

PUBLIC LAW BOARD NO. 7529

Brotherhood of Maintenance of Way)	
Emploees Division - IBT Rail)	
Conference)	
)	
and)	Case No. 66
)	Award No. 66
)	
CSX Transportation, Inc.)	

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's dismissal of Claimant B. Rolen for the alleged violation of CSXT Operating Rules 100.1, 103.2, 104.3 and 106; CSX Safeway Rules GS-1 and GS-2; and the CSX Drug/Alcohol Use Policy was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D70178214/Carrier File 2014-165888).
2. As a consequence of the violation referred to in Part 1 above, Claimant B. Rolen shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On March 11, 2014, the Carrier issued a notice of hearing to Claimant stating as follows:

The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 0250 hours, on February 26, 2014, in the vicinity of Mitchell, North Carolina, when, while you were operating CSX Vehicle (91053) outside of normal work hours, you were stopped by the North Carolina Highway Patrol for driving erratically, and subsequently arrested for DUI and taken into custody. Your CSX Vehicle was impounded.

In connection with the above incident, you are charged with conduct unbecoming an employee of CSX Transportation, operating your CSX Vehicle while under the influence of alcohol, and improper use of alcohol. These infractions appear to be in violation of, but not necessarily limited to, CSX Transportation Operating Rules 100.1, 103.2, 104.3, 104.4, and 106 (G); CSX Drug/Alcohol Use Policy; CSX Safeway - General Safety Rules GS-1, and GS-2 Substance Abuse.

In accordance with your Collective Bargaining Agreement(s), you are not eligible to participate in a Rule 106 (old G) bypass option because you have been charged with rule violations in addition to Rule 106 (old G).

On March 27, 2014, the investigative hearing convened wherein Claimant and his representative were afforded the opportunity to present witness testimony, cross-examine Carrier witnesses and introduce into the record information or exhibits pertinent to the matter under investigation.

On April 14, 2014, the Chief Engineer notified Claimant as follows:

A review of the evidence, testimony, and all other documents associated with the hearing demonstrate that the charges against you were proven and you violated CSXT Operating Rules 100.1, 103.2, 104.4, and 106; CSX Safeway Rules GS-1 and GS-2; and the CSX Drug/Alcohol Use Policy.

Based upon my finding of guilt, coupled with the serious nature of the offenses and your disregard for the basic tenant of a positive employee/employer relationship; it is my decision that the discipline to be assessed consequent to your proven actions is your immediate dismissal in all capacities from CSX Transportation.

Rule 100.1 states that “employees must know and comply with rules, instructions and procedures that govern their duties” as well as “comply with the instructions of supervisors” and “when there is uncertainty, employees must: 1. Take the safest course, and 2. Contact a supervisor for clarification.”

Rule 103.2 states: “Do not use CSX equipment or communication systems unnecessarily or for unauthorized personal business.”

Rule 104.4 prohibits these behaviors “at all times: a Concealment of facts under investigation, or b. Criminal conduct that may damage CSX’s reputation.”

Rule 106 - Drugs and Alcohol (Rule G) states:

- 106.1 The illegal possession or use of a drug, narcotic, or other substances that affects alertness, coordination, reaction, response, or safety is prohibited both on and off duty.
- 106.2 An employee shall neither report for duty nor perform service while under the influence of nor use while on duty or on CSX property any drug, medication, prescription medication, or other substance that will in any way adversely affect the employee’s alertness, coordination, reaction, response, or safety.
- 106.3 Employees are prohibited from possessing, using, or being under the influence of alcoholic beverages or intoxicants when:
 - a. Report for duty, or
 - b. On duty, or
 - c. On CSX property, or
 - d. Occupying facilities provided by CSX,

Rule GS-1, Safety Responsibilities, “All employees governed by these rules, must ensure that” they observe “Local, state and federal laws and regulations that relate to job tasks.”

Rule GS-2, Substance Abuse, states:

Employees reporting for duty, on duty, on CSXT property or occupying facilities provided by CSXT are prohibited from having in their possession, using, or being under the influence of alcoholic beverages or intoxicants.

Employees shall neither report for duty nor perform service while under the influence of, nor use while on duty or on CSXT property, any drug, medication, or other substance, including prescribed medication that will in any way adversely affect the employees' alertness, coordination, reaction, response or safety. The illegal use and/or possession of a drug, narcotic or other substance that affects alertness, coordination, reaction, response or safety is prohibited while on or off duty.

Drug/Alcohol Use Policy states:

Employees reporting for duty, on CSX property, or occupying facilities provided by CSX are prohibited from having in their possession, using, or being under the influence of alcoholic beverages or intoxicants.

Employees shall neither report for duty nor perform service while under the influence of, nor use while on duty or on CSX property, any drug, medication, or other substance, including prescribed medication that will in any way adversely affect the employees' alertness, coordination, reaction, response, or safety.

The illegal use and/or possession of a drug, narcotic, or other substance that affects alertness, coordination, reaction, response, or safety is prohibited while on or off duty.

