

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYEES DIVISION
(
(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated April 10, 2008, the Roadmaster instructed Andrew H. Furnish (hereinafter "the Claimant") to attend a formal Investigation on April 22, 2008, at the Carrier's Midwest Region Engineering Department conference room in Louisville, Kentucky, with him as principal. The letter stated:

. . . The purpose of this investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred in the Roadmaster's office at Cincinnati, OH, on April 10, 2008, at approximately 0830 hours. You were confronted that morning by myself and Engineer of Track Doc Windell and told that we would be performing a FMCSA drug and alcohol test due to reasonable suspicion. After being instructed to remain in the office pending the arrival of the testing company, you left the office without permission before the test could be performed. Company officials were unable to locate you on the premises.

In connection with the above, you are charged with refusal of a drug and alcohol test, insubordination, and failing to follow instructions. Your actions in connection with this matter appear to be in violation of, but not limited to, CSX Transportation Operating Rules - General Rule "G", General Regulations "GR-2", CSXT Safety Rule GS-2, and CSX Drug/Alcohol Use Policy.

At the Organization's request, the scheduled April 25, 2008, hearing was postponed from April 22, 2008, to May 1, 2008. A second postponement was also granted at the Organization's request from May 1, 2008, to June 3, 2008.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant did not appear at the hearing that was scheduled for and held on June 3, 2008. After the hearing opened the Organization requested a postponement based on the fact that the Claimant was not present and to permit the Organization to attempt to get in touch with him. The representative of the organization stated that he understood that the Claimant had been in touch with the EAP counselor but that he did not know where the Claimant was that day. The hearing officer denied the request on the grounds that two requests for a postponement had already been granted, no request for a third postponement had been made prior to the hearing, and the Carrier's witnesses were present and ready to proceed. The hearing officer stated that it was the responsibility of the party requesting a postponement to do so prior to the date of the hearing so that arrangements may be made to notify the other witnesses. Evidence would be presented, the hearing officer stated, that every effort was made to notify the Claimant of the hearing as prescribed in the Agreement, and the hearing officer denied the request for a postponement. The representative of the Organization stated that since the Claimant was not there and the request for a postponement had been denied, he (the representative) was exiting the hearing room.

Evidence was presented that the original charge letter dated April 10, 2008, was mailed to the Claimant at his residence on that date by certified mail, return receipt requested. The letter was returned to the sender as unclaimed. The first postponement

letter dated April 25, 2008, was signed for as received by the Claimant on 4/26/08. The second postponement letter dated May 28, 2008, was mailed the next day to the Claimant at the same address as the previous two letters. The tracking record for that letter taken from the United States Postal Service website and introduced into evidence at the hearing contains the same certified receipt number as appears on the letter and states that delivery of the item was attempted at 9:33 a.m. on May 30, 2008, and a notice was left.

The Roadmaster gave the following testimony. The Claimant was working for him on April 10, 2008, as Vehicle Operator for gang 5PD1. The position required a commercial driver's license ("CDL"), and the Claimant possessed such a license. The Roadmaster has been trained in drug and alcohol testing, most recently on October 20, 2006, in reasonable suspicion testing. On April 10, 2008, at about 8:05 a.m. the Engineer Track and the Roadmaster accompanied the Claimant to the office "to discuss his unorthodox behavior, such as being withdrawn, erratic demeanor, possible weight loss," and issues of absenteeism.

The Roadmaster [his testimony continued] called EMSI National Dispatch Center, the organization that administers drug and alcohol tests for the Carrier, and requested a FMCSA reasonable suspicion test. The person he spoke with said that she would contact the facility in Cincinnati and call him right back. The Roadmaster read the following statement to the Claimant: "You are being tested in accordance with Federal Motor Carrier Safety Act guidelines. In order to comply, you must provide breath and/or urine samples as directed. Failure to provide samples as directed will result in your being taken out of service, disqualified from performing an FMCSA safety-sensitive job and charged with insubordination."

The Roadmaster filled out a CSX form in connection with the test. At the top of

the form, to identify the kind of test being ordered, he put a check mark in front of the following printed line: REPORT OF FRA REASONABLE SUSPICION TEST (*Signs & Symptoms*), to which he added “(FMCSA).” He checked “No” to indicate that the test was not being required as the result of an FRA reportable accident or incident. In the space where the Roadmaster was required to “Identify the signs & symptoms” that an on-duty employee was displaying “of alcohol and/or drug misuse,” the Roadmaster wrote, “withdrawn, erratic demeanor [sic], weight loss, red rash around mouth, and continuing absenteeism problems.” In the space for the employee to be tested, the Roadmaster entered the Claimant’s name. The Roadmaster signed his name on the form as the “Supervisor requesting test,” and the Engineer Track signed as the “Supervisor approving test.”

