NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 13, (Case No. 13)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT RAIL CONFERENCE
(Organization File: D70709012)

vs

CSX TRANSPORTATION, INC.
(Carrier File: 2012-131021)

William R. Miller, Referee and Neutral Member
P. E. Kennedy, Employee Member
R. Paszta, Carrier Member - Dissenting (See Attachment)

QUESTION AT ISSUE:

Did the Carrier comply with Rule 25 of the Agreement when it charged B. C. Stinson with violation of Operating Rules - General Rule G and CSX Drug/Alcohol Use Policy and was substantial evidence adduced at the Investigation on July 31, 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 has thoroughly reviewed the record and determined that the Carrier complied with Rule of the Agreement and was afforded all of his "due process" Agreement rights.

On June 7, 2012, Claimant was directed to attend a formal Investigation on June 20, 2012, which was mutually postponed until July 31, 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 0730 hours on May 29, 2012, in the vicinity of Memphis Junction Yard you underwent COMPANY SHORT NOTICE FOLLOW-UP breath alcohol testing, and the test was confirmed as positive at a level of 0.086 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, CSX Operating Rules - General Rule G and CSX Drug/Alcohol Use Policy."**

On August 20, 2012, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. On September 7, 2012, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of June 1, 1999 BMWE/CSXT Agreement.

The undisputed facts indicate that on April 6, 2008, at approximately 7:15 a.m., Claimant was arrested and charged with driving under the influence of alcohol (DUI) while operating a Carrier vehicle.

On April 10, 2008, Claimant was charged with possible violation of Rules G, GR-2 and the Carrier's Drug/Alcohol Use Policy. Because that was the Claimant's first alleged Rule G violation, he was offered a Rule G By-pass which he accepted on April 14th after having admitted being guilty of the April 10, 2008, Notice of Investigation.

On June 26, 2008, Claimant signed a Substance Abuse Treatment Plan wherein he agreed to be subject to short-notice alcohol tests, attend two Alcoholic Anonymous meetings a week, and abstain from alcohol for a five year period. The Plan further stated that any violation of the Agreement could lead to the assessment of discipline.

On May 29, 2012, in accordance with the Rule G By-pass Agreement Claimant underwent a short-notice breath alcohol test that he tested positive for alcohol at a level of 0.086 gms/210 liters.

The record indicates that Claimant maintained sobriety for approximately four years, but unfortunately on May 29th he violated Operating Rule G, Carrier's Drug/Alcohol Use Policy, and the terms of his Substance Abuse Treatment Plan. 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. The Substance Abuse Treatment Plan addresses the question of what can happen to an employee that violates the Agreement. It states in pertinent part:

> **"...Failure to comply or a positive test result can result in medical disqualification or disciplinary action."**

The Organization is correct when it argued that the language of the Claimant's contract makes it clear that a violation of the Plan does not equate to automatic dismissal. It was not refuted that the Claimant is a Veteran that suffered from Post-Traumatic Stress Disorder who had stayed sober for approximately four years. The record further indicates that Claimant was forthright and admitted his responsibility for the May 29th positive follow-up test and he had

sought out treatment for his sobriety problems with the Veteran's Administration and lastly he requested to enter into the Carrier's Employee Assistance Program (EAP) if permitted.

It is clear that based upon the un-refuted record Claimant suffered from Post-Traumatic Stress Disorder and alcoholism and had made a serious effort to address to both problems. The Board does not excuse the Claimant's actions, but finds and holds that based upon the unique facts of the case and on a non-precedential basis the dismissal was excessive and is reduced to a lengthy suspension which is corrective in nature. Claimant is to be returned to service with seniority intact, benefits unimpaired, but with no back pay. Claimant is advised he is being returned to service on a **"last chance basis"** and must be able to pass all Carrier required drug and alcohol tests before being allowed to work. Additionally, he will be required to fulfill the terms of the Substance Abuse Treatment Plan wherein he is reminded that he will be subject to COMPANY SHORT NOTICE FOLLOW-UP testing for the next five years after reinstatement. The Claimant is further forewarned that he needs to be diligent to adhere to Carrier Rules and directives.

AWARD

Appeal partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.

William R. Miller

William R. Miller, Referee

Dated: March 6, 2013

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vs

CSX TRANSPORTATION, INC.
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William R. Miller, Referee and Neutral Member
P. E. Kennedy, Employee Member
R. Paszta, Carrier Member, **Dissenting**

CARRIER MEMBER'S DISSENT:

The Neutral Member's Award relies on baseless conclusions to support his decision, is inconsistent with well-settled on-property and industry-wide precedent, and is contrary to public policy because it irresponsibly jeopardizes the safety of CSX employees and the general public; therefore, the Carrier must dissent.

