

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7357
AWARD NO. 25, (Case No. 25)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

VS

**CP RAIL SYSTEM/DELAWARE AND HUDSON
RAILWAY COMPANY, INC.**

William R. Miller, Chairman and Neutral Member
Kevin D. Evanski, Employee Member
Anthony Stillittano, Carrier Member

Hearing Date: December 20, 2013

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

**"Appeal of discipline on behalf of BMWE member Mr. Dustin Mossey requests that the discipline of dismissal assessed to Mr. Mossey's personal record be removed and reversed."
(Carrier File No. 8-00856)**

FINDINGS:

Public Law Board No. 7357, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On March 9, 2012, Claimant was directed to attend a formal Investigation on March 14, 2012, concerning in pertinent part the following charge:

"The purpose of this Investigation will be to determine your responsibility, if any, regarding the incident at Kenwood Yard while employed as a Trackman/Truck Driver on March 1, 2012."

On April 3, 2012, Claimant was notified that he had been found in violation of GCOR Rule 1.5, General Order A-07 and HS 4320 and causing damage to company property (30 Demerits), using a personal electronic device while on duty (30 Demerits), testing positive for prohibited substances in his body fluids while on duty on company property (60 Demerits which is a dismissible offense in its own right).

It is the Organization's position that the Investigation was not "fair and impartial" because the charges were not specific, but were instead vague and there was no citation of any alleged Rules having been violated which made it impossible for the Organization to prepare a proper defense. The Organization further argued that the Carrier failed to comply with the language of Rule 25.13 as it did not provide all documents and evidence to the Organization prior to the Hearing. It also stated that the Hearing Officer's conduct was unacceptable as he was combative and he improperly ignored objections, and blocked relevant questioning by the Organization. Based upon those procedural errors, the Organization asked that the discipline be set aside without reviewing the merits.

Turning to the merits the Organization asserted that the Carrier did not meet its burden of proof and if it had proven anything (which it did not do) the discipline assessed the Claimant was draconian and excessive. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant received a "fair and impartial" Hearing. It argued that it is clear from a reading of the transcript that the Claimant and the Organization understood the charges and there is no requirement under Rule 25 of the Agreement that specific Rules must be stated in the Notice of Investigation. The Carrier also responded to the Organization's assertion that it did not provide relevant information stating that it complied with Rule 25.13 as all exhibits, (incident report, photos, written statement, etc.) were delivered to the Organization per their request. It further argued that the Hearing Officer did not do anything that hindered the Claimant's defense. It asked that the case be judged upon its merits rather than alleged procedural errors.

The Carrier asserted that when the record is reviewed it is clear that the Claimant damaged company property when his vehicle collided with a switch stand after which he was tested "For Cause Drug and Alcohol Test" which came back with positive results. It further stated that the evidence shows that the Claimant was using his personal cell phone for personal business during working hours, none of which was refuted. Additionally, the Carrier asserted that it takes the actions of the Claimant very serious, as the Claimant's lack of situational awareness is a serious matter as it can have catastrophic results. The Carrier also argued that the Claimant was not offered the Employee Assistance Program (EAP) because he was offered the same program in November of 2011, but he failed to complete the program, therefore, it reasoned that another attempt would be fruitless. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and is not persuaded by the Organization's procedural arguments that there were any discernible procedural irregularities that tainted the Organization's ability to effectively defend the Claimant. It is clear

that the Claimant and the Organization understood the charges and were not "blindsided" by anything that occurred during the Hearing. The Board will reiterate its comments made in Award No. 23 of this tribunal that even though the record shows the Claimant was afforded his "due process" Agreement rights in the instant case, the Board would recommend that in the future it might behoove the Carrier to set those Rules it believes were violated as it could add greater clarity to Notices of Investigation. The dispute will be resolved on its merits.

On Pages 11 and 12 of the transcript Manager, Track Maintenance Central, D. L. Kulzer, testified in pertinent part regarding the Claimant's alleged involvement in an accident on March 1, 2012, wherein a switch stand was damaged by the vehicle that the Claimant was operating while working as a Trackman/Truck Driver. Mr. Kulzer explained that after he viewed the accident site and took photographs he questioned the Claimant about what had transpired. Mr. Kulzer was questioned about the incident as follows:

"Q. All right. Well, what did you ask him, and what was his response?

A. I just asked him what happened, and he just said that he was sitting in the truck. He thought the truck was in neutral. He reached over to get a bottle of water, and the truck lunged forward and he hit the stand.

Q. Hit the - -

A. - - the switch stand.

Q. The switch stand?

A. Yeah.

Q. And what position? The forward position? Reverse?

A. Forward with the front bumper of the truck.

Q. And, Mr. Kulzer, can you explain to us what damage occurred as a result of the collision?

A. The truck had a dent in the bumper and a small dent in the front high rail, and then down at the switch stand was ripped off at the switch ties and both timbers were broken.

Q. Head blocks?

A. Head blocks, yep, head blocks.

Q. So what would the cost of the damage be estimated at?

A. A switch stand is roughly \$1,026.82, and the timbers are \$371.55 apiece.

Q. All right. And the truck damage, did you estimate it?

A. I didn't get an estimate on it, but just, you know, between the bumpers - - I don't know what the high rail, you know, if we even had it inspected yet. They're probably \$1,000 for the bumper with some high rail damage.

Mr. Kulzer went on to testify that it took three men four man-hours apiece to repair the switch stand and he further stated that the Claimant was administered a "For Cause Drug and Alcohol Test" as a result of the accident. Additionally, Mr. Kulzer testified that Claimant's phone records showed that he used his personal telephone while on duty on two occasions despite being told not to use any electronic devices while on duty.

