PUBLIC LAW BOARD NO. 7104

BROTHERHOOD OF	)	
MAINTENANCE OF WAY EMPLOYES	)	
DIVISION – IBT RAIL CONFERENCE	)	
	)	**CASE NOS. 12 & 13**
vs.	)	**AWARD NOS. 12 & 13**
	)	
CSX TRANSPORTATION, INC.	)	

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood:

. . . [W]e are requesting that Mr. Bennett would be exonerated from these charges placed against him and that he would be paid for all loss of wages including overtime, expenses he may have incurred, including mileage for the use of his personal vehicle, and all other fringe benefits would be re-instated to Mr. Bennett beginning with the date Mr. Bennett was being withheld from service by the Carrier continuing until such time he is placed back into service by the Carrier.

FINDINGS:

Public Law Board No. 7104, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The facts of this case are not in dispute. The Claimant, P.L. Bennett, had been employed by the Carrier since 1999. He was a participant in the Carrier's bypass program, offered to employees who have been charged with violations of Carrier's Rule G and/or Drug Alcohol Use Policy, as a result of a positive test for cannabinoids in 2004.

Rule G provides:

> Employees reporting for duty, on duty, on CSXT property, or occupying facilities provided by CSXT are prohibited from having in their possession, using or being under the influence of alcoholic beverages or intoxicants.

> Employees shall neither report for duty nor perform service while under the influence, of, nor use while on duty or on CSX property any drug, medication, or other substance, including prescribed medication that will in any way adversely affect the employee's alertness, coordination, reaction, response, or safety.
>
> The illegal use and/or possession of a drug, narcotic, or other substance that affects alertness, coordination, reaction, response, or safety is prohibited while on or off duty.

As a participant in the bypass program, Claimant was subject to FRA Short Notice Follow-Up Toxicological Testing. On December 1, 2006, Claimant was charged to attend an investigation, scheduled for December 11, 2006, as follows:

> The purpose of this investigation is to develop the facts and place your responsibility, if any, in connection with information . . . received on November 13, 2006 from Dr. Joseph A. Thomasino, Medical Review Officer, that the Short Notice Follow-up toxicological test that you underwent on October 16, 2006 and were unable to provide a sufficient specimen of urine for testing and the subsequent special physical examination on November 6, 2006 provided no medical explanation for your inability to provide adequate urine specimen. In accordance with applicable federal regulations you are considered to have refused to provide the urine toxicological specimen required by regulation.
>
> In connection with the aforementioned refusal to provide a toxicological test, you are charged with possible violation of CSX Transportation Operating Rule—Rule G, CSX Safeway General Safety Rules—GS-2 Substance Abuse and GR-2(4).
>
> *Additionally, since this is a violation of your substance abuse treatment* plan within the last five years, this notice will also service to reinstate the original Rule G and/or Safety Rule 21 charge dated April 30, 2004 . . . You are also charged with a possible violation of your Substance Abuse Treatment contract . . .

Thereafter, there ensued some confusion about whether the December 11, 2006 hearing had been properly postponed, and, on December 14, 2006, the Organization, by letter, asserted that the charges should be dismissed as a result of the Carrier's failure to appear. The hearing took place on January 16, 2007, and the Carrier thereafter found Claimant guilty of the charges and dismissed him from employment. The Organization filed a claim challenging the Carrier's action, which is before this Board in Case No. 12. When the Organization appealed the discipline to the highest Carrier Officer designated to handle such matters, it assigned the appeal a different case number, as, subsequently did the Carrier. In that appeal, the Organization attached a letter from Claimant's physician, dated January 11, 2007, stating that Claimant had informed him that he had

been ill with gastroenteritis just prior to the testing, and Claimant's inability to produce an adequate urine sample could be the result of that illness. This file is before the Board in Case No. 13.

Joanne Mattingly testified at the investigation that she was scheduled to be the Conducting Officer for Claimant's investigation. She stated that she needed to postpone the investigation due to a vacation, and on December 8, 2006 she called L.C. Smith, Organization Vice Chairman, Allied Eastern Federation, and so informed him. She testified that she reminded him that the hearing was scheduled for the following Monday and he needed to notify Claimant of the postponement. Ms. Mattingly provided an e-mail she sent her clerk after the conversation with Mr. Smith, instructing the clerk that Mr. Smith would call and she should prepare the paperwork for the postponement.

