Award No. 38
Case No. 38

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated September 11, 2008, Jeff Carnes, Assistant Division Engineer of Structures, instructed Timothy R. Solomon ("the Claimant") to attend a formal Investigation on September 23, 2008, in Louisville, Kentucky, "to determine the facts and place your responsibility, if any, in connection with information that I received on Wednesday, August 27, 2008, that the Company short notice follow-up breath alcohol test you underwent on August 27, 2008, has been verified and confirmed as positive at a level of 0.029 gms/210 liters." The letter stated that the Claimant was "charged with conduct unbecoming an employee of CSX Transportation, insubordination, failure to follow instructions, and possible violations of, but not limited to, your Rule G, C-2 option (bypass) that you selected on June 8, 2005; the EAP-1 Treatment Plan that you agreed to and signed on June 17, 2005; CSX Transportation Operating Rules - General Rules A and G, and General Regulation GR-2; CSX Safe Way General Safety Rule GS-2; the CSX Drug/Alcohol Use Policy."

The letter noted that the Claimant "had been charged on June 7, 2005 with a possible Rule G violation and elected the Rule G, C-2 option (by-pass) on June 17, 2005,

which served to postpone the investigation scheduled in connection with" the June 7, 2005, charge letter. The postponed hearing was being reinstated, the letter continued, and was being included "in this investigation." The Claimant, the letter concluded, was being withheld from service pending the outcome of the Investigation. After a postponement at the Carrier's request, hearing was held at the originally designated location on September 30, 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 began his employment with the Carrier on August 21, 2000. At the time of the Investigation he was assigned to the Midwest South Service Lane as a Bridge Foreman on Force 6K89. His job was to maintain and make repairs on bridge structures and culverts. Some three years prior to the present Investigation, on June 1, 2005, he was arrested for allegedly driving under the influence of alcohol. He failed to report for work

that day, and the Company subsequently learned that he had been arrested and jailed. A charge letter dated June 7, 2005, instructed him to attend a formal investigation dated June 21, 2005, and charged him "with a violation of Rule G and/or CSXT Safety rule 21 and/or CSX Drug/Alcohol Use Policy."

The letter stated that as a first offender he had the "option to choose a Rule G bypass" and enclosed a form for the Claimant to indicate whether he would attend the hearing or contact an Employee Assistance Program counselor and be willing "to immediately enroll and participate in an approved rehabilitation program. . . ." The Claimant checked the part of the form stating that he would contact an EAP counselor and was willing to enroll in a rehabilitation program. The form stated that selection of the rehabilitation option was with certain understandings, including that "The hearing on the Rule G/CSX Drug/Alcohol Use Policy charge will be held in abeyance" and that "Any reported non-compliance with my after-care plan within five (5) years of my return to service will result in a hearing on the Rule G/CSX Drug/Alcohol Use Policy charge." On June 9, 2005, the Claimant signed the form on the signature line below the statement, "I have voluntarily selected the above-indicated option(s)."

After meeting with an EAP counselor, the Claimant, on June 17, 2005, entered into a written Substance Abuse Treatment Plan, which provided as follows:

> CSX Transportation Substance Abuse Treatment Plan
>
> I, Timothy Solomon, agree to the following:

Company sponsored urine drug screening/breath alcohol tests on a short-notice basis. This will require me to call the Manager as outlined below, appear for testing at the time and place designated by CSX, give a urine/breath specimen under conditions outlined by the Manager. Failure to comply or a positive test result can result in medical disqualification or disciplinary action. This plan remains in effect even if furloughed or otherwise not in active duty service.

Comply with treatment plan as follows:

1. Maintain complete abstinence from all mind/mood-altering drugs and alcohol at all times.

* * *

3. Submit to follow-up testing (in addition to random testing) as required in bypass agreement.

4. . . . Do not work impaired.

* * *

Properly addressing a substance abuse issue is of paramount concern in the safe discharge of company related duties. I understand that failure to comply with any or all of the treatment recommendations may be grounds for disqualification by the Chief Medical Officer and, in some circumstances, may require release of the document to supervision for purposes of disciplinary action.

I understand that the contract will remain in effect for 5 years from date of return to work and I agree to release a copy to the Chief Medical Officer, CSX Transportation.

The document was signed by the Claimant on the signature line, witnessed in writing by the counselor, and was dated 6-17-05.

