

PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

CSX TRANSPORTATION, INC.

Case No. 27

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The dismissal of Ballast Regulator Operator T. R. Orr for his alleged violation of CSX Operating Rule G and CSX Safe Way Rule 21 on July 7, 2003, and for alleged false statements and insubordination on August 5, 2003, was without just and sufficient cause, based on unproven charges and in violation of the Agreement [System File I59128703/12(03-0819)].
2. As a consequence of the violations referred to in Part (1) above, Ballast Regulator Operator T. R. Orr shall now be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered.

Background:

In July 2003, Claimant T. R. Orr held a Machine Operator A position and operated a ballast regulator on the System Production Gang in the Carrier's Nashville Division District. He held seniority dating from October 11, 1974. On July 7, 2003¹, shortly after leaving work, Claimant was arrested for driving under the influence (DUI).

The arresting officer reported:

On 7-7-03 [Carroll County] Sheriff's Dept. received a call advising of a Ford pick-up repeatedly crossing left of center line.... Thomas Richie Orr was found to be in physical control of the truck. Mr. Orr appeared very sluggish and drowsy. His speech was slurred and he staggered when he got out of the truck. Mr. Orr had in his possession at least twelve prescription medications.

While in custody, Claimant was given a blood test, the results of which showed the presence of six different drugs or drug derivatives, including Librium and hydrocodone.

¹ All dates hereafter are 2003 unless otherwise indicated.

Several of the prescription medications in Claimant's possession carried warnings against operating heavy machinery while taking them. Ultimately, Claimant entered into a plea bargain with Carroll County, pleading guilty to reckless driving in return for a \$250 fine and six months' unsupervised probation.

At the time of Claimant's arrest on July 7, Roadmaster T. Cary was driving by and saw Claimant being put into a police car. Cary spoke with Claimant about the arrest at work the following day. After consultation with D. R. Daniels, Engineer-Administration, Claimant was removed from service. On July 10, Claimant was charged with violating Operating Rule G and Safe Way Rule 21. Rule G and Rule 21 contain the following identical text:

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 charge letter included a form offering Claimant the opportunity to exercise a Rule G Bypass option, stating: "Because you have been formally charged with violation of Rule G ... you should now select one of the following options...." Two options were listed, each with a box beside it. The first option stated, "I will attend hearing on Rule G violation charge[sic]." The second option stated:

I will contact one of the Carrier's Alcoholism Rehabilitation Program Counselors within five (5) days of the date the charge Notice was received and will indicate a willingness to immediately enroll and participate in an approved rehabilitation program, with the understanding that:

- (a) The hearing on Rule G charge will be held in abeyance,
- (b) I will continue to remain out of service until the officer in charge approves my return to service, and
- (c) I will be carried on the Carrier's records as being off due to "Disability".

In discussing the terms of the Bypass option with Daniels, Claimant told Daniels he had put in some bids on other jobs. According to Claimant, Daniels said he would "take care of it." According to Daniels, he told Claimant that he would not be able to go if one of the jobs was awarded to him. Although Claimant placed an "X" in both boxes on the form, Claimant testified at hearing that he accepted the Bypass option, and subsequently contacted an Employee Assistance Program (EAP) counselor.

EAP sent Claimant to several specialists for evaluation, and then sent him to an inpatient treatment facility. Upon arrival at the facility, Claimant was told that he would be participating in a thirty-day "lock-up" program and would immediately be taken off all medications. Claimant left without entering the program.

On August 5, Claimant reported for a position on which he had previously bid on System Production Gang T-1 in DeLand, Florida. Claimant did not contact EAP. Claimant did not inform his supervisors in DeLand that he had been out of service under a Rule G Bypass option.

On August 29, EAP Director D. C. Bowen advised Division Engineer R.P. Johnson by letter:

Mr. Orr has failed to follow through with any of the recommendations made to him to address an identified problem, and after a number of attempts to arrange the appropriate services, the EAP Manager reviewed this case with me.... [T]here is a lack of any indication that Mr. Orr wishes to participate in services he was referred to and I must advise you of his non-compliance....