First, the Neutral's proffered reasons for reducing the discipline from termination to suspension without pay are specious and supported by baseless conclusions. The Neutral found the Carrier met its burden of proving the Claimant violated Rule G for the second time in four years when he tested positive for alcohol. Yet, the Neutral reinstated the Claimant because he determined the Claimant "*maintained sobriety for approximately four years*", "*was forthright and admitted his responsibility*", and it was "*un-refuted*" he "*suffered from Post-Traumatic Stress Disorder and alcoholism and had made a serious effort to address to both problems.*" Public Law Board 7529, Award 13 (Miller) (p. 2-3).

Initially, it is important to note that the only suggestion of these topics during the investigation was in the Claimant's closing statement; however, this self-serving statement is not evidence. Immediately prior to the Claimant being afforded an opportunity to make a statement, he responded to the hearing officer as follows:

> *Little: Alright Mr. Stinson, do you or your representative have any further evidence that you wish to present?*
>
> *Stinson: No I do not sir.* (Tr. at 24-25).

Immediately following this testimony, the Claimant offered a closing statement. The reasoning in the Neutral's Award is based entirely on the Claimant's closing statement.

Even assuming the Claimant's closing statement was appropriate evidence, a cursory read of Claimant's self-serving statement shows that it does not support the Neutral's reasoning. The Claimant stated:

> *"...I'm here today to accept full responsibility for my actions on May 29th, 2012. I went nearly four years with no troubles whatsoever and thought I had everything under control and apparently I do have some type of problem that I need to fix or get addressed. ...the reason I requested to attend this hearing to, to accept responsibility and accept whatever decision is made, that may come of it. ...Since then I have contacted the VA and going into a program I have a letter, but I didn't bring it in on August 16th down in Nashville at the VA Center due to post-traumatic stress and some different things, to help my situations that I've had here recently that put me on a backwards slide off of my previous agreement. ...".*

The Claimant's union representative also asked the Claimant if he would be willing to go back into the Carrier's Employee Assistance Program (EAP), and the Claimant responded "*[y]es sir, most definitely.*"

Based on the above, the Neutral concluded that because the Claimant "*went nearly four years with no troubles...*" that it was "*un-refuted*" the Claimant stayed sober for four years. But, Mr. Stinson does not even say that he stayed sober four years. All he said was that he went four years "*with no troubles.*" That could just as easily mean that he went four years without getting caught, not that he remained sober for four years. The Claimant also did not submit any evidence that he had maintained sobriety for the prior four years. The Carrier cannot possibly refute a contention that the Claimant never made and that was not supported by any evidence.

The Neutral concluded that it was "*un-refuted*" that the Claimant "*suffered from Post-Traumatic Stress Disorder and alcoholism and had made a serious effort to address to both problems.*" But again, the Claimant never presented any evidence that he suffered from post-traumatic stress disorder or even mentioned that he suffered from alcoholism. There is no evidence how, when, or how long he has suffered from post traumatic stress disorder, let alone the relevance to whether the discipline was excessive.

The Neutral also concluded that the Claimant "*made serious efforts to address to both problems*" of alcoholism and Post-Traumatic Stress Disorder. As explained, there was no evidence or testimony that Claimant suffered either problem. The Claimant stated that, "*apparently I do have some type of problem that I need to fix or get addressed"* and further stated he was going into a program at the VA due to "*[p]ost-traumatic stress and some different things*". So, in his closing statement, he stops short of admitting he suffers from alcoholism and avers only that he is intending to get "some type of problem" addressed some day. The "un-refuted" record shows only that, at the time of his hearing, he had not taken any concrete steps since his positive test to address his problems. Claimant's willingness to enter into a VA program some three months after the incident at issue, and a willingness to enter the Carrier's EAP program, only after he has been caught violating Rule G and the terms of his treatment program, hardly indicate a "serious effort to address both problems." Moreover, based on the Claimant's statement, he did not seek treatment for any kind of problem during the two month period between his second Rule G violation and his disciplinary investigation. There is simply no

support whatsoever in the record for the Neutral's conclusion that he made a "*serious effort to address to both problems*".

In the Award, the Neutral never draws a connection between his baseless conclusion that the Claimant suffered from alcoholism and post traumatic stress disorder and his conclusion that termination was excessive. Therefore, the Carrier must dissent.

Second, if this were a case of first impression for the parties the Carrier might not have been as inclined to write this dissent; however, this same set of facts has been addressed countless times, and this prior precedent was disregarded by the Neutral. In the Railroad industry, it is well established that Boards of arbitration have no jurisdiction to grant leniency; however, this is precisely what the Neutral did in this case. The Carrier met its burden of proof, acted within the scope of its disciplinary policy, and acted consistently with hundreds of prior awards when it dismissed the Claimant. Nonetheless, the Neutral determined the discipline was "*excessive*" and reinstated the Claimant. Thus, by definition, the Neutral exceeded his jurisdiction by granting leniency.

