NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 22, (Case No. 22)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT RAIL CONFERENCE

vs

CSX TRANSPORTATION, INC.
(Carrier File: 2012-134418)

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

QUESTION AT ISSUE:

Did the Carrier comply with Rule 25 of the Agreement when it charged D. Deyton with violation of Operating Rules - General Rules A and G, and General Regulation GR-2, and GR-3, as well as, CSXT Safe Way Safety Rules GS-2 and applicable FMCSA regulations and was substantial evidence adduced at the Investigation on October 16, 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 25 of the Agreement and the Claimant was afforded all of his "due process" Agreement rights.

On September 21, 2012, Claimant was directed to attend a formal Investigation on October 3, 2012, which was mutually postponed until October 16, 2012, concerning in pertinent part the following charge:

> **"...to determine the facts and place your responsibility, if any, in connection with information that I received on Tuesday, September 11, 2012 that the urine specimen you provided in connection with a random FMCSA toxicological test that occurred on Wednesday, September 5, 2012 at approximately 0935 hours, in the vicinity of Erwin, Tennessee, was inconsistent with that of human urine.**
>
> **Consequent to the above, you are charged with conduct unbecoming an employee of CSX Transportation, refusal to provide a legitimate urine sample for testing,**

insubordination, and possible violations of, but not limited to CSX Transportation Operating Rules - General Rules A and G, and General Regulation GR-2, and GR-3, as well as, CSXT Safe Way Safety Rules GS-2 and applicable FMCSA regulations."

On November 5, 2012, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. Subsequently in an undated letter 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 September 28, 2011, at approximately 7:30 a.m., Claimant was administered a random FMCSA breath alcohol test, and tested positive for alcohol at a level of .029 gms/210 liters.

On October 3, 2011, Claimant was charged with possible violation of Rules A and G, GR-2 and the Carrier's Drug/Alcohol Policy and GS-2. Because that was the Claimant's first alleged Rule G violation, he was offered a Rule G By-pass Agreement which he accepted on October 13, 2011 and on October 19, 2011, he agreed to the Substance Abuse Treatment Plan. The Plan required the Claimant to be subject to on-duty follow up testing and it further stated that any violation of the Agreement could lead to the assessment of discipline.

On September 5, 2012, the Claimant took a random FMCSA toxicological urine non-observed test. The Claimant's first sample contained an insufficient amount of urine and was discarded by the tester, Collector J. Street. The Claimant's second sample contained a sufficient amount, and the Claimant certified the sample had not been adulterated in any manner.

On September 11, 2012, the Carrier was advised that the Claimant's urine sample was "substituted" because the sample was not consistent with human urine. Under Carrier Policy and applicable federal law, a substituted sample is considered a failure to test and/or the equivalent of a positive test.

In its defense of the Claimant, the Organization proffered several arguments. It first argued that Claimant's sample should be excused because the Claimant accidentally dropped the testing container in the urinal that had standing water and a germicidal disk that according to it contaminated the urine despite the fact that the Claimant attempted to shake the water out of the container. It asserted that if the Claimant had been tested in accordance with the Agreement which requires under Appendix C that two urine samples be obtained, it is highly unlikely the Claimant would have dropped a second sample that should have been obtained at least 20 minutes after the first was taken. It reasoned that if the Agreement testing procedures had been done the second sample would have shown that the Claimant was alcohol and/or drug free as the first sample obviously still contained some droplets of contaminated water. The Carrier

countered that argument by stating that the test was a Department of Transportation (DOT) test and not a Carrier administered test subject to the Agreement provisions. It further argued the test was properly performed by the tester.

The Carrier is correct that the test was a DOT test and was not subject to the same provisions of a Carrier administered test and there was no requirement to take a second sample.

The Carrier has also suggested that the filing of any subsequent charges requires a ruling on any charges held in abeyance and the Board is required in this instance to make a determination on the Claimant's alleged September 28, 2011, Rule G violation that was held in abeyance on October 13, 2011, even if the Carrier did not meet its burden of proof in the present case. The Organization disagreed and argued that the Board is not compelled to address the alleged September 28th Rule G violation until the Carrier has satisfied its burden of proof that the Claimant did in fact have a second Rule G violation as alleged.