The Carrier also became aware that Claimant was working in Florida, and again removed Claimant from service. By letter dated August 29, the Carrier instructed Claimant to report for an investigation, charging:

The Employee Assistance Program has advised this office that you have not complied with the provisions of your Rule G Bypass Agreement and therefore all charges have been reinstated....

Additionally, you are charged with Making False Statements and Insubordination...in that after being advised that you were removed from service pending the results of the formal investigation you returned to work on August 5, 2003 on the T-1 System Production Gang without release from the Employee Assistance Program as required.

The investigation, after two postponements, was held on September 18. At hearing, Claimant admitted that he took the prescription medications found in his system on July 7 almost every day. He testified that his doctor monitored him monthly, but admitted that his doctor did not observe him at work and would not know if the medications affected his work performance.

The Carrier dismissed Claimant by letter dated October 2. By letter dated October 20, the Organization appealed the dismissal and expressed an objection that the hearing transcript had not been sent with the dismissal letter, asserting that the Organization's "ability to file a proper appeal has been severely hindered...." Thereafter, the Organization issued an addendum to the appeal by letter dated November 5. The Carrier subsequently denied the appeal, and the parties exchanged further letters. The matter was not resolved, and therefore is presented to this Board for final decision.

Carrier's Position:

The Carrier contends that Claimant was afforded a fair and impartial hearing, at which the Carrier produced substantial evidence of Claimant's guilt. In response to the Organization's allegation that Claimant was not afforded due process, the Carrier asserts that Claimant was given proper notice of the charges, sufficient time to prepare a defense, and full opportunity at hearing to produce and examine evidence and present and cross-

examine witnesses. According to the Carrier, Claimant's ability to develop a full record was not restricted in any way. In addition, the Carrier contends, the parties' Agreement does not require hearing transcripts to be provided to the Organization within any particular timeframe. Moreover, the Carrier argues, the timing of the Organization's receipt of the transcript in the instant case did not restrict the Organization's ability to pursue its appeal, as the subsequent on-property handling of the matter demonstrates.

On the merits, the Carrier argues that Claimant, who operated a ballast regulator, was arrested for DUI on July 7, 2003, and admitted at hearing that he had tested positive after the arrest for drugs that carried warnings against operating machinery while under their influence. The Carrier submits that Claimant's condition as observed by the arresting officer shortly after Claimant left work, as well as Claimant's admissions at hearing, establish that Claimant violated Operating Rule G and Safe Way Rule 21. According to the Carrier, upon Claimant's failure to comply with his EAP plan, the initial charges were reinstated against him, those charges were proved at hearing, and dismissal was appropriate.

The Carrier further contends that Claimant's conduct in reporting for a new position in DeLand, Florida, on August 5, was insubordinate and involved making false statements. According to the Carrier, Claimant had twenty-nine years of experience, and the Rule G Bypass option and its requirements were fully explained to him by Daniels. Nevertheless, the Carrier argues, Claimant did not comply with his EAP plan and instead unilaterally decided to return to service without being qualified by the Medical Department, exercising seniority to obtain the DeLand, Florida position without notifying Carrier management in DeLand that he had been out of service. Claimant's conduct in

failing to remain out of service was insubordinate, the Carrier submits, and his representation in DeLand that he was qualified for service constituted making false statements. On the basis of either of these charges alone, according to the Carrier, dismissal was justified.

Organization's Position:

The Organization contends that Claimant was not afforded due process. The Organization asserts that the hearing on September 18, 2003, was a one-sided and partial investigation into the matter. In addition, the Organization argues, it did not receive the hearing transcript until October 21, 2003. This hampered the Organization's ability to properly appeal Claimant's dismissal within fifteen days of receipt of the Carrier's October 2 decision letter as required by the parties' Agreement.