The Roadmaster testified at the Investigation, “I noted that he was withdrawn, had erratic demeanor, possible weight loss, red rash around his mouth and continuing an absenteeism problem.” The Engineer Track testified that the Claimant “had been showing some unorthodox behavior. He had been kind of withdrawn, problems with absenteeism, acting erratic. He looked like he had lost weight. We were having several issues with him.” Like the Roadmaster, the Engineer Track has also been trained regarding reasonable suspicion testing.

While the Roadmaster and the Engineer Track were in the office with the Claimant, the person from EMSI called back around 8:30 a.m. and told the Roadmaster that she had to ask him some questions concerning the reasonable suspicion. The Roadmaster and the Engineer Track did not want to speak with the EMSI’s representative in the Claimant’s presence and instructed him to remain in the room until they returned. The Engineer Track testified, “I personally told [the Claimant] to sit in the seat there in

the office and not to move until we got back.” The Roadmaster and the Engineer Track left the room for another office so that they could converse privately with the EMSI representative. They spoke with her for approximately eight minutes, and, when they returned to the office, the Claimant was gone.

The Roadmaster and the Engineer looked for the Claimant but could not find him. The EMSI collector arrived at around 9:35, and they explained to him that they had been looking for the Claimant the past hour or so and had also called his cell phone number but without success. The EMSI collector waited a further 15 minutes while they searched for the Claimant but were unable to find him.

The Roadmaster faxed a copy of the report form he and the Engineer Track had completed and signed to the Manager Drug & Alcohol Regulations at CSX headquarters in Jacksonville, Florida. At the bottom of the form the Roadmaster wrote, “* Employee Refused To The Test By Leaving The Property Against Our Instructions.”

The office of the Chief Medical Officer in Jacksonville, Florida, sent a memorandum dated April 10, 2008, to the Division Manager-Midwest in Louisville, Kentucky, reciting that reasonable suspicion toxicology testing was ordered that date for the Claimant, who was told that the testing was being ordered, and who then left the premises before the collector arrived. The memorandum stated, “Based on the documentation provided, [the Claimant] should be charged with a refusal to test.” It advised, “A hearing as described in 49 CFR 219.104 should be offered to this employee.”

The Roadmaster identified and read into the record the following rules and regulations that were cited in the charge letter as possibly having been violated by the Claimant:

Operating Rules - General Rule G

G. Employees reporting for duty, on duty, on CSX property or occupying facilities provided by CSX 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 employees' 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.

General Regulations - GR-2.

GR-2. All employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public. Employees must not:

* * *

4. Be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless, or incompetent.

5. Willfully neglect their duty.

* * *

8. Conceal facts concerning matters under investigation.

General Safety Rules - GS-2

GS-2. Substance Abuse

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 CSXT property, any drug, medication, or other substance, including prescribed medication that will in any way adversely affect the employees' 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.

Company Policies - Drug/Alcohol Policy

Drug/Alcohol Use Policy

Employees reporting for duty, on duty, on CSX property, or occupying facilities provided by CSX 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 employees' 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.

The Roadmaster identified documentation that showed that the Claimant was trained in the Operating Rules and scored 98 on a test of the rules given on July 13, 2006. He also was trained in the Safety Rules and received Engineering Safety Certification most recently on January 21, 2008, in a course that included review of the Safety Rules.

The Roadmaster also identified a document headed What You Need to Know About Federal Drug and Alcohol Testing. He called attention to the beginning of the document where the statement is made, "DOT and FRA testing regulations (49 CFR Parts 40 and 219) apply to all employees covered under the hours of service law (e.g., train and engine employees, dispatchers, and signal employees)." He also quoted the following portion of the document:

Refusal to Test

A refusal to take a Federal test usually has harsher penalties than a positive test result. **Never** refuse to cooperate with the testing requirements. Take the test and if needed, address any issues you have later. A refusal includes:

- Failure to appear for a test
- Failure to remain at the testing site
- Failure to cooperate with the testing process
- Failure to provide a sufficient amount of breath or urine (without an adequate medical explanation as determined by a physician through a

- required medical evaluation)
Adulteration or substitution of your urine specimen

The Roadmaster testified that he included the reference to Rule G in the charge letter because the Claimant's erratic behavior and actions made him suspicious that the Claimant was under the influence of something. His refusal to take the test, the Roadmaster stated, led him to believe that something was being used. GR-2, which prohibits insubordinate conduct, was included in the charge letter, the Roadmaster testified, because the Claimant was instructed by him (the Roadmaster) and the Engineer Track not to leave until the person from the testing facility arrived, and the Claimant failed to follow the instructions. The Claimant was being paid for his waiting time, the Roadmaster testified, and he left without requesting permission and without explanation. The Roadmaster and the Engineer Track both testified that in their opinion the Claimant was insubordinate in leaving the office and the premises after being specifically instructed not to leave.