On April 21, 2014, Claimant elected to proceed with a review of his dismissal by submitting a claim to this Special Board of Adjustment No. 7529. In doing so, Claimant acknowledged that the decision of the Neutral Member of the Board is based on the notice of investigative hearing, transcript of hearing, notice of discipline, Claimant's prior service record and Rule 25 of the Agreement.

Carrier's Position

Around midnight on February 26, 2014, a North Carolina Highway Patrol Officer stopped Claimant in a CSX vehicle after having observed Claimant driving erratically. Based on Claimant's driving the Officer suspected Claimant of driving under the influence (DUI). He asked Claimant to submit to a breath test but Claimant refused the test. Thereafter the Officer charged Claimant with DUI and another, separate charge of criminal conduct for refusing the breath test under the State's implied consent law. After refusing the test at 12:14 a.m. on February 26, Claimant was taken into custody and the vehicle impounded. The next day (February 27) Claimant was released from detention at 6:00 a.m. and a CSX Special Agent inspected the vehicle finding a container of alcohol (beer) in a cooler.

According to the Carrier:

At the time he was stopped and arrested the Claimant was off duty, observing rest days and staying at a hotel in Burnsville, [NC], as he was moving to nearby Asheville, [NC]. We are to believe he was staying at a hotel in a town 40 minutes away from

Asheville, [NC] and elected to drive at midnight while suffering from low blood sugar, in a state that made him appear intoxicated and affected his memory enough he did not recall leaving the hotel in which he was staying. Assuming for the sake of argument this series of events occurred, he had the opportunity to exonerate himself [by] taking the breathalyzer test, but refused to do so, violating North Carolina's implied consent law and the Carrier's Rules 104.4 and GS-1 in the process. His refusal of the breathalyzer test was done at his own peril. The Board may draw an adverse inference from the Claimant's refusal to submit to the breathalyzer test.

As for Claimant's use of the CSX vehicle, the supervisor instructed Claimant "don't go off the beaten path too far" (worksites to residence). Claimant acknowledged that Burnsville (NC) is not on the route to Asheville (NC).

There is substantial evidence that Claimant violated Rules 100.1, 103.2, 104.4, 106; CSX Drug/Alcohol Use Policy and CSX Safe Way Rules GS-1 (Safety Responsibilities) and GS-2 (Substance Abuse). Claimant acknowledged violating GS-2; this is a defacto admission that he violated Rule 106 because the rules are virtually the same. Although Claimant testified he had no recollection of leaving the hotel or refusing to take the breathalyzer test, such testimony is an admission he violated Rule 104.4 because he used CSX property (Vehicle 91053) carelessly and engaged in behavior endangering life or property. By refusing the breathalyzer test, Claimant violated North Carolina's implied consent law which, in turn, violates Rule 104.4 (prohibits criminal conduct which may damage CSX's reputation or endangers CSX property, employees, customers or public) and GS-1 (comply with all local, state and federal laws and regulations related to Claimant's job). Claimant's use of a CSX vehicle for personal business and to carry personal property including alcohol - - a substance prohibited from all Carrier property - - violates Rules 100.1, 103.2, 104.3, 106 and GS-2. As for the bypass option (formerly identified as Rule G Agreement, CSXT Labor Agreement 6-076-88)), the Carrier is not required by the Agreement or policy to offer it when there are multiple rules violated.

Claimant's dismissal is not arbitrary or excessive. These multiple rules violations constitute major offenses. Claimant's explanation that he was in insulin shock and confused to such a degree that he has no recollection of leaving the hotel are not credible given the presence of alcohol and his unauthorized use of CSX property for non-business purpose at midnight. Claimant exhibited DUI symptoms and he refused the breath test in violation of state law. Claimant's refusal to take the breath test eliminated consideration of leniency.

Organization's Position

Claimant, a rail train operator, maintains approximately fifteen (15) years of seniority and a clean employment record without formal discipline. He is an insulin-dependent diabetic; when he experiences a spike in his blood sugar level he is in insulin shock which can lead to symptoms similar to those exhibited by a person under the influence.

At the time of this incident Claimant had access to and use of a CSX vehicle as well as his supervisor's permission to use it during off-duty hours. Claimant informed his supervisor that he was driving to Asheville (NC) in search of housing "and that manager essentially acquiesced to such" thereby establishing that Claimant was acting within the scope of authority for the vehicle. Claimant looked at

the apartment in Asheville on Wednesday afternoon (February 25, 2014). He checked into a hotel in Burnsville (NC), forty (40) miles from Asheville, Wednesday evening.

Claimant asserts he was not drinking and driving. Instead, Claimant asserts he was lost and dealing with his diabetic medical condition. Since the Trooper did not testify, the Board is presented with a vague citation which does not show Claimant as intoxicated. The citation is not probative evidence that Claimant was DUI. Even the Carrier's witnesses acknowledged no alcoholic beverages were found in the CSX vehicle's passenger compartment. Claimant "merely faces criminal charges" which "is not evidence of guilt or wrongdoing." There is no merit to the allegation that Claimant failed to control his vehicle and damaged it. Contrary to the Officer's report, the Carrier's Special Agent confirmed the CSX vehicle sustained no damage.