The Claimant subsequently returned to work and tested negative on several follow-up short-notice drug and alcohol tests. On August 27, 2008, however, he was

administered a short-notice follow-up breath alcohol test where he tested positive. An alcohol reading of .02 or above is considered a positive test. In a breath test administered at 7:39 a.m. on August 27, the test result was an alcohol level of .037. Following a positive reading, a second test must be given after an interval of at least 15 minutes but no longer than approximately 34 minutes. The Claimant was given a second breath test at 7:59 a.m. that showed an alcohol level of .029.

The results of the test were reported to management, and Mr. Carnes sent the charge letter dated September 11, 2008, described above to the Claimant. He testified at the Investigation that he was notified by the Medical Department of the results of the breath alcohol test and identified a letter dated August 27, 2008, from the Chief Medical Officer informing him "that the breath alcohol testing you underwent on August 27, 2008, was positive at a level of 0.029 gms/210 liters." A copy of the test results as reported by the breath alcohol technician was enclosed. The Claimant was asked at the Investigation if he questioned the Medical Department concerning the test results, and he said that he did not.

The Claimant testified that the morning that he was tested he told the technician who performed the test and a company manager who was present that "there's something wrong here, this cannot be right." The technician, the Claimant stated, asked him to relate everything he did that morning from the time he got up. The Claimant told the technician everything that he did, and, according to the Claimant, the technician then said

there could have been a false positive test based on what the Claimant ate or drank and that he (the technician) would take another test. According to the testimony of the manager who was present for the testing, after the first positive test, the Claimant said that he had used mouthwash that morning.

After the second positive reading, the Claimant testified, he "was completely bewildered," and the technician suggested that he could take a blood alcohol and urine test if he agreed to do so. The Claimant testified that he agreed to such a test, and the manager said that he would have to check on it. The manager left to find out if such a test could be given and came back and said that it could not. The manager testified that he went to the staff engineer's office to inquire about the possibility of a blood test, and the hearing officer in this case, who was the staff engineer at the time, inquired of the medical department and then told the manager that a blood test could not be done.

The Claimant testified that the technician who tested him told him of someone who was under a Rule G violation who tested positive after chewing Trident gum. "So the second test," the Claimant stated, "came about I guess apparently after that." In his own case, the Claimant testified, he regularly uses a mouth wash that says "alcohol-free" on the bottle but which contains propylene glycol, a product which contains the ingredient ethyl alcohol. In addition, he sprayed his bed sheets heavily with a fabric softener, the Claimant testified, that contained ethyl alcohol.

Daniel C. Bowen, Clinical Manager of the Carrier's Employee Assistance Program

since December, 1987, has, among his duties, oversight of Rule G and drug testing cases. He confirmed the validity of the breath alcohol tests administered to the Claimant. He noted that in addition to the two breath tests performed on the Claimant, an accuracy test was also performed to check the accuracy of the testing instrument, and it checked out OK. The Clinical Manager explained that the first breath test is considered a screening test, and that the second result is what counts. He stated, ". . . it's a valid test result."

Mr. Bowen testified that after a test result of .02 or above the machine locks out for 15 minutes and can't be used again during that period. The reason for this, he explained, is to allow surface alcohol in the mouth of the employee being tested, such as from mouthwash, to evaporate to assure a reliable test. Surface alcohol, he testified, will evaporate in a matter of minutes. There is some amount of alcohol in most mouthwash, he stated, but the product is not intended to be ingested but to be swished around and expelled from the mouth. It would leave only surface alcohol, he testified, that would evaporate in probably six minutes or less, depending on how much was present. If someone were drinking mouthwash, Mr. Bowen testified, "then it could possibly be present on the later test, however, they would have to drink a lot of mouthwash to have a level this high." There is no way, according to Mr. Bowen, that the Claimant's .029 reading could have been caused by surface mouthwash. It was conclusive that the Claimant had alcohol in his system, Mr. Bowen testified, with a .029 reading after a 20 minute wait from his first test.

There is no blood test option, Mr. Bowen stated, after a follow-up test. Follow-up testing, he testified, is done according to the same standards the Carrier applies to federal testing, and there is no provision for a blood test. All follow-up testing, Mr. Bowen averred, is done solely with breath testing for alcohol and urine testing for other substances. The testing done, Mr. Bowen testified, was in accordance with the terms of the Substance Abuse Treatment Plan that the Claimant entered into.

