

PUBLIC LAW BOARD NO. 7288

AWARD NO. 4

CASE NO. 4

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees Division - IBT Rail Conference

vs.

CSX Transportation, Inc.

ARBITRATOR: Janice K. Frankman

DECISION: Claim sustained

STATEMENT OF CLAIM:

1. The dismissal of Foreman M. Roehrborn for alleged violation of CSX Transportation Operating Rules – General Rules A and G; General Regulations GR-1, GR-2, and GR-2A, CSX Safe Way General Safety Rule GS-2 and CSXT's Drug/Alcohol Use Policy while he was off duty during the evening hours of August 27, 2008 was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (Carrier's File 2008-032346).
2. As a consequence of the violations referenced in Part 1 above, Claimant Roehrborn will be reinstated 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.

FINDINGS:

The Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute herein; and that the parties were given due notice of the hearing. Pursuant to agreement constituting this Board, parties submitted Briefs, limited to five pages, with attachments which were received by Neutral Member on April 20, 2009.

Claimant commenced service with Carrier on June 17, 1974, and holds seniority rights in the Engineering Department in the position production foreman. On August 27, 2008, he was arrested and incarcerated at about 0200, charged with public intoxication and possession of marijuana and drug paraphernalia. He was assigned that day as production foreman on Force 5KB7 running the 707 authority and was scheduled for work from 0700 to 1730. When he was released from jail on bond at about 1200, he called Carrier to report that he had been incarcerated, the reason he had not reported for work. He spoke with his supervisor several times that afternoon before being withheld from service pending investigation.

Claimant had pled not guilty before the investigation on October 16, 2008.. Hearing on the misdemeanor charges was set for mid-November, after Claimant received Notice of Dismissal on November 3, 2008, which was based upon a conclusion that all Carrier charges against him had been proven. Reference also was made to “recent incidents related to various rule violations.” Organization appealed the dismissal on November 21, 2008. Claimant appealed Carrier’s January 12, 2009, denial on March 6, 2009. During three years prior to date of incident, Claimant received Time Out Session Corrective Action (12/6/2005); and Waived Hearing/Accepted 30 Days Susp 3 Wks Served 1 Wk Training (4/25/2008).

Following his work day on August 26, 2008, Claimant joined co-workers at a bar about a mile and one half from the hotel provided by Carrier. He drank beer and whiskey and became ill. He left the bar before the others and walked back to the hotel. He had picked up a box on the sidewalk and put it in his pocket. He was stopped by a police officer who searched and arrested him. The local newspaper reported the incident in its “Police Blotter”:

Michael H. Roehrborn, 54, of Plymouth, was arrested by Auburn Police at 1:52 a.m. and charged with possession of less than 30 grams of marijuana, a Class A misdemeanor; possession of paraphernalia, a Class A misdemeanor; and public intoxication, a Class B misdemeanor. He was held on \$2500 bond.

Claimant was allowed two phone calls from jail which he made to his wife for money to post bond and to a bondsman who he asked to call Carrier to report that he would be unable to work at 0700. When he called his supervisor at noon after his release from jail, he told him that he had been in jail for public intoxication, the reason he was not at work. His supervisor did not know until he called that he was not there. They spoke several times through the afternoon. His supervisor had seen the Police Blotter and asked whether there wasn’t something else Claimant wanted to tell him about the incident. Claimant denied knowing that he had been charged with possession of marijuana and paraphernalia until he read the charges after being asked the question. He testified at investigation that he did not know what was in the box he had picked up and was unaware that the Police had taken it. There was no discussion about it with the Police, and he did not see the box or its contents while he was in jail.

Claimant enrolled in Carrier’s EAP recognizing that he had a serious problem with alcohol. He had been given a breathalyzer test in jail which he believed measured .8 or .9. No Court document is a part of this record. Claimant expected to be asked to submit to blood and urine testing by Carrier. Carrier testified that a decision had been made not to require testing because there was no reasonable suspicion to support it and referred to Claimant being an hours of service employee. At investigation, Claimant acknowledged his poor judgment in drinking too much. He chose to walk to the hotel rather than drive because of it. He recognized that he would not be able to work, prompting him to ask the bonds agent to call Carrier to protect his work and the work of those working for him. He expressed his belief that he did a good job in a position he has held for a long time and which he likes. He reported continuing his work with the EA Counselor.

