three hours after the accident occurred, but the test revealed high levels of alcohol in the Claimant's system. The Carrier asserts that the subsequent drug analysis produced a positive for cocaine metabolites. The Carrier argues that these tests establish that the Claimant was working in an unfit condition, while under the influence of alcohol and/or illegal drugs. The Carrier points out that the Claimant admittedly used alcohol and drugs to counteract fatigue.

The Carrier then addresses the Organization's position that the Claimant should have been offered the opportunity to sign a Rule G Waiver. The Carrier maintains that when the Claimant allowed his vehicle to collide with the other vehicle, causing extensive damage to three vehicles, the Claimant was in significant violation of the Carrier's Code of Conduct, thereby rendering himself ineligible for the Rule G Waiver. As for the Organization's argument that Carrier employees were culpable in this matter because they failed to take notice of the Claimant's being under the influence of drugs and alcohol, the Carrier insists that there is no evidence that there were any visible signs that the Claimant was under the influence, or that Carrier employees were aware of his condition and ignored the potential for disaster. The Carrier contends that it is preposterous to suggest that the Claimant's colleagues should share the blame. This position is wholly lacking in merit and should be rejected.

The Carrier cites the Claimant's admission that he knew "the night before" that he would be operating a hi-rail truck on a main line, yet he proceeded to consume large quantities of liquor that placed him far in excess of the legal limit. The Claimant also knowingly had ingested cocaine, which is potentially lethal when combined with alcohol. The Carrier argues that the Claimant's decision to put himself and others at risk constituted such an extraordinary lapse in judgment as to amount to recklessness, demanding the most severe form of discipline.

The Carrier acknowledges that weather conditions had been poor earlier in the day, but the rain had subsided to a drizzle by the time of the accident. The Carrier emphasizes that the vehicle in front of the Claimant's managed to stop at a safe distance from the leading truck, while the Claimant was not able to do so. Moreover, if the Claimant accurately suggested that he was under instructions to "giddy-up a little bit," he certainly was not following the alleged instructions if the two vehicles in front already were at a complete stop when the Claimant came out from under the bridge 515 feet away; the Claimant was lagging behind. The Carrier emphasizes that the Claimant had delivered salt to this location on six previous occasions, so the Claimant knew that there was a usual stop at this location. The Carrier insists that not only should the Claimant have been prepared to slow down, but he had a clear line of sight for 515 feet once he exited the bridge. The Carrier maintains that this gave the Claimant more than adequate space to stop if he had recognized that the lead trucks were at a standstill and he had followed the correct procedure.

As for the Organization's assertion that the vehicle did not stop when the Claimant

applied the brakes, the Carrier points out that its Manager of Automotive and Work Equipment found that there were no problems with the braking system on the Claimant's vehicle. Moreover, tests showed that the vehicle, in comparable weather conditions and carrying the same amount of salt, showed that the vehicle stopped after 95.6 feet and that the brakes were in good working order. The Carrier asserts that the Claimant should have been able to stop his vehicle well within the 515 feet available to avoid the crash.

The Carrier goes on to argue that the Claimant's testimony suggests that he did not properly apply the brakes. The Claimant mentioned applying the Maxi brake, but he never said anything about applying the foot brake pedal. The record shows that applying the Maxi brake alone will only lock the vehicle's brakes, while applying the brake pedal will operate both of the vehicle's braking systems. The Carrier insists that such a lapse in judgment would constitute gross operator error, and it begs the question as to the effects of alcohol and cocaine in his system.

The Carrier then points to the significant damage caused to the vehicles in the crash, which raises questions regarding the point at which the Claimant realized that the vehicles in front had come to a complete stop and began to apply the Maxi-brake, if he actually did so. Given this damage and the fact that it took 103 feet after the impact for the Claimant's vehicle to come to a stop, the Carrier argues that this suggests more than mere "sliding." The Carrier contends that the Claimant's account of the accident lacks credibility.

The Carrier emphasizes that the Claimant chose to operate a Carrier vehicle while he had cocaine and alcohol in his system, which created a tremendously volatile

combination of circumstances. The Carrier maintains that under the circumstances, there can be no rationale for finding that permanent dismissal was arbitrary, capricious, excessive, or an abuse of managerial discretion. The Carrier asserts that prior Board Awards uniformly have held that the use of illegal drugs, even standing alone, warrants permanent dismissal. The Claimant knew, or should have known, that when he used illegal drugs, he placed his employment in peril.

