Award No. 81
Case No. 81

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

J. R. Oliver ("the Claimant") was first charged with possible violations of CSXT Operating Rule General Rule G, Safeway Rule GS-2, and the Drug/Alcohol Use Policy by letter dated August 21, 2007. The letter stated that on August 12, 2007, he admitted to two Carrier officials that he was under the influence of alcohol. A formal Investigation or hearing on the charges was scheduled for September 6, 2007, but the letter stated that since this was the Claimant's first Rule G charge within the preceding five years he was being offered a Rule G bypass option

The Claimant chose the option in lieu of the hearing. On August 22, 2007, he signed a document in which he agreed to contact the Carrier's Employee Assistance Program "and will indicate a willingness to immediately enroll and participate in an approved rehabilitation program, with the understanding that: (a) The hearing on the Rule G/Rule GS-2 charge will be held in abeyance, (b) I will continue to remain out of service until the appropriate supervisor approved my return to service, (c) I will be carried on the Carrier's records as being off due to 'disability', and (d) 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/Rule GS-2 charge." Above the Claimant's signature on the document was the statement, "I have voluntarily selected the above-indicated option(s)."

The Claimant successfully completed the rehabilitation program and returned to work. On June 15, 2008, he was given a follow-up breath alcohol test that resulted in a

positive reading of .148 gms/210 liters. A confirmation test given 18 minutes later was positive at a level of .159 gms/210 liters. Carrier management was informed of the positive test result on June 16, 2008.

By letter dated June 23, 2008, from the Manager System Production Team Operations, the Claimant was directed to attend an Investigation on July 16, 2008, at the Division Office in Selkirk, New York, "to develop the facts and place your responsibility, if any, in connection with information that I received on June 16, 2008, from Dr. T. J. Neilson, Chief Medical Officer, that the Company Short Notice Follow-Up breath alcohol testing that you underwent on June 15, 2008, was confirmed as positive at a level of 0.159 gms/210 liters." The letter charged the Claimant with possible violations of Rule G, Safeway General Safety Rule GS-2, and Substance Abuse Treatment contract.

"Additionally," the letter stated, "since this is your second verified positive test within the last five years, this notice will also serve to reinstate the original Rule G and/or Safety Rule 21 [sic] charge dated August 19, 2007 which has been held in abeyance in accordance with the provisions of your election to opt for handling in the Employee Assistance Program, which was signed by you on August 22, 2007." The letter confirmed that the Claimant was being withheld from service pending the outcome of this Investigation. The July 16, 2008, scheduled hearing was postponed and, by letter dated August 24, 2010, from W. D. Murray, Director Tie Teams, was rescheduled to September 9, 2010, in East Syracuse, New York.

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

Claimant's alleged offense violated Rule 25 1(d) and the side agreement. The Organization requests that the Claimant be exonerated and made whole for his losses.

The Organization is in error in contending that the July 16, 2008, hearing was not "scheduled to begin within thirty (30) days from the date management had knowledge of the employee's involvement. . . ." Management had knowledge of the Claimant's involvement on June 16, 2008. The general rule regarding calculating time periods from the date of knowledge is that the date itself is not included. Thus the first day of the 30-day period would have been June 17, 2008, and the 30th day, July 16, 2008. See, for example, Third Division Award No. 9578 (1962).

In that case the applicable contract language stated, ". . . When a decision is so appealed the Representative will be notified in writing of the decision within sixty days from date the decision was appealed. When not so notified, the claim will be allowed." The Board held, "Since the appeal was taken on September 30 and no written notice of the denial of the appealed claim was given the Representative on or before the close of November 29, the sixtieth day thereafter, the claim was thereupon automatically allowed. . . ." The language "within sixty days from date the decision was appealed" parallels the applicable language in this case, "within thirty (30) days from the date management had knowledge." Just as the Board in the cited case began counting the 60-day period from October1, the day after the date of appeal, in the present case the 30 days must be counted beginning the day after management had knowledge. The Board so finds.

Both the Agreement and the November 11, 1999, side letter permit postponements. The record shows that both the Carrier and the Organization believed that the Claimant had resigned his employment. According to the evidence the Claimant took no action to reclaim his job until almost two years after completion of his rehabilitation treatment. That

fact is a strong indication that the Claimant had given good cause to believe that he had, in fact, resigned. It is not the way of the world for someone who believes that he is entitled to be returned to work after an absence to remain quiet for almost two years and make no claim to be allowed to go back to work. The Claimant's silence for so long a period of time lends strong support to an inference that no action was taken by either the Carrier or the Organization to schedule a hearing in this case following the Claimant's course of rehabilitation treatment because he had given cause to believe that he had resigned. Under these unique circumstances the Board finds that the postponement was for a valid reason and for a reasonable period of time.

On the merits, the facts of this case provided grounds for dismissal. See Public Law Board No. 7120, Awards No. 65 and 79. The claim will be denied.

Since it is not necessary to do so for a decision in this case, the Board makes no ruling on the question of whether the Organization is correct in its position that a hearing must be scheduled to actually begin within 30 days from the date management had knowledge of the employee's involvement as opposed to providing a notice of charges within the 30 day period.

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
December 10, 2010