In response to questions from the Claimant, Mr. Bowen testified that he honestly did not think that a piece of chewing gum would give the test results evidenced in the Claimant's testing. Mr. Bowen explained that the technician doing the testing is supposed to have the employee clear his mouth of any gum, chewing tobacco, or anything else during the waiting period between breath tests and that the test results in the Claimant's case were "coming down in kind of a normal fashion you'd expect from somebody that was metabolizing alcohol at that rate."

Mr. Bowen dismissed the possibility that any alcohol found in air fresheners or fabric softeners could explain the Claimant's testing positive in the second breath test. He stated that the trace amount of alcohol such products expose one to is not going to give the kind of alcohol levels as found in the Claimant's test results in the breath "basically coming out of your lungs."

Following the Investigation Tod Echler, Division Engineer, by letter dated October 14, 2008, notified the Claimant that a review of the transcript and exhibits of the hearing

supported the charges against him and that "[d]ue to the seriousness of the charges proven in this case, discipline assessed in this case is your immediate dismissal from the service of CSX Transportation and forfeiture of all rights and seniority."

The Carrier contends that the Claimant was provided a fair and impartial investigation, that it produced substantial evidence of his guilt, and that the discipline assessed was fully justified. The Carrier argues that there is no merit in the Organization's contention that the hearing officer should have removed himself based on his contact prior to the hearing with one of the Carrier's witnesses concerning an aspect of the case. The hearing officer made no determination of guilt or innocence, the Carrier asserts; allowed both parties to submit evidence; and his contact with the Carrier witness was of an administrative nature.

On the merits, the Carrier contends that the documentary evidence in the record demonstrated that the Claimant violated his Substance Abuse Treatment Plan and the Carrier's drug and alcohol regulations. It refers to a discussion at the hearing regarding whether the Claimant's second test result was .027 or .029 and observes that either way the result was a confirmed positive level of alcohol. The Carrier argues that the time interval of at least 15 minutes between tests allowed for any substance such as mouthwash "to clear from the system prior to the second test." It was therefore clearly established, the Carrier contends, that the test was accurate and positive for alcohol.

The Claimant's positive alcohol test, the Carrier asserts, reinstated the first Rule G

charge pursuant to the terms and conditions of his Substance Abuse Treatment Plan and substantiated his second Rule G violation. No substantial evidence was produced to discredit the August 27, 2008, positive test, the Carrier argues. In the railroad industry, the Carrier asserts, an employee is given only one opportunity for substance abuse treatment to correct a substance abuse problem. Dismissal was fully warranted, the Carrier maintains, for the Claimant's failure to abide by his treatment plan during its five-year period given the severity of his offense.

The fact that the hearing officer conveyed to the Claimant's manager during the testing procedure that the medical department would not authorize a blood test for alcohol after a positive follow-up breath test is not a basis for disqualification of the hearing officer. That a company official or manager has prior familiarity with the facts of an Investigation of an employee, or played some part in the course of events that resulted in charges against the employee, is not necessarily a basis for disqualifying that person from being a hearing officer in the Investigation of the employee.

In the present case the hearing officer did not testify and was not the deciding official regarding discipline. He permitted the Organization and the Claimant to question any witness they wanted to and to call any witness they wanted to in the Claimant's defense. No roadblocks were placed in front of the Organization or Claimant with regard to the presentation of the Claimant's defense. In the Board's opinion, after examination of the record, the hearing was basically fair, and there is no basis for disqualification of

the hearing officer. His role in the bringing of the charges against the Claimant was, at best, peripheral in that, in response to an inquiry from the Claimant's manager, he asked the medical department whether a blood test was permissible after a positive alcohol breath test and conveyed the medical department's answer to the manager. Such action on the hearing officer's part, prior to his selection as hearing officer in this case, in no way tainted his participation as hearing officer.

The other procedural issue in this case is whether the Claimant was entitled to a blood test for the presence of alcohol after testing positive for that substance in a breath alcohol test. The Clinical Manager, who has administrative responsibility in connection with drug testing and is familiar with the rules and regulations governing testing, testified positively that there was no right to a blood test for the presence of alcohol after a positive breath alcohol test in follow-up testing pursuant to a treatment plan. None of the documents introduced into evidence in this case provided for blood testing in relation to alcohol use. There was no showing that the collective bargaining agreement of the parties provides for a blood test for someone in the Claimant's situation who has tested positive in a breath alcohol follow-up test. On the record in this case, the Board finds that the Claimant was not entitled to a blood test for alcohol after testing positive for alcohol in a follow-up breath alcohol test pursuant to a Substance Abuse Treatment Plan.

