

PUBLIC LAW BOARD NO. 7163

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

vs.

CSX TRANSPORTATION, INC.

**Case No. 439
Award No. 439
Organization No. L64605617
Carrier No. 2017-226268**

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. J. Cleveland, by letter dated June 22, 2017, in connection with allegations that he violated his Drug and Alcohol Rehabilitation/Education Program, his signed EAP-1 and the Prevention Program Companion Agreement was without a fair and impartial hearing (System File L64605617/2017-226268 CSX).
2. The Agreement was further violated when the Carrier failed to comply with Rule 24(a) when it failed to render a decision in writing within sixty (60) days from the date the August 16, 2017 claim appealing Claimant’s discipline was filed.
3. As a consequence of the violations referred to in Parts 1 and/or 2 above, Claimant J. Cleveland ‘... shall now be paid for all straight time and overtime hours that he was denied working at his respective straight time and overtime rates of pay from the beginning of this violation up and until he is returned to full service and that all time be credited towards vacation and retirement for the Claimant. Additionally the Claimant will be reimbursed for all losses of contractual benefits suffered as a result of this violation. ***’ (Employes’ Exhibit ‘A-1’).”

JURISDICTION

The Board upon consideration of the entire record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; that the parties were given due notice of hearing.

FINDINGS

The Carrier hired J. Cleveland (“Claimant”) on February 4, 2008. On May 12, 2015, Claimant committed a Rule G violation by testing positive on a random drug test. As a result, on May 31, 2015, Claimant signed an agreement (waiver) accepting responsibility. Then in connection with information the Carrier received from its Medical Review Officer, Claimant tested positive during a company short notice follow-up breath alcohol test. As a result of this positive test, it was determined that Claimant committed a second Rule G violation and he was dismissed by letter dated June 22, 2017.

The Organization appealed Claimant’s dismissal on August 6, 2017. The claim was based upon the fact that the Carrier had not provided Claimant with a hearing prior to dismissing him in violation of Rule 24. In addition, by letter dated November 13, 2017, the Organization notified the Carrier that it had failed to respond to the August 16, 2017 claim within the sixty (60) days allowed under Rule 24(a) and, therefore, the claim had to be allowed as presented. The matter was conferenced on December 12, 2018. The parties were ultimately unable to resolve the dispute and the matter now comes before this Board for final adjudication.

The waiver agreement reads, in part that:

If, at any time during the five (5) year period referred to in paragraph “b” above, you fail to follow the course of treatment established by the counselor, the carrier shall remove you from the program, and you agree to accept dismissal without the necessity of further disciplinary proceedings.

As referenced above, the Organization makes a procedural argument that the Carrier violated Rule 24 of the collective bargaining agreement (Agreement) first by not providing Claimant with a fair and impartial hearing under Rule 25. Second, the Carrier violated Rule 24(a) when it failed to render a decision within sixty (60) days from the date the August 16, 2017 claim was filed. Under the terms of the Agreement, such a claim will be allowed.

The Carrier counters that the Organization's claim was untimely. A dismissal is discipline and under Rule 25 which governs discipline in the Agreement, the claim needed to be filed within 30 days of the discipline date. In this case, the Organization filed 55 days after Claimant was dismissed. The Organization's attempt to use Rule 24 which requires 60 days for filing should not prevail because even the claim states a violation of Rule 25, not Rule 24. Therefore, the claim was untimely. Notwithstanding the timeliness issue, under the terms of the waiver agreement, Claimant was not entitled to a hearing.

In reaching its decision the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence *de novo*. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion.

With respect to the procedural issues raised in this case, the Board finds no violations by either party that dispense with the matter. As such, we will address the merits. The Board finds substantial evidence in the record to uphold the Carrier's position on the merits. The Board finds substantial evidence in the record to uphold the Carrier's position in this case. Consistent with other Boards, we find "that in a Rule G waiver situation when the employee is found in violation of the waiver agreement because he had drugs or alcohol in his system, an investigation is not even required.... Rule G waivers are self-executing agreements, and therefore, if it is proven that the Claimant has not lived up to his part of the bargain and has been found to have drugs or alcohol in his system, he can be returned to discharge status without the necessity of an investigation." NRAB Second Division, Award 11978 (Meyers). The record evidence establishes that Claimant did not live up to his part of the waiver agreement when he tested positive for alcohol within the probationary period. Accordingly, the relief sought by the Organization is denied. The discharge shall remain on Claimant's personal record.

AWARD

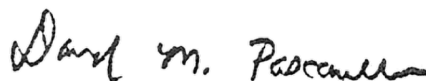
Claim denied.



Jeanne Charles
Chairman and Neutral Member



John Nilon
Carrier Member



David M. Pascarella
Employee Member

Dated: 9/20/2021