

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7529  
CASE NO. 35, AWARD NO. 35**

**Brotherhood of Maintenance of Way  
Employees Division – IBT Rail Conference**

**v.**

**CSX Transportation Inc.**

**Patrick Halter, Neutral Member  
Robert Paszta, Carrier Member  
Andrew Mulford, Organization Member**

**STATEMENT OF CLAIM:** “Claim of the System Committee of the Brotherhood that:

1. Carrier’s decision to impose discipline in the form of an immediate dismissal upon Claimant R. Serafin for the alleged violation of CSXT Operating Rule G, CSX Drug/Alcohol Policy, FRA regulations (49 CFR Part 219.101), FMCSA regulations (49 CFR Part 382.201) and his EAP treatment plan in connection with allegations that he provided a positive FMCSA Reasonable Suspicion breath alcohol exam on March 18, 2013 was arbitrary, unwarranted and in violation of the Agreement (System File D70502913/2013-143674).
2. As a consequence of violation referred to in Part 1 above, Claimant shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement.”

**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 this dispute.

Claimant entered on duty with the Carrier on May 14, 2007. On or about February 5, 2013, Claimant voluntarily entered the Carrier’s Employee Assistance Program (EAP), a program designed to cover “a wide range of matters” wherein “employees are encouraged to seek out and join the program for help at any time.” Claimant’s treatment plan required, among other matters, abstinence from “alcohol at all times” and Claimant’s non-compliance “with any service recommendation can result in ... medical disqualification from service and/or disciplinary action.”

On March 18, 2013, Claimant reported for duty as scheduled. Following a job briefing at approximately 8:30 a.m., the Roadmaster detected the odor of alcohol with Claimant and asked him if he had been drinking whereupon Claimant answered in the affirmative. Based on the odor and Claimant's response, the Roadmaster directed the Claimant to a "reasonable suspicion" breath alcohol test. Claimant measured 0.060 gms/210 liters, e.g., positive test.

On April 1, 2013, Claimant received notice from the Carrier to attend a formal investigation concerning the positive test. The notice also stated "[i]n accordance with Collective Bargaining Agreement(s), as this is your first verified and confirmed positive test result within the last five (5) years, you are eligible to participate in the Rule G, C-2 option (bypass) if you desire."

An amended notice issued on April 4, 2013, wherein the Carrier "revoked in its entirety" the April 1 notice and directed Claimant to an investigative hearing concerning his positive test for alcohol. In connection with the positive test, the Carrier charged Claimant with "conduct unbecoming a CSX employee, and possible violations of, but not limited to, CSXT Operating Rules – General Rule G, CSX Drug/Alcohol Policy, FRA regulations (49 CFR Part 219.101), FMCSA regulations (49 CFR Part 382.201), and not complying with the terms of your EAP treatment plan."

On May 1, 2013, the Carrier dismissed the Claimant for violation of "CSX Transportation General Operating Rule G, CSX Drug/Alcohol Use Policy, FRA regulations (44 CFR Part 219.101), and FMCSA regulations (49 CFR Part 382.201); as well as, the terms of your EAP treatment plan." After Claimant's dismissal, the Organization filed this expedited appeal.

#### CARRIER'S POSITION:

The Carrier states that it accorded Claimant a fair and impartial investigative hearing encompassing all of his "due process" rights under Rule 25. On April 1, 2013, the Carrier instructed Claimant to attend a formal investigation into the incident with his positive test for alcohol or Claimant could elect the Rule G bypass which, under the CSXT Labor Agreement 6-075-88 (Drug and Alcohol Agreement), is offered when the "Carrier has probable cause to believe that a Rule G violation has been committed and no other rule violation has occurred." Rule G promotes rehabilitation and permits an employee with no other violations of the rule during the prior 5 years to have the charge held in abeyance while participating in EAP.

The Carrier withdrew the bypass option because Claimant's positive test violated other rules, e.g., Drug and Alcohol Policy, FRA regulations, FMCSA regulations and EAP treatment plan. Section 9 in the Drug and Alcohol Agreement states that the Carrier has sole discretion to charge Claimant with a Rule G violation "as well as any other rule or rules and hold hearing under applicable agreement." Since Claimant's positive test violated other rules, the Carrier "revoked in its entirety" the notice of April 1, 2013 (bypass option) and issued a notice dated April 4, 2013, directing Claimant to hearing.

The evidence shows that Claimant violated the rules as charged as well as his EAP treatment plan. General Operating Rule G, Drug and Alcohol Policy, FRA regulation and FMCSA regulation proscribed Claimant from reporting for duty, remaining on property, or performing safety-sensitive duties under the influence. His EAP treatment plan requires abstinence from mood/mind altering drugs including alcohol; failure to comply with any service recommendation can result in disciplinary action.

Claimant acknowledged he reported for duty on March 18, 2013, under the influence of alcohol thereby violating these rules and his treatment plan. A Rule G violation is a major offense and a first time violation of Rule G can result in dismissal. As a short-term employee, Claimant's dismissal is appropriate given his history of drug and alcohol abuse and multiple tours through EAP. [Carrier Exhs. B, C]

#### ORGANIZATION'S POSITION:

Claimant did not receive a fair and impartial hearing because the hearing officer's comments reflect bias and a predisposition about the rules necessary for inclusion in the record. The presiding officer also led witnesses to ensure that certain points were included in the record. The EAP Director acknowledged in testimony that he was aware of the evidentiary record thereby confirming there was collusion among the Carrier's witnesses.