On the merits, the evidence establishes that after his first breath alcohol test was positive, the Claimant was given a second valid alcohol test and again tested positive at

an alcohol level of .029. The second test was given 20 minutes after the first test, which complied with the requirement of the testing protocol that at least 15 minutes elapse between tests. The 20 minutes were more than sufficient time for any surface alcohol that the Claimant might have had in his mouth to evaporate.

In a closing statement the Claimant said that he stood firmly in maintaining that he had no alcohol consumption prior to work on August 27, 2008, or from the time he signed the Substance Abuse Treatment Plan. It is clear that the Carrier did not believe his assertion since it found him guilty of the charges against him. The Board cannot say that there was not substantial evidence to support the Carrier's refusal to credit the Claimant's denial of alcohol consumption. It is common knowledge that devices used for determining the alcohol content of a breath sample, such as the AlcoSensor IV used in this case, are considered reliable even to the extent that their testing results are accepted as accurate in a court of law, so long as the test is properly administered.

The documentary evidence in this case indicates that the two tests were properly administered and showed positive results each time. As noted, the 20 minutes between tests were more than enough time for any surface alcohol that the Claimant may have had in his mouth from mouthwash or the like to evaporate. An Accuracy Check test performed on the test instrument found it to be accurate. A letter to the Claimant from the Chief Medical Officer's office, enclosing the test results as printed by the AlcoSensor IV testing device, stated that ". . . the breath alcohol testing you underwent on August 27,

2008, was positive at a level of 0.029 gms/210 liters." The Chief Medical Officer, who was given the test documentation, did not indicate that he had found any problem with the way the breath tests were administered or the testing device.

It is significant also, as Clinical Manager Bowen testified, that the reduction in the two readings 20 minutes apart, from .037 to .029, was consistent with the metabolization of alcohol in the body (Tr. 61). Had the first positive reading been the result of surface alcohol in the Claimant's mouth, such as from swishing or gargling mouthwash, there should have been a precipitous drop between the two readings, not a gradual reduction consistent with alcohol metabolization in the body.

The Carrier has proved by substantial evidence that the Claimant violated his Substance Abuse Treatment Plan, which required him to maintain complete abstinence from alcohol at all times for the five-year period of the plan and not to work impaired. To the extent that he tested positive for alcohol on August 27, 2008, on the Carrier premises during duty hours he did not abstain from alcohol and he did work impaired.

In a letter dated August 27, 2008, to the Division Manager-Midwest regarding the Claimant's verified positive alcohol test of that date, the Chief Medical Officer stated as follows:

> This is Mr. Solomon's first verified test, positive toxicological testing result or confirmed positive alcohol test within five (5) years. However, he had been charged with a Rule G in 2007 [sic] and was already under the by-pass. Therefore, this should be treated similarly to handling afforded a second strike under the Company policy and the employee

> immediately charged with a violation of Rule G and CSX Drug/Alcohol Use Policy.

In the Board's opinion, notwithstanding the erroneous date given for the prior Rule G charge, the Chief Medical Officer's approach in this case was a reasonable one.

The Claimant could have elected to contest the June 7, 2005, charges against him in which he was accused of "a violation of Rule G and/or CSXT Safety rule 21 and/or CSX Drug/Alcohol Use Policy." Once he signed the bypass agreement and entered the treatment program, the Carrier was entitled to treat him the same as any other employee who had entered into a substance abuse treatment plan pursuant to a bypass agreement.

The policy at the Carrier, and in the railroad industry generally, is not to permit an employee under a bypass agreement and substance abuse treatment plan, who fails to abide by the treatment plan and tests positive for drugs or alcohol in a follow-up test, to undergo treatment a second time in a company program. Instead the general approach in such circumstances is to dismiss the employee from employment. See Public Law Board No. 7120, Award No. 23, Public Law Board No. 6564, Case No. 11.

The Substance Abuse Treatment Plan that Claimant Solomon entered into specifically indicated that failure to comply with any of the treatment recommendations could result in disciplinary action. He was aware that the discipline for failing a follow-up test after undergoing a substance abuse treatment program could be dismissal. Considering the Carrier's responsibility to maintain safe operations and the dangers

inherent in railroad work, one cannot say that the Carrier's dismissal action in this case was unreasonable.

AWARD

Claim denied.

ORDER

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
May 5, 2009