Mr. Smith acknowledged at the investigation that he spoke with Ms. Mattingly on December 8, 2006, that she informed him she would be on vacation the following week and unable to conduct the hearing on December 11, and that she told him the other potential Conducting Officer would also be on vacation. Although Mr. Smith testified that he had not agreed to postpone the hearing, he conceded he told Ms. Mattingly he understood she was going on vacation, "not to worry about that too much," and he would contact her clerk the following Monday.

During the investigation, the Carrier presented medical documentation of the testing procedure and result. Daniel Bowen, Clinical Manager for Carrier's Employee Assistance Program, explained that Claimant was subject to follow-up testing as a result of his bypass agreement, and underwent such testing on October 16, 2006. He explained that Claimant was unable to provide a sufficient urine sample for testing within the allotted time, and as a result he was examined by a physician to determine if there was any medical explanation for the failure. He stated that in this situation an employee is permitted to continue in service until the results of the special examination have been provided to Carrier's Medical Review Officer for a final determination. The results of that special examination, he stated, showed no medical explanation, and under the applicable rules, Claimant's failure to produce was considered a refusal to provide a sample.

Claimant acknowledged at the investigation that he was subject to follow-up testing as a result of his previous Rule G violation and bypass agreement. He stated that on October 16, 2006, he drank water and made three attempts to provide the sample, but was unable to do so. He stated that he and his family had been ill the week before, experiencing vomiting and diarrhea, up until the evening before he was tested. Claimant's physician's letter recited that Claimant had provided him the same information, but also stated Claimant did not see the physician until after the illness had passed. There is no indication in the letter that Claimant underwent a medical examination.

The Carrier first asserts that all of Claimant's due process rights were fully protected and the hearing was conducted in a fair and impartial manner. With respect to

the Organization's contention that the Carrier did not appear at the time designated it its December 1, 2006 letter, the Carrier responds that it gave the Organization verbal notice of the postponement request and there is nothing in the Agreement which specifies how or to whom such a request must be made.

On the merits, the Carrier asserts that it clearly demonstrated that Claimant violated Rule G and related rules, as well as his substance abuse treatment plan. The evidence shows, the Carrier points out, that Claimant was unable to produce a sufficient urine sample for testing, and the Carrier's medical evidence demonstrated that there was no medical explanation for Claimant's failure. While Claimant denied the violation and asserted that medical problems precluded him from producing a sufficient sample, the Carrier urges that the Board, in accordance with well-established practice, defer to the Hearing Officer's credibility determinations. It is well established, the Carrier urges, that a failure to produce is considered a refusal and a positive test. In these circumstances, the Carrier concludes, it was well within its rights in determining that dismissal was the appropriate sanction.

The Organization first asserts that the Carrier waived its right to investigate the charges against Claimant, as it made no valid request to postpone the hearing and simply did so on its own. On the merits, the Organization states that the record shows Claimant was simply unable to produce an adequate sample, and should not be held to have violated any rules.

The Board has carefully reviewed the record in its entirety. First, we find no procedural irregularities which deprived Claimant of his right to a full and fair investigation. The record evidence demonstrates that the Organization, tacitly if not expressly, agreed to the Carrier's request that the investigation be postponed, and we therefore do not accept the Organization's argument that the Carrier waived its right to proceed with the charges. There is no evidence that the Claimant was prejudiced by the postponement, and nothing to suggest that the rescheduled hearing did not result in a full and fair hearing.

On the merits, we conclude that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. The record includes the undisputed evidence that Claimant did not produce an adequate sample for testing, and the Carrier's medical evidence established that there was no physical reason for the Claimant's failure to do so, notwithstanding Claimant's contrary contention and the statement from his physician, which did little more than repeat Claimant's explanations. It is well established that, absent a valid medical explanation, the failure to produce is viewed as a refusal to test and a violation of the applicable rules.

Given this fact, the record demonstrates that Claimant failed to comply with the conditions for retention of his employment following his previous positive test result. Under these circumstances, the Carrier's decision to dismiss the Claimant cannot be found arbitrary, capricious or unjust.

AWARD

Claim denied.

JACALYN J. ZIMMERMAN
Neutral Member

MATTHEW BORZILLERI
Carrier Member

TIMOTHY KREKF.
Organization Member

Dated this 10th **day of** October **, 2008.**

Oct 10, 2008