In reviewing numerous recent on-property Awards, the Carrier could not find one appeal that was even partially sustained when it was addressed on the merits. In addition to upholding the Carrier's decision to dismiss, these Neutrals recognized the consequences of reinstating a repeat drug/alcohol offender. See NRAB Third Division Award 31864 (Chamberlain); NRAB Third Division Award 36331 (Eischen); Public Law Board 5896, Awards 187, 188, 193 (Myers); Public Law Board 6239, Awards 1, 2, 13, 27, 43, 59 & 62 (Myers); Public Law Board 6564, Award 11 (Parker) ("*It is well understood that employees working in the railroad industry must work drug-free. Employees who misuse alcohol or drugs may get the opportunity for a second chance through a substance abuse treatment program such as that provided by CSXT. However, it is universally understood that in the transportation industry, there is no third chance... in the railroad industry [it is] recognize[d] that an employer is not obligated to retain an employee who tests positive for drugs or alcohol after having been given the chance to participate in a substance abuse treatment program*".) Public Law Board 6564, Award 12 (Parker) ("*In the railroad industry, the widely accepted approach to drugs and alcohol in the workplace is "two strikes and you are out." Arbitrators have consistently applied this principle, and there is no basis in this Record for the application of any other disciplinary standard. Claimant must be held accountable for his repeated failure to abide by the Carrier's drug and alcohol rules. He has no entitlement to a third chance.*"). Public Law Board 6564, Awards 27, 32, 38, 42 46 (Parker); Public Law Board 7008, Award 21 (Eischen); Public Law Board 7104, Award 20 (Zimmerman) ("*While we recognize Claimant's extensive efforts to address his situation, innumerable arbitration awards support the Carrier's right to discharge an employee who has tested positive while subject to the conditions of a bypass program and it is well recognized that leniency is the prerogative of the Carrier, not this Board. The Carrier's decision to dismiss the Claimant cannot be found arbitrary, capricious or unjust.*"); Public Law Board 7104, Awards 12 &13 (Zimmerman); Public Law Board 7120, Award 23 (Kossoff) ("*The essential fact is that the Carrier has already given the Claimant an opportunity to correct his drug-abuse problem by participating in a Substance Abuse Treatment Plan.... The Board has shown that it has a policy to dismiss employees who test positive for drugs a second time after being given a chance to participate in a substance abuse treatment program following a first positive test. See Public*

Law Board No. 6564, Case No. 11 dated February 17, 2004, involving these same parties. The Carrier's dismissal of the Claimant in the present case was consistent with that policy. The policy is a reasonable one and, according to published arbitration awards, similar to policies at other carriers in the railroad industry. The Board finds no basis for disturbing the Carrier's dismissal action in this case."); Public Law Board 7120, Awards 38, 65, 79, 83 (Kossoff); Special Board of Adjustment 1037, Award 47 (Myers) ("*This Board has stated on numerous occasions that a Carrier cannot be expected to keep on its payroll employees who are unable to or refuse to remain sober and without drugs in their system. There are just too many safety issues involved in the operation of a railroad. Since the Claimant was unable to keep his system clean of drugs even after he was given a second chance, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated his employment. Therefore, the claim will be denied.*").

As stated in the above cited Awards, it is clear, consistent, and universally accepted on this property that dismissal for a second Rule G violation while under a Rule G by-pass is within the Carrier's rights. As such, the Neutral's Award in this case is out of step and clearly shows that the Neutral is truly dispensing his own brand of industrial justice. Accordingly, the Carrier must dissent.

Finally, the Neutral's Award is contrary to public policy because it irresponsibly jeopardizes the safety of CSX employees and the general public, and should not be followed under any circumstance. The Claimant committed his first Rule G violation when he was arrested for driving a CSX vehicle while under the influence of alcohol at 0715 hours. The Claimant committed his second Rule G violation when he showed up to perform service as a Track Inspector at 0715 hours under the influence of alcohol. The Claimant has demonstrated that his alcohol abuse takes priority over the safety of the general public on the roads, as well as his fellow employees working on or around the tracks the Claimant is responsible for inspecting. Because the Award presents a risk to CSX employees and the general public, the Carrier must dissent.

For these reasons, the Carrier Member respectfully DISSENTS with the Neutral's Award.

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBER'S DISSENT
TO
AWARD 13 OF PUBLIC LAW BOARD NO. 7529
(Referee Miller)

After reading the Carrier Member's dissent to Award 13, the Organization finds itself obligated to respond in kind and review why the dissent is nothing more than a tardy attempt to change an unfavorable award and also ultimately lack any worthwhile insight.