Dismissal is arbitrary and unwarranted for this long serving employee with no prior history of discipline. At no time did the Carrier dispute Claimant's medical status which, severe as it was at the time of this incident, caused Claimant to exhibit behaviors and symptoms of intoxication. Claimant was lost but not drinking and driving. "Moreover, other employees facing similar alcohol related charges have been given the opportunity to seek assistance (if needed) while maintaining their ties to CSX."

Findings

Public Law Board No. 7529, 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 the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

A decision by this Special Board of Adjustment No. 7529 is based on the notice of investigative hearing, transcript of hearing, notice of discipline, Claimant's prior service record and Rule 25 of the Agreement. The parties establish the record for review within that evidentiary framework. Having reviewed the record, there is substantial evidence for the following findings.

The CSX vehicle issued to Claimant is a work truck; he was not authorized to use it for a non-business purpose when on duty or off duty. When released from duty he is authorized to drive the work truck from the worksite to his residence; he was released from duty at 5:00 p.m. on February 24, 2014 (Tuesday). On the incident date (February 26, 2014), Claimant was off duty with a rest day. Claimant acknowledged that the hotel in Burnsville (NC) was not on the route to his residence.

On February 25, 2014, at 11:35 p.m. a North Carolina Highway Patrol Officer observed Claimant driving the truck. Based on that observation, the Officer has "probable cause to believe" Claimant "did unlawfully and willfully operate a (motor) vehicle on a (street or highway) ... while subject to an impairing substance" - - driving under the influence. The Officer offered Claimant a breath test at 12:14 a.m. on February 26; however, Claimant refused the test as shown by his signature on the document titled "Rights of Persons Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance Under N.C.G.S. 20-16.2(a)." The document states Claimant was "charged with an implied-consent offense. Under the implied-consent law, [Claimant] can refuse any test, but [his] driver's license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel [Claimant] to be tested under other laws."

Claimant denied at the investigative hearing that he was DUI but enduring insulin shock. The obvious oddity of Claimant's denying he was DUI is his refusal to submit to the breath test which would have proven his denial and exonerated him. Claimant's refusal to submit to the breath test and the presence of at least one (1) container of alcohol in the CSX work truck undermines his denial.

Based on these findings, the Claimant violated Rule GS-2 - Substance Abuse and Rule 106 – Drugs and Alcohol (Rule G) which prohibit alcohol on Carrier property (work truck) as well as the Drug/Alcohol Use Policy that prohibits "the illegal use and/or possession of a drug, narcotic, or other substance that affects alertness, coordination, reaction, response, or safety ... while on or off duty." Also violated was Rule 103.2 (prohibits use of Carrier's equipment (work truck) for a non-business purpose), Rule GS-1 (observe DUI laws related to his job), Rule 104.4 (refusing test) and Rule 100.1 (comply with the rules).

The numerous rules violations involve a major offense under the disciplinary policy which stipulates that dismissal is the penalty. In considering whether the penalty of dismissal is arbitrary, excessive or unwarranted (Part 1 of claim), the Board considers Claimant's assertion that his insulin shock was the cause of the incident, not alcohol.

A co-worker writes that in "weeks leading up to the February 25th incident, [Claimant] had expressed to me on more than on occasion that he was having issues getting his blood sugar under control." During the weeks prior to the incident, Claimant discussed with his supervisor taking vacation and relocating to Asheville (NC). Claimant did not inform his supervisor that "he was having issues getting his blood sugar under control" and he was not seeking medical assistance.

Claimant asserts that the incident is the first time his insulin shock left him in a "subconscious" state such that he could not recall leaving the hotel in Burnsville (NC) and driving the work truck away from it. Claimant's assertion that spikes in his blood sugar level left him confused and "subconscious" causing him to exhibit symptoms of intoxication is not corroborated by his voice message to his supervisor a day after the incident wherein Claimant stated "like I told you earlier, had I not had the phone in my lap trying to get the GPS turned on I would have never, none of this probably would have ever happened." There is no mention of insulin shock leaving him "subconscious" and confused; there is no indication from Claimant that he received medical assistance for shock during his detention.

There is insubstantial evidence to support Claimant's assertion that his medical condition was the incident cause whereas there is substantial evidence proving the rules violations. The penalty is not excessive or unwarranted given that (i) Claimant knows and understands the rules he is charged with violating as he was tested on them in January 2014 or about one (1) month prior to the incident (February 26, 2014) and (ii) Claimant refused to submit to the breath test which would have disproven the DUI charge.

The Carrier may have offered other employees assistance for drug/alcohol issues (Organization's assertion) but it is not shown that those situations are the same or comparable to Claimant's situation. This claim is unlike Award 25 of Public Law Board 7120 where a twelve (12) year employee acknowledged an incident, submitted to a test and the board reinstated him following medical clearance or Award 35 of this Board where a claimant accessed the employee assistance program prior to an incident but subsequently tested positive for an alcohol violation. This claim is denied.

Award
Claim denied.

Patrick J. Halter /s/
Patrick J. Halter
Neutral Member

Dated on this 2nd day of
December, 2015