The Organization further asserts that the Carrier should not have charged Claimant with a Rule G violation in July 2003. The Organization argues that Claimant was not found guilty of DUI, only reckless driving, because it was not proved that Claimant's driving was impaired by the medications in his system on July 7. For over two years, Claimant's physician had monitored on a monthly basis the effect on Claimant of the prescribed drugs he was taking, and during that time, no issues regarding Claimant's performance at work had arisen.

The Organization also contends that Claimant didn't understand the Rule G election form, and was manipulated into electing the Rule G Bypass option by Daniels. Nevertheless, according to the Organization, Claimant tried to comply his EAP counselor's recommendations, and attended several appointments with specialists. However, the Organization contends, when Claimant arrived at the inpatient facility to

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which EAP had sent him and was told he would be taken off all medications immediately, he was legitimately concerned. According to the Organization, "anyone would be extremely hesitant about being taken off medications in a situation where no consultation was done with the employee's physician." (Org. Subm. at 5.)

In response to the Carrier's charge that Claimant was insubordinate and made false statements when he reported on August 5, 2003 for the DeLand, Florida position, the Organization contends that Claimant's action was reasonable. The Organization asserts that when Claimant told Daniels he had put bids in on jobs prior to July 8, Daniels told him he would "take care of it." Instead, the Organization submits, the Carrier offered Claimant the DeLand position and gave him a date to protect the assignment. According to the Organization, it was therefore reasonable for Claimant to go to DeLand and protect the assignment.

Based on all of these circumstances, the Organization submits, Claimant's dismissal was not justified.

Findings:

As a threshold matter, the Organization contends that the Claimant was not afforded due process because the investigatory hearing was one-sided, and because the timing of the Organization's receipt of the hearing transcript hampered the Organization's appeal of Claimant's dismissal. The Board finds these contentions to be without merit. A review of the hearing transcript demonstrates that Claimant was given full opportunity to present evidence and witnesses on his behalf and develop the record without restriction. In addition, the Organization submitted an addendum to its appeal after receipt of the hearing transcript, without objection from the Carrier. It is evident

from the extensive on-property handling of this matter—ultimately leading to its presentation before this Board—that the Organization was fully able to pursue its appeal of Claimant's dismissal regardless of any delay in receipt of the hearing transcript. The Board therefore finds that Claimant was properly afforded all due process in the instant case.

Turning to the merits, it is undisputed that Claimant initially elected to avoid an investigation and potential discipline for the Rule G violation with which he was charged on July 10, 2003, by accepting the Rule G Bypass option offered. While the Organization asserts that Claimant did not understand the Rule G Bypass election form, and was subsequently manipulated by Daniels into choosing the Rule G Bypass option, the Organization presented no evidence regarding the nature of the alleged manipulation. Claimant admitted at hearing that he had accepted the Bypass option, and did not mention any coercive or unfair tactics by Daniels. The Board has no doubt that having been arrested for DUI shortly after leaving work, and having tested positive immediately after the arrest (and therefore immediately after work) for several prescription medications, Claimant considered the Bypass option to be in his best interests, and no manipulation by Daniels was necessary to persuade Claimant to accept the option.

It is also undisputed that Claimant failed to comply with his EAP plan, as required by the Bypass option agreement Claimant signed. When EAP referred Claimant to an inpatient treatment facility, Claimant refused to enter the treatment program. The Organization asserts that Claimant's refusal was understandable because he was concerned about being taken off medications his physician had prescribed for him. EAP, however, did not send Claimant to the inpatient facility on a whim. Claimant was

evaluated by several specialists, and the inpatient treatment program was determined to be appropriate for him based on those evaluations. When the moment to enter the program was at hand, perhaps Claimant was overwhelmed by the idea of going off his medications, but it is difficult to believe that he did not until that moment understand that the program would require him to do so. It is hard to imagine what else Claimant thought a rehabilitation program would entail. Claimant testified at hearing that he had initially been told that he would only have to complete a two-week program. It is possible to conjecture that it was the discovery that he was entering a thirty-day lock-up program that truly gave Claimant pause.