On page 31 of the transcript Mrs. Margaret Anderson, Coordinator, Health Services US, testified regarding the results of the Claimant's for cause drug/alcohol test as follows:

"Q. Okay. And, Mrs. Anderson, if you could just explain for us what you know about this incident which occurred on March 1st, 2012 at Kenwood, New York.

A. The information I received was that there was a vehicle accident, and for cause testing was done on our employee.

Q. And that employee's name?

A. Dustin Mossey.

Q. And now, could you describe the test, time and results?

A. Yes. The test they did a federal test, and it was done at 16:05 on March 1st, and the results were double positive for cocaine and marijuana."
(Underlining Board's emphasis)

Mrs. Anderson further testified that the actual testing was done by an Acosta Collector, which was a third party neutral that does all collections on site. She also explained that "For Cause Drug and Alcohol Tests" are done when there is an incident such as the one involving the Claimant and/or for alleged Rule violations.

The aforementioned testimony of Mr. Kulzer and Mrs. Anderson was not effectively refuted.

Review of the Claimant's testimony reveals that he did not deny that the accident happened as Mr. Kulzer explained it transpired. On pages 43 and 44 of the transcript the Claimant was questioned about the drug test as follows:

"Q. Mr. Mossey, Mrs. Anderson, US Health Coordinator, testified that your drug result - - well, first of all, did you give a drug test?

A. Yes, I did.

Q. How, did you do that? What type of test was it?

A. It was a breathalyzer, urine analysis.

Q. Are you now aware of the results?

A. Yes, sir.

Q. And what were the results?

A. Positive.

Q. For?

A. Marijuana and cocaine.

(Five minute recess was taken)

Q. Mr. Mossey, the last question for you was, please explain how you resulted in a cocaine and marijuana positive. Can you please explain how that happened?

A. I'm not sure on how that happened.

Q. Well, the question, the obvious question would be, were you using cocaine or marijuana?

A. Not on work hours. You know, I'm not sure how I got it into my system.

Q. But you do acknowledge that the positive test is there. So you had to have been using some form of drug in that application, cocaine or marijuana, in order to get a positive result?

A. Yes, sir.

Q. You're saying it was not at work that you used drugs, marijuana or cocaine?

A. I'm not sure. (*Underlining Board's emphasis*)

The evidentiary proof offered by the Carrier and the testimony of several witness including the Claimant substantiate that on March 1, 2012, the Claimant struck a switch stand with a company truck. Claimant testified that he had accidentally put his foot on the acceleration pedal while reaching for a bottle of water in the back seat, not knowing the vehicle was in gear. Claimant's excuse for the accident shows that the Claimant was not being careful in the operation of the vehicle. The record further shows that the Claimant used a personal electronic device while on duty without Carrier authorization and that violation can lead to distractions that might result in harm and/or damage to employees or equipment. Lastly, the record proves that on the date of the incident the Claimant while on duty, on Carrier property working with other employees had multiple foreign substances (cocaine and marijuana) in his bodily fluids. Substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately four years of service with a less than stellar work record that included multiple warnings and demerits. The Organization argued that the Claimant should have been allowed the opportunity to enter the Employee Assistance Program (EAP) whereas the Carrier argued that the Claimant was offered the same program in November of 2011, but failed to complete the program, thus, it reasoned another attempt would be fruitless. The Organization in its defense of the Claimant suggested that the Claimant should be given a second opportunity to enroll in the EAP.

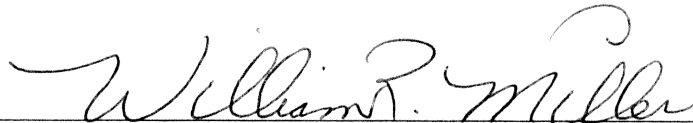
The Organization offered the Board for its consideration Third Division Award No. 41774 in support of its position. Examination of that Award finds it is not on target with the instant case because of a significant factual difference. In that Award the Claimant first entered the EAP for legal assistance and was denied a second opportunity to enter into the program for drug problems on the basis that he had already gone through EAP. That Board determined that because the issues were not related, the Claimant should have been allowed to enter the EAP to address the latter problem. In the instant case the Claimant entered the EAP for drug problems in 2011 and is now requesting a second opportunity to address the same problem.

The Organization also offered Award No. 8, of this Board as being on point with the instant dispute. Examination of that Award shows that the Claimant in that case was afforded the opportunity for a second enrollment in the EAP, however, a review of that Award reveals that it involved an employee who voluntarily entered the EAP and completed the program and was making a sincere effort to conquer his problems. Additionally, that Award pointed out that it was not refuted that other employees in a like and/or similar situation had been given a second chance to enter the EAP.

The instant case is factually different than the aforementioned Awards because it stands un-refuted that the Claimant entered the EAP in November of 2011 account of drug issues and he did not complete the program. Additionally, there was no showing that the Claimant was treated disparately from other employees in a like and/or similar situation nor was there any showing in this instance that the Claimant had endeavored to address his addictions. Therefore, the Carrier did not have an obligation to allow the Claimant to reenter the EAP, four months later, in March of 2012, to address the same problem. The Board finds and holds that the discipline was in accordance with the Carrier's disciplinary policy and it will not be rescinded because it was not arbitrary, excessive or capricious. The claim will remain denied.

AWARD

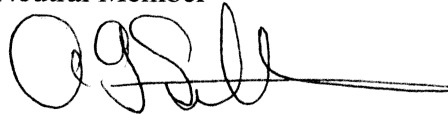
Claim denied.



William R. Miller, Chairman & Neutral Member



Kevin D. Evanski, Employee Member



Anthony Stillittano, Carrier Member

Award Date: MARCH 13, 2014