The Carrier relies upon the Rule G Bypass Agreement, Paragraph 7 for support of its argument which states:

> **"Should an employee who has been returned to service under Paragraph 3 of this agreement appear to again violate Rule G within a period of five (5) years from the date authorized to resume duty, hearing will be held on the Rule G charge under the applicable agreement rule."**

The Board has determined that the Carrier's reliance upon the aforementioned language is misplaced. Paragraph 7 makes no specific mention that the Board must render a decision on the Investigation held in abeyance even if it found no substance to the allegation that an employee had committed a second violation of Rule G. The Board further notes that no other section of the Rule G Bypass Agreement requires a decision to be rendered on the Investigation held in abeyance even though there had been no showing that an employee has committed a second offense. A careful reading of Paragraph 7 shows that a better argument can be made that it pertains to the latter charge as it specifically states in pertinent part: **"...appear to again violate Rule G...hearing will be held..."**. The language guarantees that a Hearing will be held on the latter charge in accordance with the applicable Agreement Rule. Carrier's argument in this instance is similar to those arguments sometimes raised by Carriers involving conditional leniency reinstatements wherein it has been asserted that when employees have agreed to a waiver they have agreed that during their probationary period if they commit a similar violation they can be returned to a dismissed status without substantial proof that they have actually committed a second offense. That argument has consistently been rejected (See for example First Division Award No. 27288).

Lastly the Carrier's argument is counterproductive to rehabilitation as it opens the process to potential abuse because an employee could be falsely accused of a second Rule G violation and even though there was no proof of a second violation a strong case could made that he was guilty of the alleged violation held in abeyance on the basis that the employee would have never entered into the Rule G Bypass Agreement unless he thought there was some merit to the first charge. The result could be a valuable employee to the Carrier that was on the successful road of rehabilitation could be permanently lost. The Board finds and holds that it will address the charges pertaining to September 11, 2012, and will only address the Investigation held in abeyance on October 13, 2011, provided substantial proof has been offered that Claimant was guilty of the allegations concerning September 11, 2012.

Turning to the merits and as stated above the Claimant testified he dropped the cup in toilet and then shook the water out leaving a few droplets of water and because of that the Organization contended that the sample was contaminated by the deodorizer and/or diluted by the remaining water. The facts indicate at the time of the incident Claimant did not tell the tester he had dropped the cup in the toilet and signed and certified the sample had not been adulterated in any manner. On page 64 of the transcript the Claimant said the reason he didn't say anything at the time was because he did not know what could contaminate a sample. It is somewhat surprising that he did not mention to the Collector that he dropped the cup in the urinal as he testified on page 61 that he had probably taken ten urine tests over the past year. In response to the Claimant's assertion the Carrier argued that its Employee Assistance Program Clinical Supervisor D. C. Bowen testified that the Claimant's excuse was not consistent with the results because the deodorizer would have registered as "adulterated", and if there was a small amount of water in the cup it would still register as urine and would not have registered as substituted sample (See Transcript pages 72, 73, 77 and 78).

Review of Mr. Bowen's testimony reveals that it was not as exacting as characterized above by the Carrier. Mr. Bowen when asked about the sample on page 78 of the transcript testified as follows:

> **"Bowen: But that's, and by the way, that's my, <u>I'm not a qualified scientist</u> in these, so, I'm not a toxicologist, but I believe that you would have a different report. You would have a different report. You would have like adulterated rather than substituted.** *(Underlining Board's emphasis)*

Bowen's response was not definitive and on page 78 he went on to testify that when people from the testing facility come in to administer the urine tests they place some type of dye in the commodes, or urinals that are being used for testing and tape off the faucets.

The Organization argued that the test given the Claimant was improper because the tester did not dye the water in the toilet blue as the Claimant testified the water was clear. The Carrier countered by stating that argument should be rejected because the Claimant himself could not even remember what color the water was until his representative presented a line of leading questions on pages 66, 78, 79 and 84 of the transcript that the Claimant eventually agreed with.

Examination of the aforementioned pages indicates that Claimant was somewhat coaxed on pages 66 and 84, but on pages 78 and 79 the discussion was between the Hearing Officer and the Claimant's representative over what the Claimant had previously stated when questioned by the Hearing Officer. That prior questioning was on page 63 of the transcript when the Claimant was questioned about his conversation with the Medical Review Officer by the Hearing Officer and he specifically stated: **"...And I looked into the urinal, it looked clear."** Claimant's statement that the urinal water was clear was not effectively refuted. The Hearing Officer attempted to get hold of the tester, but he was not available, therefore, absent any testimony to the contrary the Claimant's uncontested testimony must be considered as being factually correct.