Regardless of the reasons for Claimant's hesitation, however, it was incumbent on him to try to resolve the matter in some manner beyond simply refusing to enter the program. Claimant should have discussed his concerns with his EAP counselor and his physician and reached some resolution regarding the course of action to be pursued so that Claimant could comply with his EAP plan and fulfill his obligations under the Bypass option agreement. Instead, Claimant left the Nashville area and reported for service in DeLand, Florida, without having been approved to return to service, and without mentioning to his new supervisors that he had been out of service under a Rule G Bypass agreement. The Bypass option Claimant elected specifically required him to "indicate a willingness to immediately enroll and participate in an approved rehabilitation program" in return for the Rule G charge hearing being held in abeyance. The Board finds that Claimant's refusal to enter the inpatient treatment program, lack of follow-up attempts to comply with his EAP plan, and reporting without approval to the DeLand position demonstrate the absence of such willingness. Claimant did not comply with the

terms of the Bypass option, and the original Rule G charge was properly reinstated against him.

The Organization argues that Claimant was not properly charged with violating Rule G, because Claimant ultimately was not convicted of DUI and because no issues with Claimant's work performance while he was taking the prescription medications for which he tested positive on July 7, 2003 were identified. The Board finds, however, that the Carrier's determination that Claimant violated Rule G was based on substantial credible evidence. The fact that Claimant was not convicted of DUI is irrelevant to the issue of whether he violated Rule G. Rule G provides:

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. (Emphasis added.)

Claimant admitted at hearing that he was taking the prescription medications found in his system on July 7, 2003, almost every day, and that he worked while under their influence. He also admitted that several of the medications carried warnings that the operation of machinery while under their influence could be dangerous. In his Machine Operator A position, Claimant operated a ballast regulator. The fact that he had not yet had any performance issues as a result of his medications does not mean he was not impaired by those medications. Claimant's testimony that the medications did not adversely affect him is insufficient to balance the evidence to the contrary. The medications Claimant was taking included Librium and hydrocodone, in combination. The officer who arrested Claimant on July 7 shortly after the end of Claimant's shift reported that Claimant was staggering and had slurred speech. Such signs of obvious impairment are substantial

evidence that Claimant was adversely affected by his medications, making it unsafe for him to work while under their influence. Rule G requires employees to use especially good judgment regarding the use of hampering medications while on the job. The Board finds that Claimant failed to do so.

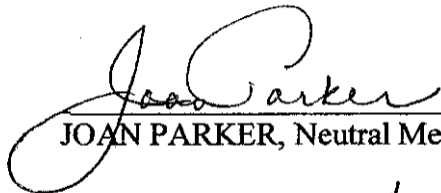
Claimant's violation of Rule G and subsequent failure to comply with the Bypass option agreement's requirements by refusing to enter treatment provides sufficient basis to justify dismissal. Claimant's misconduct, however, went even further. The Bypass election form that Claimant signed explicitly included the following condition: "I will continue to remain out of service until the officer in charge approves my return to service." According to Claimant's own testimony, he discussed with Daniels at the time he elected the Bypass option that he had put in bids on various positions. Clearly such discussion took place in relation to reaching an understanding of the language on the form regarding remaining out of service. Moreover, Claimant had twenty-nine years of experience with the Carrier and knew what being out of service meant. It is thus indisputable that Claimant was on notice that under the terms of the Bypass option agreement he was to remain out of service, and would need approval to return to service. Claimant nevertheless reported to a position in DeLand, Florida on August 5, 2003. In reporting to the DeLand position, Claimant held himself out as qualified to return to service when he knew he was not, and he did not inform his DeLand supervisors that he had been out of service. The Board finds that, whether or not Daniels specifically instructed Claimant not to report to any job awarded him, Claimant's actions in relation to the DeLand position were dishonest. As such, they present aggravating factors the Carrier properly considered in determining the penalty Claimant should be assessed.

The Board finds that dismissal was warranted.

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Award:

The claim is denied.


JOAN PARKER, Neutral Member


CARRIER MEMBER

DATED: 04-18-05


ORGANIZATION MEMBER

DATED: 4-18-05