

PUBLIC LAW BOARD NO. 7529

Case No. 134

PARTIES  
TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes  
Division of the International Brotherhood of Teamsters  
System File: D70406716

VS.

CSX Transportation, Inc.  
Carrier File: 2016-210471

Referee: Sherwood Malamud

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FINDINGS

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employee 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.

Under date of July 28, 2016, Claimant E.A. Arroyo signed a request to submit this disciplinary matter for processing by Public Law Board (Special Board of Adjustment, as referenced in the request) 7529 for expedited handling.

FACTS

The Carrier hired Track Inspector E. A. Arroyo on April 9, 1979. On April 2, 2015, Claimant agreed to a Rule G Bypass. As a condition of that Agreement, Claimant agreed to participate in follow-up breath alcohol testing, as set forth in his Rule G Bypass Agreement. Claimant was scheduled to submit to a breath test on November 18, 2015, a date he was on duty and paid. He failed to provide sufficient breath for the test. On November 30, 2015, the Carrier sent Claimant to a special physical examination to ascertain if there was a medical reason for Claimant's failure to provide sufficient breath for the testing procedure. An independent physician, who reviewed the test on December 3, 2015 concluded there was no medical reason for Claimant's failure to provide adequate breath for the test. The Carrier's Chief Medical Officer concluded that Claimant's conduct manifested a shy lung event. The Chief Medical Officer considered that the shy lung event constituted Claimant's failure to present himself for the breath test. The Carrier considered Claimant's conduct as insubordinate conduct in violation of Rule 104.2.

Roadmaster II Carreno scheduled an investigatory hearing for December 22, 2015. After 4 postponements initiated by the Organization, the hearing was scheduled for June 30, 2016. On the date of the hearing, the Organization requested a fifth postponement which the on property



Carrier Hearing Officer denied. The Organization submitted a medical excuse for Claimant's nonappearance at the hearing. In material part, the note signed by Dr. Vucicevic stated as follows:

The above – named patient[Claimant] is under medical care for shoulder impingement, bilateral knee degenerative joint disease, and lumbago and radiculopathy. Due to the listed conditions, the patient is unable to operate a motor vehicle for long periods of time and is unable to work at this time.

The Carrier's Chief Medical Officer, Heligman, in an email dated June 14, 2016 concluded that the diagnoses reflected in the Dr. Vucicevic medical excuse did not prevent Claimant from attending the hearing. When the Carrier's Hearing Officer denied the request for the postponement of the June 30 hearing, the Organization left the hearing. The hearing was conducted in absentia. Based on the evidence adduced at the hearing on June 30, 2016, the Carrier on July 16, 2016 issued an order of dismissal. It is the subject of this appeal.

#### The Carrier Argument

The Carrier argues that Claimant received a fair hearing. Claimant absented himself from the hearing. He did so at his own risk, NRAB Third Division Award No. 35373 (Simon). Claimant was apprised of the charges. He received notice of the time and place of the hearing. He was afforded the opportunity to bring forth evidence and to cross examine witnesses.

The Carrier agreed to four postponements of the hearing originally scheduled for December 22, 2015. This fifth request was denied. Claimant failed to give a valid reason for the postponement of the hearing scheduled for June 30, 2016. The Carrier's Chief Medical Officer determined that the medical reasons provided did not prevent Claimant from attending the hearing. The Carrier's denial of this postponement conforms to Rule 25. The Carrier afforded Claimant a fair hearing.

On April 4, 2015, Claimant signed an agreement that provided for his return to work. He agreed to submit to follow-up breath testing. On November 18, 2015, Claimant failed to produce adequate breath sample for testing. The Carrier established through subsequent testing and medical evaluation, there was no medical reason for the failure to provide sufficient breath for testing. The Carrier met its burden of proof; it provided substantial evidence in support of these facts. Claimant did not make sufficient effort to provide a testable sample. This failure violates Rule 104.2. This is insubordinate conduct. He violated the agreement he signed that served as the basis for his return to work.

Dismissal is the appropriate penalty under the Carrier's long standing IDPAP policy. Claimant's conduct constitutes a major offense punishable by dismissal for a first offense, Public Law Board No. 6957 Award No. 68 (Parker). The Carrier asks the Board to deny this claim.

#### The Organization Argument



The Organization argues that the Carrier violated Rule 25, it failed to include in the notice for the investigatory hearing the Rules allegedly violated by Claimant. The Carrier denied Claimant a fair hearing. Claimant was disabled at the time of the hearing. He could not attend. By holding the hearing in absentia and without the presence of the Organization's representative, the Carrier denied Claimant a fair hearing.

The Carrier failed to meet its burden of proof. Claimant was not insubordinate. He appeared for testing and follow-up medical examinations, at the time and places as directed. He was disabled on the date of the scheduled hearing. The Carrier failed to meet its burden of proof. It failed to establish Claimant deliberately refused to provide sufficient breath for the test.

#### Board Findings

The Carrier complied with Rule 25 requirements: 1) It provided Claimant with notice of the hearing and the alleged conduct that is the subject of the charges against him; 2) The Carrier notified him of the postponements. Only after 4 postponements initiated by the Organization, at the commencement of the hearing on June 30, 2016 did the Carrier's Hearing Officer deny the request for a fifth postponement. The Carrier's Chief Medical Officer determined that the reasons provided by Claimant's physician did not support or explain why Claimant could not appear at the hearing. 3) At the scheduled hearing, the Carrier afforded Claimant and the Organization the opportunity to cross examine the Carrier's witnesses and present witnesses and evidence. Both Claimant and the Organization chose to absent themselves from the hearing. Board precedent supports the on property hearing going forward, in the absence of a valid reason to postpone the hearing. The Carrier submitted substantial evidence in support of the decision to hold the hearing on June 30, 2016.

The evidence presented at the hearing established that the Carrier provided Claimant with three opportunities to provide an adequate breath sample on November 18, 2015. He failed to do so. The Carrier established by substantial evidence that there is no medical reason for Claimant's failure to provide a sufficient breath sample.

The Organization argues that the Carrier failed to establish that by his conduct that Claimant was insubordinate. He reported for the initial test and all subsequent medical examinations. He did not provide a sufficient sample.

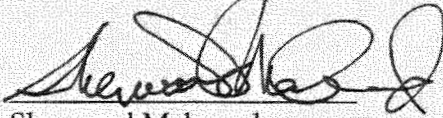
The Carrier established that there was not a medical reason for the shy lung result. Without a medical explanation for the shy lung test result, then it follows that Claimant controlled the result. This evidence supports the Board's drawing an inference that the failure to produce an adequate sample was willful on Claimant's part and within his control. He was insubordinate.

The Organization notes that Claimant is a long service employee with over 35 years seniority. The Board notes that Claimant signed an agreement to participate in follow-up testing. The Carrier appropriately treats the shy lung result as a refusal to fully participate in the testing, where an independent physician has determined that there is no medical reason that the

employee was unable to provide an adequate sample. Any other treatment of Claimant's shy lung result would allow him to subvert the testing commitment Claimant made to support his return to work. It would deprive the Carrier of its ability to test Claimant's condition to perform his duties as a Track Inspector safely without harming himself or others. The Carrier's IDPAP policy fully supports the imposition of the dismissal penalty for Claimant's conduct.

AWARD

Claim denied.



Sherwood Malamud

Neutral Member

Date: 2/27/2018