Following the hearing the Division Engineer notified the Claimant by letter dated June 18, 2008, that the Investigation supported the charges brought against him in the initial charge letter and that "[d]ue to the seriousness of the charges proven in this case; discipline assessed is immediate dismissal from the service of CSX Transportation and forfeiture of all rights and seniority."

The first issue in the case is whether it was proper for the hearing officer to hold a hearing in the absence of the Claimant and despite the request of the Organization, which represented the Claimant, to postpone the hearing. Rule 25 of the current Agreement is pertinent and provides as follows:

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 twenty (20) days from the date management had knowledge of the employee's involvement. 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. . . .

The evidence establishes that the Claimant was given reasonable and prompt advance notice in writing of the exact offenses of which he was accused and that a copy was provided to the Union representative. Notice was sent by certified mail, return receipt requested, and included the date and location of the hearing, and the starting time.

In addition, documentary evidence was presented that the Claimant received and signed for the letter containing the first notice of postponement. He therefore had actual knowledge that charges were pending against him from the Company and that a formal hearing was scheduled to investigate the charges. It was his responsibility to check his mail and appear for any scheduled hearing or, if he had a valid reason why he was unable to appear as scheduled, to request, by himself or through his representative, a postponement. No evidence has been presented of a valid reason for postponement.

The board finds that the hearing officer acted properly when he denied the Organization's request for a postponement made for the first time on the day of the hearing after the Carrier and its witnesses had appeared for the hearing as scheduled. Rule 25(d) states that a hearing may be postponed for a valid reason. A valid reason for the postponement was not provided in this case.

The CSX Transportation Reasonable Suspicion Testing Manual for Supervisors as revised 9/2006 states at page 15, “In **most** cases you should observe **at least two** signs or symptoms before you require an employee to take a reasonable suspicion test.” The exception given in the Manual does not apply in this case, and the Roadmaster was required to observe two symptoms in order to require the Claimant to take a reasonable suspicion test. The list of signs and symptoms appears at page 20 and in Appendix A of the Manual.

The specific signs and symptoms listed by the Roadmaster in the documentation completed by him and approved by the Engineer Track were the following: “withdrawn, erratic demean[or], weight loss, red rash around mouth and continuing absentee problems.” Weight loss and rash are not included in the list of signs and symptoms found in the Manual. Appendix C of the Manual, “The Troubled Employee,” specifically states that the signs of a troubled employee, such as absenteeism and tardiness, “are not grounds for reasonable suspicion.” “If performance has dropped to unacceptable levels,” the Manual states, “you should confront and refer the employee to the Employee Assistance Program.” Unsatisfactory attendance calls for referral to the Employee Assistance Program and not for reasonable suspicion testing.

However, “withdrawn” is found in the Manual’s list of signs and symptoms under the heading “Behavior,” which includes in the list “Depressed, withdrawn.” “Erratic demeanor” would also probably qualify, although the Roadmaster should have specified the precise nature of the erratic behavior. The Board is willing to give the Carrier the benefit of the doubt in this case because of the undisputed testimony of both the Roadmaster and the Engineer Track that the representative of EMSI questioned the Roadmaster about the reasonable suspicion testing the Roadmaster was requesting before

sending a collector out to do the test. According to the Roadmaster's testimony they spoke for approximately eight minutes about the reasonable suspicion testing. It is a reasonable inference that the EMSI representative would not have sent a collector to do the testing unless she was satisfied from her conversation with the Roadmaster that the requisites for such testing had been satisfied.

In any event the Claimant was clearly insubordinate in this case. He should have taken the test and then, if he tested positive, argued that the test was improperly ordered because he did not give reasonable suspicion that he was under the influence of drugs or alcohol. Instead he defied a clear instruction that he was to remain in the office until the EMSI collector arrived to test him.

Defiant disobedience of a clear authoritative instruction related to one's job is insubordination. The Individual Development & Personal Accountability Policy permits discipline up to dismissal for a first offense of insubordination. The Claimant was specifically notified that he was being tested for drugs and/or alcohol and expressly warned that failure to provide a specimen as directed would be considered insubordination. Nevertheless he defiantly left the premises before he could be tested and, it must be assumed, and the Board finds, to avoid being tested. This was insubordination in accordance with the warning given to him. In addition he disobeyed the Engineer Track's instruction to remain in the office until the tester arrived. The Claimant was thus doubly insubordinate in this case.

Given the circumstances of the insubordination in this case, where it deprived the Carrier of the ability to determine whether an employee in a safety-sensitive position who was exhibiting withdrawn and erratic behavior was endangering the public and his coworkers by being under the influence of drugs while on duty, the Board finds that the

Carrier was entitled to conclude that the retention of the Claimant in its employ posed an unacceptable risk to the safety of the public, the welfare of its employees, and the efficient operation of its business. The discipline administered by the Carrier will not be disturbed.

A W A R D

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
February 5, 2009