

**PUBLIC LAW BOARD NO. 6564**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**and**

**CSX TRANSPORTATION, INC.**

**Case No. 32**

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

1. The dismissal of Track Repairman R. J. Phillips for his alleged violation of Rule G was without just and sufficient cause and excessive and undue punishment [System File D21722203/12(03-0698)].
2. Track Repairman R. J. Phillips shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

**Background:**

Claimant R. J. Phillips was hired by the Carrier on May 15, 1979. In March 1999, Claimant was given a return-to-duty drug test, and tested positive for cannabinoids. By letter dated March 30, 1999, the Carrier charged Claimant with violations of Operating Rule G and Safety Rule 21, and withheld Claimant from service pending formal investigation. 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.

Claimant was offered a Rule G Bypass option, which he accepted, electing to enter the Carrier's Employee Assistance Program (EAP) in lieu of an investigation. On April 2, 1999, Claimant signed an EAP contract, which stated in pertinent part: "Any reported non-compliance with my after-care plan within five (5) years of my return to service will result in a hearing on the Rule G/Safety Rule 21 charge."

Claimant ultimately returned to service, subject to further drug testing, and was working as a track repairman in July 2003<sup>1</sup>. On July 22, Claimant was notified that he would be given a Company Short Notice Follow-up drug test. The results were positive for amphetamines and methamphetamines.

The Carrier again removed Claimant from service and instructed him to report for an investigation on August 21. At hearing, which Claimant elected to attend without representation, Claimant admitted that he had tested positive for drugs on July 22, and had taken the drugs in question the day before the test. He also admitted that it was his second positive drug test within five years, and that he had violated his Rule G Bypass agreement. The Carrier subsequently formally determined that Claimant had violated Rule G/Rule 21 and FRA and DOT regulations, 49 CFR Part 219.101, and dismissed Claimant by letter dated August 28.

The Organization appealed Claimant's dismissal by letter dated September 11. The Carrier declined the appeal by letter dated October 24. The matter was discussed in conference on October 15, but was not resolved. It therefore is presented to this Board for final decision.

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<sup>1</sup> All dates hereafter are 2003, unless otherwise stated.

**Carrier's Position:**

The Carrier contends that Claimant was afforded a fair and impartial hearing, at which substantial evidence of Claimant's guilt was presented. Claimant admitted at hearing that he had been under the influence of amphetamines and methamphetamines the day before the Short Notice Follow-up test on July 22, 2003. He also admitted that it was his second failed drug test in less than five years, and that he had violated his Rule G Bypass agreement. The Carrier submits that because Claimant had been given a second chance after his first positive drug test, but failed to comply with the provisions of the agreement he had voluntarily signed, dismissal was warranted.

The Carrier asserts that the Organization is seeking leniency for Claimant based on Claimant's twenty-five years tenure with the Carrier. According to the Carrier, a plea for leniency is an admission of guilt seeking "a remission of the penalty as an act of administrative grace" (quoting Award No. 45, PLB No. 4901 (Wallin, 1/27/94)). The Carrier argues that arbitral precedent has established that leniency decisions are the prerogative of the Carrier, and in the instant case the Carrier has chosen not to grant leniency. Therefore, the Carrier submits, the Organization's claim should be denied.

**Organization's Position:**

The Organization contends that the Carrier's dismissal of Claimant was arbitrary and capricious. According to the Organization, Claimant's twenty-five years of discipline-free service mitigates his misconduct in the instant case. The Organization submits that the penalty assessed Claimant therefore should have been something less than dismissal.

**Findings:**

It is undisputed that Claimant tested positive for cannabinoids in March 1999 and avoided discipline for violating Rule G and Rule 21 by accepting the Rule G Bypass option offered. Claimant signed an agreement that acknowledged "[a]ny reported non-compliance with my after-care plan within five (5) years of my return to service will result in a hearing on the Rule G/Safety Rule 21 charge." It is also undisputed that Claimant tested positive for amphetamines and methamphetamines on July 22, 2003. At hearing, Claimant admitted taking such drugs the day before the test. Under these circumstances, the Carrier's decision to dismiss Claimant could hardly have come as a surprise to him.

Claimant had already been given a second chance, allowed to avoid discipline for his March 1999 positive drug test and instead avail himself of an opportunity to participate in rehabilitation. He subsequently returned to service with the Carrier fully aware that he would be subject to drug tests from time to time. Four years after avoiding discipline for the March 1999 positive drug test, Claimant was again using drugs. The Board finds that Claimant's dismissal was warranted.

While the Organization asserts that the penalty assessed Claimant should be mitigated based on his twenty-five years of "discipline-free" service to the Carrier, the Board finds this assertion to be without merit. Claimant's work history (Car. Exh. 1) shows three instances of prior discipline: a one-day suspension assessed February 20, 1980; a thirty-day suspension assessed December 8, 1980; and a ten-day suspension assessed January 25, 1989. Even without this prior discipline, however, Claimant cannot claim a record that is "discipline-free." He only avoided discipline for his March 1999

positive drug test by accepting the Rule G Bypass opportunity he was offered. In these circumstances, Claimant's length of tenure provides no basis for mitigation of his dismissal.

This Board has no authority to disturb discipline that has been properly assessed. At hearing, Claimant threw himself on the Carrier's mercy. Whether to grant leniency is purely the Carrier's choice. In the instant case, the Carrier has elected not to grant leniency. The Organization's claim must be denied.

**Award:**

The claim is denied.

  
JOAN PARKER, Neutral Member

  
CARRIER MEMBER

  
ORGANIZATION MEMBER

DATED: 05-18-05

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