

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7163**

<b>Brotherhood of Maintenance of Way</b>	)	
<b>Employes Division, IBT</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. 136</b>
	)	
<b>CSX Transportation, Inc.</b>	)	

Statement of Claim

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when CSX required Mr. M. Roehrborn to sign and comply with a Substance Abuse Treatment Plan (SATP) as a condition of his return to service, even though such plan was not contemplated as a condition of his return to serve in Arbitrator Frankman's June 10, 2009 arbitration award nor was it provided for under the Agreement (Carrier Files 2010-061498, 2010-063977, 2010-070410 and 2010-072371).
2. As a consequence of the violation referred to in Part 1 above, Claimant M. Roehrborn shall be afforded: one (1) hour overtime for each Alcoholics Anonymous (AA) session he attended; ten (10) minutes overtime for time spent traveling to and from the AA sessions; mileage to and from each AA session; any and all other relief deemed proper by this Board."

Background

Claimant entered service with the Carrier on June 17, 1974 and maintains seniority in the Engineering Department as a Production Foreman. On August 27, 2008 he was arrested and incarcerated at 2:00 a.m. on a charge of public intoxication and possession of marijuana and drug paraphernalia. Claimant reported for duty around twelve (12) noon on August 28, 2008 and, shortly thereafter, the Carrier withheld Claimant from service pending investigation.

Prior to the investigative hearing on October 16, 2008 Claimant pled not guilty to the misdemeanor charges which were set for hearing in mid-November 2008; however, the Carrier dismissed Claimant from service on November 3, 2008 based on its conclusion that all charges levied by the Carrier against Claimant were substantiated. The charges involved General Rules A and G, General Regulations GR-1, GR-2 and GR-2A, CSX Safe Way General Safety Rule GS-2 and CSXT Drug/Alcohol Use Policy.

The Organization filed a claim stating the dismissal was based on unproven charges in violation of the Agreement. The dispute was presented to Public Law Board (PLB) No. 7288.

On June 10, 2009, PLB 7288 issued Award No. 4 sustaining the claim and directing the Carrier to reinstate Claimant "to service with all benefits and seniority rights unimpaired and compensation for all wage loss suffered and his record will be cleared of the charges leveled in this instance." In Award 4, the arbitrator stated that "Claimant enrolled in Carrier's EAP recognizing that he had a serious problem with alcohol" and "he reported continuing his work with the EA Counselor." The arbitrator noted that "[i]t was known that he had enrolled in Carrier's EAP and continued to work with an EA Counselor" but "without explanation, Carrier failed to consider its Drug and Alcohol Agreements set out at Appendix T ... or apply the salutary provisions of IDPAP which specifically address rehabilitation." The arbitrator sustained the claim "as set forth in Part 2 of Claim Statement" and directed the Carrier to "implement this Award on or before 30 days from the date of its execution [June 10, 2009]."

Around June 23, 2009 Claimant completed the Carrier's physical examination; he was cleared to return to work. Following an exchange of telephone discussions over the following weeks, Claimant was informed on July 17, 2009 that the Carrier's Medical Director required Claimant to participate in a Substance Abuse Treatment Plan (SATP). Claimant understood this situation as requiring him to sign SATP or he would not be allowed to work. Claimant signed the SATP "under protest".

The Organization's claim in this proceeding - - a consolidation of four claims involving the same issue but covering the period of November 14, 2009 through May 10, 2010 - - is that Claimant was forced to sign and comply with the SATP as a condition of returning to work and this is counter to Award 4 where Claimant was reinstated without conditions and in violation of Appendix T along with Rule 16 – Calls, Rule 23 – Waiting or Traveling by Direction of Company, Rule 25 – Discipline, Hearings and Appeals and Rule 27 – Determination of Physical Fitness.

The Carrier denied the claim on the basis that the Organization failed to establish any rules violations. Also, Claimant voluntarily entered EAP prior to his dismissal in November 2008 and the Organization's position conflicts with its argument before PLB 7288 where BMW stated "in recognition of his illness the Claimant requested and received help through the Carrier's [EAP]. The Claimant recognized he had a problem, took the corrective proactive measures necessary to rehabilitate himself by voluntarily entering into a treatment program[.]"

#### Carrier's Position

The Carrier complied with Award 4 as shown by Claimant's return to service, receipt of all back pay for wages lost and clearing his record of the charges. Award 4 did not address or modify Claimant's participation in EAP which he voluntarily entered prior to his dismissal in November 2008.

An employee, such as Claimant, away from work for ninety (90) days is required to undergo a physical examination by the Carrier's Medical Department and receive medical clearance to

return to work. Also, Claimant was evaluated by EAP and instructed to continue participation which required attendance at AA meetings to foster his rehabilitation. The meetings are for Claimant's need and are not the requirement of the Carrier.

During on-property handling of the instant claim, the Organization stated that Claimant did not voluntarily enter EAP and asserts the Carrier "forced the Claimant into an EAP Program." This is the opposite position from the one taken by the Organization before PLB 7288 where it stated "Claimant recognized he had a problem, took the corrective proactive measures necessary to rehabilitate himself by voluntarily entering a treatment program."

Award 4 relied on the Organization's representation that Claimant voluntarily entered a treatment program as one of the "significant mitigating factors which support reversal of the dismissal." Based on the doctrine of estoppel the Organization is precluded from arguing its current position that Claimant's entry into EAP was forced or involuntarily as it had previously argued that Claimant voluntarily entered a treatment plan.