On page 57 of the transcript Clinical Supervisor Bowen testified that the MRO was required to advise the Claimant that he had the right to have his split specimen retested and on page 74 the Hearing Officer continued the questioning of Bowen about the MRO's obligation to advise the Claimant of his right to re-test a split specimen. Mr.Bowen stated the following:

> **"...So one, the opportunity for the re-test was presented to Mr. Deyton when he spoke with the MRO I believe would presume, and by the way like I said, I don't have knowledge of the exact, any conversation that they had, other than what's been reported to us in these exhibits. <u>But that is the protocol</u>. So, you know, and that is the specimen specifically, so if there's a problem with the lab or something, <u>this is the employee's protection</u> and they can use another lab to have that results reconfirmed or, you know, if its, invalidated, then the test would be cancelled, but that's the only opportunity that's provided for another test,..."** *(Underling Board's emphasis)*

On page 77 of the transcript the Claimant's representative cross-examined Mr. Bowen regarding the MRO's responsibility to advise the Claimant to have his split specimen retested as follows:

> **"Procise: You mentioned earlier about when Mr. Deyton would have spoken with the MRO, that he would have gotten information or advice, or whatever from that person at that time about being re-tested, or whatever, did I understand you correctly?**
>
> **Bowen: To have his specimen, his split specimen re-tested that was already at**

the lab in storage.

Procise: Oh, okay.
I misunderstood what you said.

Bowen: That's part of the protocol, and that's why I stated earlier the reason that they even have an interview for these kind of cases, because they didn't used to, used to be that if there was some kind of adulterant detected, or a substituted specimen, there was no interview because there was no interview because there wasn't any medical explanation possible for those things. However, they realized and I believe it was from the Brotherhood's bringing this to regulator's attention was that they still have the right to challenge that finding if it was a substituted specimen, or an adulterated specimen. So they changed the regulation from years ago to allow, to require that interview still take place, even in these cases, but mainly the mission of that primarily, is to also determine that they have been informed that they could have a specimen re-tested, (the split specimen) re-tested at another lab and and the rule is the same for that as for a positive. They had 72 hours from the time that they're told that, exactly 72 hours to request it."
(Underling Board's emphasis)

In the aforementioned testimony, the Carrier's EAP Clinical Supervisor explained that the parties had changed the MRO's obligation to advise the Claimant that he had a right to have his split specimen retested even if the MRO did not believe there was a medical explanation for the Claimant's urine specimen having allegedly been adulterated and/or substituted. The Carrier having set forth the proper protocol for employees being re-tested requires the Board to examine whether or not those requirements were followed since the Claimant asserted they were not adhered to. The issue was properly raised on the property at the formal Investigation and the Board is empowered and obligated in accordance with Section 7 and 8 of the governing Public Law Board Agreement to address the Claimant's assertion.

Examination of Federal Regulations substantiate Clinical Supervisor Bowen's statements on pages 57, 74 and 77 that those regulations require the MRO to notify an employee of his/her right to a split specimen test in the event that the initial testing suggests there may have been a "substitution" or "adulteration" and the procedures and time limits to request such test. Title 49 Transportation, Part 40 Procedures for Transportation Workplace Drug and Alcohol Testing Programs, Subpart G, Subsection 40.153, Paragraph (a) specifically states:

"As the MRO, when you have verified a drug test as positive for a drug or drug metabolite, or as a refusal to test because of adulteration or substitution, you must notify the employee of the procedures for requesting a test of the split specimen." *(Underlining Board's emphasis)*

On page 71 of the transcript the Claimant was questioned by the Hearing Officer as follows:

"Smith: **Did you discuss with the MRO when they contacted you about about your exam, did you question them as to the validity of for you to go out and get your own test?**

Deyton: **I never thought of it at that moment.**

Smith: **Did they give any advice as to anything that you could do?**

Deyton: **No.**

I did tell the MRO the circumstances that I just revealed, about dropping the cup in the urinal, and I was given no advice. I've been given no advice by anybody related to CSX in any way.

Smith: **So the MRO was aware of the circumstances of the test and still made their ruling the way they did, is that correct?**

Deyton: **That's correct."** *(Underlining Board's emphasis)*

The Claimant's testimony was not refuted that the MRO gave him no advice nor was it contested that the MRO did not advise him that he could challenge the results of the September 5th test by requesting his split specimen be retested. Examination of the Medical Review Officer Final Report of September 11th and two letters from the Associate Chief Medical Officer make no mention that Claimant was advised of his right to request a test of the split specimen and because we have no contradictory testimony and/or evidence the Claimant's testimony must be accepted as fact.