First, Award 13 of PLB No. 7529 was rendered by Referee Miller on March 6, 2013 and the Carrier Member waited three (3) months until June 7, 2013 to write a dissent to said award. Such a tardy response smacks of the classic *lying behind the log* and is nothing more than an eleventh-hour attempt to diminish the precedential value of a well-reasoned award. It seems clear that if the Carrier actually objected to the holding of Award 13 it would not have waited so long to write its dissent. Clearly, this extreme untimeliness in responding diminishes not only the Carrier's credibility, but also diminishes any value of its dissent to Award 13.

Second, a review of the Carrier Member's dissent quickly reveals that it is riddled with baseless allegations and semantics. Indeed, the Carrier Member attacks the Referee for accepting the Claimant's testimony, as developed during the on-property hearing, as fact because the Claimant "never presented any evidence" to substantiate his testimony. The Carrier Member further attacks the Referee by alleging that the Claimant's testimony in regards to his suffering of Post Traumatic Stress Disorder (PTSD) as well as maintaining a life of sobriety for over four (4) years did not mean what the Claimant intended it to mean or as the Referee interpreted it to mean. The Carrier's allegations and semantics again diminish the value of its dissent. In regards to the Carrier's attack on the Referee accepting the Claimant's testimony as fact, we simply note that it is a more than well-established principle in the railroad arbitration industry that undisputed statements must be accepted as fact. A simple review of the on-property hearing transcript reveals that the Carrier never refuted the Claimant's testimony and, as such, his testimony must be accepted as fact.

In this vein, it must be noted that rail carriers routinely argue that the on-property hearing officer is the "trier of fact". As such, hearing officers are responsible for the development of all relevant facts related to the matter under investigation. Review of the on-property hearing transcript clearly reveals that the hearing officer did not challenge the Claimant's testimony regarding his suffering of PTSD or his maintaining sobriety in excess of four (4) years. Had the hearing officer questioned the Claimant's testimony, he – as the "trier of fact"- was responsible for asking the Claimant more questions and/or requesting further evidence/documentation in order to substantiate or refute the Claimant's position. Again, however, the hearing officer did not challenge the Claimant's testimony and the transcript verifies that it is entirely barren of any questions or requests to indicate a challenge to the Claimant's testimony. Accordingly, the Claimant's testimony went unchallenged and pursuant to the well-established principle that undisputed statements must be accepted as fact, the Referee rightfully accepted the Claimant's unchallenged statements as fact.

Labor Member's Response to
Carrier Member's Dissent
Award 13

In regards to the Carrier's allegations that the Claimant's testimony did not mean what the Claimant intended it to mean or as the Referee interpreted it to mean, such semantics further erode the value of its dissent. A review of the Claimant's unchallenged testimony clearly reveals that it was accurately interpreted by the Referee. Again, the Carrier hearing officer did not attempt to challenge the Claimant's line of testimony and did not request further evidence/documentation to substantiate or refute his position. Therefore, again, the Claimant's testimony was unchallenged and must be accepted as fact. Thus, the Carrier's attempts to otherwise misconstrue the Claimant's testimony to fit its baseless position cannot be accepted as a means to erode the precedential value of Award 13 of PLB No. 7529.

Finally, within the Carrier's dissent it notes that cases similar to that involved in Award 13 have been routinely denied by Referees and cites a multiple of on-property awards purportedly supporting such contention. The Carrier's contentions and citation of on-property awards within its dissent are nothing more than disingenuous and cannot be accepted. The proper forum for citing the Carrier's on-property awards that purportedly support its position is within its submission before the Referee. A review of the Carrier's submission before the Referee in this case reveals that it only cited two (2) on-property awards in support of its position. Further review of these awards reveal that they involve different factual circumstances; different language within the Rule G By-pass Agreements; and even different crafts of the Carrier. We must note, however, that the most distinguishing of said differences is their factual circumstances, as Award 13 possessed clear and mitigating circumstances that needed to be considered in the determination of discipline and which was allowed through the precatory language contained within the Claimant's Rule G By-pass Agreement. The Carrier clearly did not consider such mitigating circumstances when rendering discipline in this instance but, fortunately, the Referee did rightfully so. Regardless, the Carrier's latent citation of on-property awards within its dissent to Award 13 is disingenuous and cannot be accepted as a means to diminish value of said award. Again, the Carrier's conduct in this regard not only diminishes the Carrier's credibility but also any purported value of its dissent to Award 13.

For the above-detailed reasons, we respectfully concur with the Referee's decision in Award 13 of PLB No. 7529.

Respectfully submitted,

Dennis R. Albers

Dennis R. Albers
Labor Member