By letter dated August 20, 2012 the Organization conceded that the claim is not valid if Claimant voluntarily entered the EAP program - - "If Claimant truly volunteered to be in the EAP Program, which he did not, but was instead forced into it, then he would have no right at all to be paid for his time[.]"

Finally there is no evidence to support the Organization's allegations that the Carrier committed rules violations. Claimant was not called out to perform work (Rule 16) and he was not waiting or traveling at the direction of the Carrier (Rule 23). As for Rule 25 (Discipline, Hearings, and Appeals) and Rule 27 (Determination of Physical Fitness), the Organization failed to explain these alleged violations.

#### Organization's Position

Claimant satisfactorily cleared the return-to-work physical examination; there were no medical problems or issues. In other words, there were no problems or issues that would be cause to require Claimant to sign the SATP. Nevertheless, without any authority under the Agreement the Carrier forced or coerced Claimant in mid-July 2009 to sign the SATP as a condition to return to duty. The SATP was not required by Award 4 as a condition of reinstatement.

Claimant did not voluntarily sign the SATP in July 2009; it was a condition imposed by the Carrier on Claimant for his reinstatement. In other words, sign the document or remain away from work. The SATP is a mandatory and binding agreement where Claimant's 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 this document to supervisors for purposes of disciplinary action."

When Claimant was discharged on November 3, 2008 the Carrier imposed that sanction through its standard discipline policy and not as part of a Rule G option. In the context of Award 4 this means that Claimant's discipline was processed and handled outside the confines

of the Drug and Alcohol Agreements, Appendix T. Since Claimant's involvement with EAP in August and September 2008 was not tied to the Rule G waiver option, he was free to leave EAP at any time without repercussions under the Agreement.

Claimant may have sought EAP in August and September 2008 but that is no basis to impose the SATP in July 2009 after his dismissal had been thrown out by PLB 7288. Claimant was reinstated unconditionally with all requested relief granted. The Carrier's imposition of a five (5) year SATP requirement involves up to seven hundred fifty (750) AA meetings.

Rule 25, Section 4 – Exoneration, states “the discipline is stricken from the record” because Claimant prevailed in Award 4. This explicit provisions restricts the Carrier in its actions towards Claimant. Requiring Claimant to sign the SATP added a term and condition to the Agreement in violation of the Agreement.

Regarding the Carrier's argument of estoppel, this common law principle has no place in arbitration. Regardless, the Organization has not changed its position. Claimant did initially seek EAP assistance in 2008 when he was charged with alcohol violations. He received some assistance but never signed any EAP document. The coercion occurred in July 2009 upon Claimant's attempts to return to work when he was told to sign the binding SATP or not work.

#### Findings

Public Law Board 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employee within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute and (3) the parties to this disputes were accorded due notice of the hearing and participated in this proceeding.

PLB 7288, Award 4 directed the Carrier to clear as in expunge Claimant's record of all charges. The charged misconduct was not sustained in Award 4 because, in accordance with the claim statement, it was unproven, arbitrary, capricious and excessive. Thus, Claimant did not violate CSX Transportation Operating Rules at General Rules A and G, General Regulations GR-1, GR-2 and GR-2A, CSX Safe Way General Safety Rule GS-2 or CSXT's Drug/Alcohol Use Policy.

Notwithstanding Award 4 and the evisceration of all charges from Claimant's record, the Carrier denied the claim in this proceeding based on the unproven misconduct. Award 4 removed that unproven misconduct from Claimant's record.

Claimant was reinstated with all requested relief. The requested relief did not encompass a SATP. The Carrier's Medical Department determined that Claimant be evaluated by EAP after he had satisfactorily completed the Department's physical examination which cleared Claimant for return to work. The Carrier delayed the reinstatement on the basis of EAP. Specifically, Claimant voluntarily sought EAP assistance in August and September 2008. If that is the basis for the EAP referral, then, at most, the Carrier could inform, suggest or recommend to Claimant that he voluntarily resume EAP counseling as in his best interests for maintaining employment and that would place Claimant in the same “make whole” position he was prior to his now-

rescinded discharge. That is, voluntarily participating in EAP. If there is a rule basis for directing Claimant to sign the SATP prior to returning to work, it has not been established in this proceeding.

Award 4 did not require Claimant to sign a SATP as a condition to reinstatement. In the absence of a document signed by Claimant in 2008 requiring him to enter EAP upon return to duty, the Carrier's determination to present Claimant with a Hobbesian choice of return to duty under an SATP or not return to duty, e.g., effectively void the order of reinstatement, is not consistent with the relief granted in Award 4.

This claim is sustained in order to effectuate the unconditional order of reinstatement in Award 4. Claimant will be compensated for any lost wages caused by the delay in his reinstatement due to the SATP and compensated at the appropriate rate for hours foregone (such as overtime or lost opportunities for call out under Rule 16) that he did not receive because of his unavailability caused by participating in AA sessions. Other requested relief is not granted.

Award  
Claim sustained.

Patrick J. Halter /s/  
Patrick J. Halter  
Neutral Member  
Award No. 136



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Rob Miller  
Carrier Member



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Andrew M. Mulford  
Organization Member

Dated on this 20th day  
of August, 2014