The Board also notes that after the Claimant was advised of the results of his September 5th urine test he secured a Hair Follicle Test at his own expense on October 2nd that confirmed he was negative of any prohibited controlled substance in his body. The Board will not debate the merits of hair follicle testing versus urine testing because hair analysis is not recognized by the Federal Railroad Administration (FRA) as an appropriate methodology for testing. Review of the DOT and FRA regulations indicate that all drug tests concerning railroad employees are conducted using only urine samples, therefore, the Board in the resolution of this dispute has not considered the results of the October 2, 2011, test in its determination.

In summation the Board is not persuaded that the tester, Collector Street, secured the collection site in accordance with mandatory Federal Regulations. Additionally, it stands un-refuted that the MRO failed to advise the Claimant of his right to request a retest of the split specimen. Because there was no proof offered that those procedural safeguards were provided the test results cannot be accepted as being valid, therefore, it is determined that substantial evidence was lacking and the Carrier did not meet its burden of proof. Additionally, the Board recognizes that the transcript substantiates that on September 5th, the testing date, the Claimant was also administered a breathalyzer test that he passed with a reading of .000 and Roadmaster J. Holland testified on pages 20 and 23 of the transcript that the Claimant did not appear to be under the influence of any substances on September 5, 2012, which bodes well in behalf of the Claimant. The Board emphasizes that we have made no finding on the merits of the parties argument as to whether or not the Claimant's urine sample may have been adulterated and/or substituted because the Claimant was not afforded all of his protective rights under the testing and appeal process.

The Board finds and holds that the dismissal was not appropriate and should be removed from the Claimant's personnel record. Claimant is to be returned to service with seniority intact, benefits unimpaired and made whole for all loss of monies in accordance with Rule 25, Section 4. Claimant is also forewarned that upon reinstatement to service he needs to continue to be diligent in adherence to his Substance Abuse Treatment Plan.

AWARD

Appeal 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: May 20, 2013

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William R. Miller, Referee and Neutral Member
P. E. Kennedy, Employee Member
R. Miller, Carrier Member - **Dissenting**

CARRIER MEMBER'S DISSENT:

The Majority's decision in favor of the Claimant in this case relied on baseless conclusions and failed to recognize well-established industry practices when the Neutral considered a defense submitted after the on-property handling of the case and, therefore, outside the scope of the Board's authority as defined by the Public Law Board Agreement.

In the Award, the Majority asserts that the Claimant testified that he was not offered the opportunity to have his split sample tested after the MRO determined that the Claimant provided a substituted urine sample. This conclusion is not based upon any testimony in the record. The context of the testimony referenced on page 7 of the Award concerned the Claimant's ability to submit the results from an additional drug test the Claimant had performed nearly four weeks after the initial test and was completely unrelated to the testing of a split sample.

Neither the Claimant nor the Organization ever alleged during the investigation or hearing that the MRO failed to offer the Claimant the opportunity to have his split sample tested. Contrary to the Majority's opinion, the Board has no authority to expand its scope of review beyond the issues raised during the on-property handling of a claim.

The Award correctly states that the Carrier provided no testimony and/or evidence regarding the Claimant's right to request a test of the split specimen. However, the Carrier was unable to provide any rebuttal because the first time the defense was raised was before this Board. Had the question been properly raised during the on-property handling of the case, the Carrier would have offered rebuttal testimony. By considering a defense offered after the on-property handling of the case, this Board has prevented the Carrier from providing any rebuttal testimony or evidence. The Boards actions are in opposition to tenets of industrial relations and the Board's authority.

The Carrier concludes that the Board overstepped its authority and the findings are patently erroneous and of no precedent-setting value in any future case. For these reasons, the Carrier respectfully DISSENTS with the Award.

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBER'S DISSENT
TO
AWARD 22 OF PUBLIC LAW BOARD NO. 7529
(Referee Miller)

The Carrier's Dissent to Award 22 (Case No. 22) of Public Law Board (PLB) No. 7529 is baseless and illogical and, therefore, does not diminish the precedential value of the well-reasoned Award 22.

The Carrier's primary assertion within its Dissent is that the Referee considered a defense submitted by the Organization after the conclusion of the on-property handling of the case and, therefore, the Referee went outside his scope of authority per the provisions of the Public Law Board Agreement. The Carrier's assertion is patently erroneous.

