

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 17, (Case No. 17)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE
(Organization File: D70822812)**

vs

**CSX TRANSPORTATION, INC.
(Carrier File: 2012-132913)**

William R. Miller, Referee and Neutral Member
P. E. Kennedy, Employee Member
R. Paszta, Carrier Member

QUESTION AT ISSUE:

Did the Carrier comply with Rule 25 of the Agreement when it charged T. L. Carter with violation of Operating Rules - General Rule G, CSX Drug/Alcohol Use Policy and FMCSA regulations (49 CFR Part 382.201) and was substantial evidence adduced at the Investigation on September 5, 2012, to prove the charges; and was the discipline assessed in the form of permanent dismissal warranted?

FINDINGS:

Public Law Board No. 7529 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.

The Board will first address the Organization's procedural argument that the Claimant was denied a "fair and impartial" Investigation because it was held in "absentia". The facts indicate the Claimant was granted three postponements between the date of the charge letter of June 12, 2012 and when the Investigation was held on September 5, 2012. At the beginning of the Hearing, the Organization requested a fourth postponement because the Claimant allegedly had a conflicting doctor's appointment. The Carrier denied that request as being unreasonable. The Board reviewed the transcript and record of evidence which shows that the Claimant offered no explanation as to why he was required to be at his doctor's office on the morning of the Hearing. Claimant knew when the Investigation was scheduled yet he did not call his representative until 7:11 a.m., September 5th asking him to make a request for a postponement at the onset of the Hearing. The postponement request was for an indefinite period and the record further substantiated the Claimant never offered any proof that he actually had a medical appointment or that it could not be done on another date. The Board has thoroughly reviewed the record and determined that the Carrier did not violate the Claimant's right to a "fair and impartial" Hearing in this instance when it was held in absentia. Claimant offered no proof that

he could not attend, thus his absence must be viewed as being voluntary. The Board has thoroughly reviewed the record and found that the Carrier complied with Rule 25 of the Agreement and Claimant was afforded all of his "due process" Agreement rights. It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to attend, he does so at his own potential peril because he offers no rebuttal or alternative theory or story (See Second Division Awards 11763, 13217, 13360, 13491, 13924, 13957 and 13989).

On June 12, 2012, Claimant was directed to attend a formal Investigation on July 6, 2012, which was mutually postponed until September 5, 2012, concerning in pertinent part the following charge:

"...to determine the facts and place your responsibility, if any, in connection with a report received that at approximately 1147 hours, on June 7, 2012, in the vicinity of Richmond, Virginia, you underwent FMCSA REASONABLE SUSPICION breath alcohol testing and the test was confirmed as positive as a level of 0.183 gms/210 liters.

In connection with the above incident, you are charged with conduct unbecoming an employee of CSX Transportation and possible violations of, but not limited to, CSXT Operating Rules - General Rule G, CSX Drug/Alcohol Use Policy and FMCSA regulations (49 CFR Part 382.201)."

On September 14, 2012, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. On October 10, 2012, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of the June 1, 1999 BMW/CSXT Agreement.

There is no dispute between the parties that on June 7, 2012, the Claimant tested positive for alcohol while on duty working as a Bridge Mechanic. At the morning job briefing, Claimant's Supervisor noticed the Claimant had an unruly appearance, smelled of alcohol, and seemed agitated. Based upon those observations, the Supervisor contacted Examination Management Services, Inc. (EMSI) to order a reasonable suspicion breath alcohol test.

After ordering the test, the Supervisor contacted another Carrier Officer to confirm or deny his observations. The other Officer confirmed those suspicions as he noted the strong smell of alcohol on the Claimant. EMSI administered the breath alcohol test and the Claimant tested positive for alcohol at a level of .183 gms/210 liters. After failing the test, the Claimant was removed from service, given a taxi ride to his house, and his Supervisor drove the Claimant's vehicle home. The results of the test were confirmed, verified, and unchallenged during the

Hearing. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had 13 years of service. The Organization argued that the discipline was excessive and offered various Awards that speak to the proposition that discipline should be corrective in nature. However, examination of those Awards reveal they are not directly on point as they involve Claimants who recognized their drug and/or alcohol problems and entered rehabilitation programs seeking treatment for their conditions during which time they suffered relapses despite genuine efforts to follow those programs. In the instant case, the Claimant was offered the opportunity to enter into a Rule G by-pass Agreement that he rejected and instead chose to go forward with his Hearing. In most Rule G cases on this property, employees are offered and accept a Rule G by-pass Agreement. The Agreement holds the discipline Hearing in abeyance, and the Investigation is subsequently dropped when the employee completes his five year substance abuse treatment program. If employees withdraw from the program or do not comply with the terms of the program, the discipline Hearing is held and if the Carrier proves a violation of Rule G, the employees are subject to dismissal. Unlike many Rule G cases, the Claimant did not sign a waiver or consider entering a substance abuse treatment plan even though he tested positive for being under the influence of alcohol while on duty. As stated above Claimant was offered a Rule G by-pass Agreement, but instead chose the formal Investigation process. Claimant now displeased with his initial choice and the Carrier's subsequent dismissal decision has asked for a "second bite of the apple" and is requesting entrance into the Rule G by-pass Agreement program after first rejecting it and choosing to go to a formal Investigation which he voluntarily chose not to attend. The Board is not persuaded by Claimant's belated request as it dissuades employees with legitimate problems from seeking treatment and instead suggests that employees should go to a formal Investigation and if unhappy with that decision seek treatment as a last resort. Claimant faced possible dismissal if the charges were proven, therefore, because those charges were substantiated the Board finds and holds that the discipline assessed was not arbitrary, excessive or capricious and was in accordance with the Carrier's IDPAP Policy. The discipline will not be set aside and the appeal/claim is denied.

AWARD

Appeal denied.



William R. Miller, Referee

Dated: April 24, 2013