Aside from denying Claimant a fair and impartial hearing, the Carrier wrongly denied Claimant the opportunity to choose the Rule G bypass option. Claimant voluntarily entered EAP and not as a result of a positive test for alcohol. Therefore his positive test for alcohol on March 18, 2013, is Claimant's first positive test. Under the Carrier's Drug and Alcohol Policy, Claimant should have been offered the opportunity to elect the Rule G bypass option. The Carrier's refusal to offer a waiver violates the Policy and subjects Claimant to disparate treatment. Although the Carrier argues that Section 1.F.9(b) in the CSX Labor Agreement precluded Claimant from accessing a first time Rule G waiver, there is no such section in the collective bargaining agreement.

Dismissal is unwarranted and not supported by the record for a first positive test. Claimant's disciplinary record shows an incident in July 2007 which was not drug or alcohol related. Claimant accepts responsibility for his actions and initiated steps for rehabilitation. The Board has authority to lessen the penalty. [Organization Exhs. G-1, G-2, G-3, G-4, G-5]

#### CONCLUSIONS:

Before addressing the matter of this claim in substance, there is the Organization's allegation that the Claimant did not provide a fair and impartial hearing as required by Rule 25 – Discipline, Hearings, and Appeals. This allegation centers on the hearing officer's instructing witnesses to read the cited rules into the record as reflecting bias and the EAP Director stating his familiarity with the record as evidence of collusion among witnesses.

Having reviewed the transcript of the hearing, the Board finds no bias by the hearing officer and no collusion among the witnesses. The Organization and Claimant received the notice of hearing where the rules were identified by the Carrier. The hearing officer's instructing a witness to read the verbatim text of the rules into the record after the witness had referred to or cited the rule in his testimony does not show bias and collusion among witnesses was not shown by the EAP Director testifying about his job duties and knowledge of the rules. Claimant received a fair and impartial hearing.

In this proceeding the burden of persuasion resides with the Carrier to (1) establish the facts that show Claimant engaged in the charged misconduct which constitutes violations of the cited rules and (2) demonstrate that the disciplinary action imposed (dismissal) is proportional for the charged misconduct. Where the Carrier's facts do not establish or support the charged misconduct and or the disciplinary action imposed is not proportional to the wrongdoing, the discipline imposed may be modified in part or in whole.

The record shows that the Carrier revoked the Rule G bypass once it decided to charge Claimant with violations of other rules. Section 9 in the Drug and Alcohol Agreement states that the Carrier has sole discretion to proceed in this manner, that is, proceed to a formal investigation when there are other rules allegedly violated. Contrary to the Organization's argument, this exercise of discretion has not subjected the Claimant to disparate treatment.

The burden for the Carrier to establish facts supporting the charged misconduct is satisfied by the Claimant acknowledging, when the Roadmaster inquired, that he had consumed alcohol and his consumption, based on the positive test result, showed Claimant reported for duty on March 18, 2013, under the influence of alcohol. The Drug and Alcohol Policy, General Operating Rule G, FRA regulations and FMCSA regulations proscribe an employee from reporting for duty under the influence of alcohol which is defined or measured as 0.04 gms or more alcohol concentration in the breath or blood. Claimant violated the Policy and Rule G as well as the Federal regulations. Also, the EAP treatment plan states that Claimant will "maintain complete abstinence from mood/mind altering drugs including alcohol at all times." Claimant did not comply with this term in his treatment plan.

Having established that Claimant violated the cited rules and his treatment plan, the Carrier dismissed Claimant from service. According to the Carrier, dismissal is warranted given these numerous violations. Arbitrators have upheld dismissal for a first time offense involving reporting for duty under the influence; this cited award involved an unrepentant claimant in denial about his drug use. [Carrier Exh. B] Another arbitrator upheld a dismissal for substance abuse and noted there is no third chance in the transportation industry. [Carrier Exh. C]

In the Board's view, Claimant is not an unrepentant claimant in denial because he readily acknowledged on March 18, 2013, that he had consumed alcohol the prior day (March 17). Moreover, the Engineer of Track testified this was Claimant's first positive test on property and there is no evidence in this record of any other positive test by Claimant. This supports Claimant's testimony that the positive test is his first positive test "for anything" which does not

place Claimant in the third chance category. Notwithstanding Claimant's noncompliance with the treatment plan and its emphasis on abstinence from alcohol at any time, a violation of that plan "does not equate to automatic dismissal." [Organization Exh. G-4]

The Roadmaster and Engineer of Track testified that the typical process is to offer an employee the opportunity to enter EAP when that employee has violated Rule G. In this situation, however, Claimant had not violated Rule G when he entered EAP on his own volition and initiative for rehabilitation. Even if Claimant is a repeat user of EAP services, he has maintained an employment history of approximately seven (7) years and that history reflects an infraction in July 2007 (two months after he had entered on duty) unrelated to the infractions in this claim.

Given the record established by the parties and placed before the Board in this proceeding, the Claimant's dismissal is assessed as an excessive disciplinary measure. The dismissal is reduced to a suspension without pay for time served and with seniority and other benefits restored. In reaching this conclusion, the Board recognizes the significance of the operative rules in this claim as they protect and enhance the safety of employees, the public and the Carrier's property. The Board also recognizes the Carrier's right to initiate disciplinary action in accordance with the collective bargaining agreement when there is a violation of Rule G. Therefore, Claimant's return to service is on a "last chance" basis. In other words, a lapse in judgment by Claimant will lead to a termination of the employment relationship. Prior to returning to duty under this arrangement, Claimant must be cleared by Carrier medical or other appropriate personnel designated by the Carrier. In accordance with these findings and conclusions culminating in Claimant's "last chance" return to duty, the claim is sustained.

AWARD

Claim sustained in accordance with the findings and conclusions.

Patrick Halter /s/

Patrick Halter

Signed on this 18th day  
of December, 2013