The Agreement for PLB No. 7529 is unique in its design as its provisions do not provide for the traditional on-property claim and grievance handling procedures, as defined within Rule 25 of the June 1, 1999 CBA and, as typically utilized by the parties involved when handling discipline cases. In this regard, Sections 6, 7 and 8 of the PLB No. 7529 Agreement state:

> "6. An employee who is dissatisfied with a discipline decision shall have the right for a period of thirty (30) days from the effective date of the discipline to elect to: (1) handle the dispute through normal procedures under the applicable working agreement, or (2) submit the decision directly to the Board established by this Agreement for expedited handling. Election of either option waives all right to the other. If option (2) is elected, the employee must given written notification thereof to both the Carrier and Organization members of the Board within the above-mentioned thirty (30) day period. ***
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> 7. Within thirty (30) days after receipt of the disciplined employee's written notification of his/her desire for expedited handling of the discipline assessed, the Carrier member of the Board shall arrange to transmit to the Referee one copy of each of the following: (1) notice(s) of investigation(s); (2) transcript(s) of hearing(s); (3) notice of discipline; and, (4) employee's service record. ***
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> * * *
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> 8. **The Board's disposition of the dispute shall be based solely on the material supplied under Section 7**. In deciding whether the discipline assessed should be upheld, modified or set aside, the Board

> "shall determine (1) whether there was compliance with the applicable working agreement; and (2) **whether substantial evidence was adduced at the hearing(s)** to prove the charge(s); (3) whether the discipline assessed was appropriate."

As revealed by the above-quoted PLB provisions, the on-property handling of claims and grievances falling under expedited procedures is limited to the notice of investigation, transcript of hearing, notice of discipline and the employe's service record. Therefore, any information and/or testimony developed during the on-property handling of a claim or grievance falling under PLB No. 7529, i.e., primarily the formal investigation hearing, is within the purview of the Referee.

In this regard, a review of the on-property formal investigation transcript for Case 22 reveals that the Claimant spoke in great detail regarding all events surrounding the matter under investigation. Further review of the hearing transcript reveals that the Claimant spoke in great detail of his discussion with the Medical Review Officer (MRO) upon being notified of an alleged substituted urine test (Tr.PP.63&71). Most significant - and obvious - is the line of questioning by the Carrier hearing officer and the testimony of the Claimant found on Tr.P.71:

> "Smith: Did you discuss with the MRO when they contacted you about your exam, did you question them as to the validity of for you to go out and get your own test?
>
> Deyton: I never thought of it at that moment.
>
> Smith: Did they give you any advice as to anything that you could do?
>
> Deyton: **No**.
>
> I did tell the MRO the circumstances that I just revealed, about dropping the cup in the urinal, and **I was given no advice**. **I've been given no advice by anybody related to CSX in any way**."

The above-quoted line of questioning and related testimony developed during the on-property hearing makes it transparently clear that the Claimant was not advised of or afforded his right to a split specimen test by the MRO pursuant to Subpart G, subsection 40.153 of Title 49: Transportation, Part 40: Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

Accordingly, per the provisions of the PLB No. 7529 Agreement, the Arbitrator properly recognized a defense raised by the Claimant. In fact, we note that the Carrier's hearing officer was made aware of this defense during the on-property handling of the instant dispute. With this in mind, the Carrier's contentions on this point are simply disingenuous and baseless.

Notwithstanding, the Carrier's assertion that the split specimen test defense was purportedly submitted by the Organization after the on-property handling of the case and its further assertion that it was prevented from providing any rebuttal testimony or evidence is befuddling in light of the fact that the issue was raised and discussed during the on-property formal investigation hearing. Indeed, a review of the transcript clearly reveals that the split specimen test subject matter was discussed in great detail, approximately thirty (30) pages, during the formal investigation hearing. The Carrier has the obligation to provide the charged employe, i.e., the Claimant, with a fair and impartial investigation before administering discipline for the alleged charges. A basic tenet of a fair and impartial hearing is presenting all witnesses possessing relevant information at the formal investigation hearing. The Carrier knew very well who the MRO was and that said MRO possessed pertinent information regarding the charges involved. Moreover, the Carrier was well aware that the MRO was the qualified expert to provide testimony related to the medical documents purported by the Carrier. Yet, the Carrier failed to produce such witness. In essence, the Carrier failed to provide the Claimant with his express and implicit due process right to a fair and impartial hearing before disciplining him. Regardless, the Carrier had more than ample opportunity to produce its proper witnesses, prior to and during the formal investigation, to provide testimony in support of its position and the Carrier simply failed to do so. The Carrier's attempt to shift its failures in the handling of this onto the Arbitrator is disingenuous.

For the reasons stated above, we concur with Referee Miller's well-reasoned decision in Award 22.

Respectfully submitted,

T. R. McCoy, Jr.
Labor Member