Under CSX General Operating Rules and Regulations, Employees are required to know and obey rules and special instructions [General Rule A]; behave in a civil and courteous manner

and must not be disloyal, dishonest, or immoral or conceal facts concerning matters under investigation [GR-2 (4) and (8)]; and must report for duty as designated, must not be absent without permission and if unable to perform service, must notify the proper authority [GR-1]. Employees reporting for or on-duty, on Carrier property or occupying facilities provided by Carrier are prohibited from possessing, using or being under the influence of drugs or alcohol. Illegal possession of a drug, narcotic or other substance that affects alertness, coordination, reaction, response or safety is prohibited on or off-duty. [General Rule G]. Criminal conduct which indicates a potential danger to the company, its employees or the public is prohibited. [GR-2A]. CSX Safe Way General Rule GS-2 and Drug/Alcohol Use Policy at Section 5 mirror Operating Rule G.

Carrier has taken the position that Claimant's conduct constituted violation of each of the Rules and provisions cited, that his statements concerning possession of marijuana and paraphernalia lacked veracity and that he has had earlier discipline which justifies his dismissal. It argued that he was dishonest with his supervisor, that he would have endangered himself and others had he not been arrested and gone to work and that he failed to protect his and his co-workers' work.

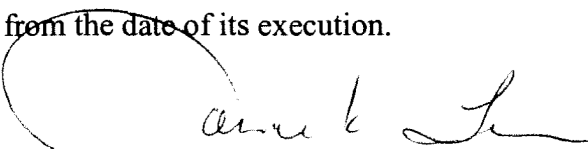
Organization argues that Carrier acted in a capricious and arbitrary manner in dismissing Claimant and without substantial evidence to support its action. It points to his tenure and satisfactory work performance, acknowledging his lack of judgment in drinking to apparent incapacity. It argues that his was an ill-advised off-duty act that did no harm to no one. It argues that Claimant was forthright and honest, that he protected his and his co-workers' work and that he recognized his problem and continued to work with the EA Counselor. Organization argues Carrier ignored its alcohol and drug policy, failing to test Claimant or to otherwise apply its provisions relative to discipline.

There has been no failure of due process in the manner in which the investigation was conducted. Carrier has failed to provide substantial evidence in support of its action. This conclusion has been reached following very careful reading and consideration of the detail of the entire record including the specific language of each Rule and policy provision cited, together with the evidence and testimony which constitute the facts. Claimant was off-duty and away from Carrier-provided facilities when he drank too much and ended up in jail. His testimony with regard to the detail of the incident and his response to it was unrefuted. The newspaper report of the incident made no reference to Carrier and no other evidence was adduced to suggest injury to Carrier's reputation.

There is no evidence of the ultimate outcome of the misdemeanor charges to which Claimant pled not guilty. There also is no evidence with regard to earlier discipline to determine the nature of the violation for which he accepted discipline. In addition, there are significant mitigating factors which support reversal of the dismissal. Claimant was a tenured employee with an undisputed good performance record when the incident occurred. It was known that he had enrolled in Carrier's EAP and continued to work with an EA Counselor. Nonetheless, without explanation, Carrier failed to consider its Drug and Alcohol Agreements set out at Appendix T of the parties Agreement or apply the salutary provisions of IDPAP which specifically address rehabilitation. This Claim is properly sustained.

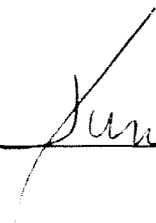
AWARD

Claim is sustained as set forth in Part 2 of Claim Statement. Carrier shall implement this Award on or before 30 days from the date of its execution.



Janice K. Frankman, Chairperson
Neutral Member

Dated: _____

 June 10 2009