

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 24, (Case No. 24)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE
(Organization File: D70155512)**

vs

**CSX TRANSPORTATION, INC.
(Carrier File: 2012-134972)**

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

QUESTION AT ISSUE:

Did the Carrier comply with Rule 25 of the Agreement when it charged C. W. McPhan, Jr., with violation of Operating Rules - General Rule A and G, CSX Drug/Alcohol Use Policy, CSX Safeway - General Safety Rule - GS-2 Substance Abuse and the CSX Smoking Policy and was substantial evidence adduced at the Investigation on October 23, 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 Organization argued that the Claimant was denied a "fair and impartial" Investigation because he was denied the opportunity to face his accusers. Countless arbitral Boards have determined that the Carrier does not have subpoena power to compel non-employees to attend Investigations, but their statements are admissible and can be considered in the resolution of a dispute. The Board has thoroughly reviewed the record and considered the Organization's procedural arguments and determined that the Carrier complied with Rule 25 of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

On September 20, 2012, Claimant was directed to attend a formal Investigation on October 16, 2012, which was mutually postponed until October 23, 2012, concerning in pertinent part the following charge:

"...to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 1300 hours, on September 17, 2012 at the Comfort Inn located at 630 Donaldson Road, Erlanger, Kentucky, when, while

you were staying in Room #216, it was alleged by the Hotel Staff that there was smoke smelled like Marijuana coming from your room. Additionally an Erlanger Police Department Law Enforcement Officer, was later contacted by hotel management after the housekeeper cleaning your room (216) found what they suspected were Marijuana cigarette butts in the room. Upon the arrival of the Erlanger Police Department they performed an inspection of your room and found the Marijuana cigarette butts (Roaches) in plain view, laying on top of a table against the window, providing confirmation that you were allegedly smoking marijuana in a non-smoking room of the CLC Facility.

In connection with the above incident, you are charged with conduct unbecoming an employee of CSX Transportation, and improper use of illicit drugs. These infractions appear to be in violation of, but not limited to, CSX Transportation Operating Rules - General Rule A and G; CSX Drug/Alcohol Use Policy; CSX Safeway - General Safety Rule - GS-2 Substance Abuse; and the CSX Smoking Policy."

On November 12, 2012, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. On November 20, 2012, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of June 1, 1999 BMW/CSXT Agreement.

The facts indicate that on September 9, 2012, the Claimant was working on a System Production Team, arrived at the Comfort Inn at Erlanger, Kentucky (a company lodging facility), and checked into room 216. On September 15th, two hotel staff members were cleaning rooms, when they allegedly noticed the entire second floor hallway smelled like marijuana and when they arrived at room 216, they knocked on the door prior to entering to clean the room. Claimant declined their service at which time the staff again allegedly noticed the strong smell of marijuana coming from the Claimant's room.

Two days later on September 17, 2012, the hotel staff returned to clean the Claimant's room while he was at work. The Housekeeper who cleaned the Claimant's room, noticed the strong smell of marijuana and saw what she believed to be a marijuana roach in the Claimant's room. At approximately 1:20 p.m., the Housekeeper notified the hotel's General Manager of what she had seen in room 216. Subsequently, the General Manager discussed the matter with the Claimant's Supervisor after having secured statements from two Housekeepers. Claimant's Supervisor called the Carrier Police, who then notified the Erlanger Police Department. At approximately 4:27 p.m., the local police arrived at the hotel and searched Claimant's room and during that search police found a small marijuana roach on the table. Due to the fact there was only a small amount of marijuana in the roach, the police did not file criminal charges and

flushed the roach down the toilet. After the search of the room, the Erlanger Police met with the Claimant's Supervisor and advised him of their findings. Claimant returned to the hotel at about 8:30 p.m. after working and was removed from service. Claimant was required to pay the hotel a \$150.00 fine for smoking in his room. After paying the hotel fine, Claimant was escorted to his room by police and his Supervisor to pick up his possessions and pulled out of service.

Claimant was offered a Rule G By-pass Agreement that involved a Substance Abuse Treatment Plan which he declined and instead chose to go to a formal Investigation.

The Comfort Inn Housekeepers Megan Havlin and Beth Thacker offered statements regarding the incident as follows:

"9-17-12

On 9/15 the 2nd floor hall smelled heavily of pot. We knocked on door #216 and when the guy opened the door we (Megan and I) were hit in the face with the smell.

Beth Thacker"

"9-17-12

"On 9-15-12 the whole 2nd floor smelled of (marijuana) pot. On the 15th when I knocked the man refused service and the smell came rushing out of that room. Today while cleaning the room it smelt strong of marijuana.

Megan Havlin"

The Erlanger Police Department Investigation Report of September 17th confirmed that they found a marijuana roach in the Claimant's room #216 and flushed it down the toilet.

In his defense the Claimant argued that the hotel staff attempted to frame him for drug possession because of an incident at the hotel earlier in the week when he allegedly complained to the same members of the staff about the cleanliness of his room. The Carrier countered that argument stating that assuming for the sake of argument the Claimant's story was true, the Claimant stated he made the complaints to the individual members of the housekeeping staff and not their Supervisor. Therefore, it made no sense that the staff would take such drastic measures for a minor complaint that their Supervisor was not even aware of. The Board is not persuaded that the hotel staff planted drugs in the Claimant's room or that the Housekeepers had anything to gain by making a nefarious complaint. It is determined that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

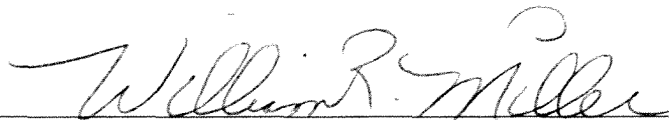
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had a approximately six and half years of service. The Organization argued that if the Board did find that the Carrier had proven its charges that dismissal was excessive. It suggested that because the Claimant was offered a waiver prior to the Investigation that waiver offer should be reinstated. A similar issue arose before this same Board in Award No. 17 that determined in pertinent part the following:

"...Claimant was offered a Rule G by-pass Agreement, but instead chose the formal Investigation process. Claimant now displeased with his initial choice and the Carrier's subsequent dismissal decision has asked for a "second bite of the apple" and is requesting entrance into the Rule G by-pass Agreement program after first rejecting it and choosing to go to a formal Investigation.... The Board is not persuaded by Claimant's belated request as it dissuades employees with legitimate problems from seeking treatment and instead suggests that employees should go to a formal Investigation and if unhappy with that decision seek treatment as a last resort. Claimant faced possible dismissal if the charges were proven, therefore, because those charges were substantiated the Board finds and holds that the discipline assessed was not arbitrary, excessive or capricious and was in accordance with the Carrier's IDPAP Policy. The discipline will not be set aside and the appeal/claim is denied."

The Board finds and holds that the reasoning set forth above is equally applicable in this case as well, therefore, the discipline will not be set aside and the appeal/claim is denied.

AWARD

Appeal denied.



William R. Miller, Referee

Dated: May 20, 2013