The Carrier acknowledges the Claimant's subsequent efforts to address his issues with drugs and alcohol, but emphasizes that he sought help only after he was caught, in the erroneous belief that it might save his job. The Carrier insists that such assistance should have been sought before the Claimant placed his life, the lives of others, Carrier equipment, and other property in peril. As a consequence of his actions, the Claimant was excluded from utilizing the provisions of the Waiver Agreement by the very terms of its coverage. The Claimant's actions were clear, direct, and serious violations of Carrier rules and policies. The Carrier contends that given the gravity of the incident, dismissal was properly assessed.

The Carrier argues that neither the Claimant nor the Organization has denied his use of illegal drugs, nor challenged the validity of the testing procedures and results. The Claimant and the Organization also have not disputed that Claimant's vehicle crashed into another vehicle, causing injury and serious damage. Instead, the Organization and the Claimant have proposed a series of theories devoid of supporting evidence, in an attempt to deny the Claimant's responsibility.

The Carrier insists that the Claimant was afforded a fair and impartial

investigation into all of the charges against him, as well as all procedural due process. Consistent with many Board Awards, the Carrier argues that the discipline imposed for the Claimant's proven violations must not be disturbed.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Claimant was remorseful and did not deny the results of the drug and alcohol testing at issue. The Organization points to the Claimant's testimony about his marital problems and his inability to properly deal with these problems. The Organization emphasizes that after his removal from service, the Claimant voluntarily contacted the Carrier's EAP and entered a recommended counseling program with which he still is involved. The Organization asserts that although other employees, including the Claimant's foreman, worked with the Claimant all morning, no one took notice of the fact that there was an aroma of alcohol until after the accident. The Organization suggests that someone ignored an accident waiting to happen.

The Organization then argues that when the Claimant noticed that the vehicles in front of him were stopped, he took the only evasive action that he could. The Claimant downshifted, and he applied the brakes via the Maxi-brake. The Organization asserts that this failed to stop the truck, and the collision ensued. The Organization questions the validity of the post-accident testing, which was done at 10 or 20 miles per hour. The Claimant's vehicle actually was traveling at 30 miles per hour, so it would take longer to stop. The Organization insists that the testing was faulty and not relevant to this case. Moreover, there was no claim that the brakes did not work; instead, the Claimant stated

that the brakes failed to stop his vehicle in time due to the conditions.

The Organization maintains that under the circumstances, the Claimant should have been allowed to sign a Rule G Waiver. The Claimant entered the program, but without the benefit of the waiver.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating numerous Carrier rules when he knowingly operated Carrier equipment under the influence of alcohol and cocaine which led to a serious accident involving a great deal of damage. Therefore, the claim must be denied.

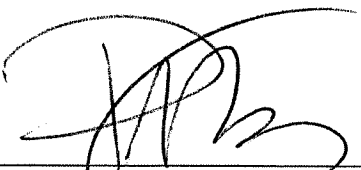
The Claimant admits that he was under the influence of alcohol and cocaine on the date that he was operating a hi-rail on the Carrier's property. At the oral argument in this case, he stated that he was "self-medicating" because of a serious divorce situation. Consequently, it is clear from the record and his admissions that he was violating Carrier rules about having alcohol and cocaine in his system while he was at work.

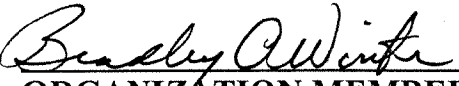
The only issue to be resolved here is whether or not the Carrier should have allowed the Claimant to sign a Rule G Waiver and take part in the assistance program to attempt to conquer his drug problems. Although that is often allowed by the Carrier in cases where individuals are found to be under the influence at work, this case involves a

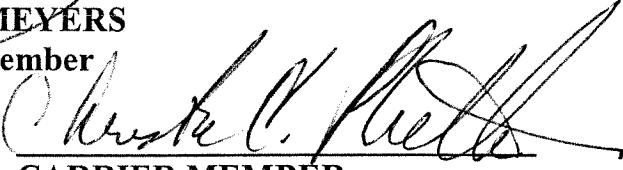
variety of rule violations on the part of the Claimant which led to the accident where his vehicle hit a CSX vehicle and caused \$20,000.00 worth of damage. It is true that the Claimant voluntarily entered an EAP program in an effort to conquer his drug and alcohol problems, but we find that the Carrier had no obligation to allow him to do that after the number of rule violations in which he engaged and the seriousness of the offense here. The Carrier chose to terminate his employment and we cannot find that the action taken by the Carrier was unreasonable, arbitrary, or capricious under these circumstances. Therefore, the claim must be denied.

AWARD:

The claim is denied.


PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER


CARRIER MEMBER

DATED: 2/5/09

DATED: February 5, 2009