

**PUBLIC LAW BOARD NO. 6564**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**CSX TRANSPORTATION, INC.**

**Case No. 35**

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

1. The dismissal of Welder Helper J. L. Crowder for his alleged insubordination on November 13, 2003, was without just and sufficient cause and [was] undue punishment
2. Welder Helper J. L. Crowder shall now be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered.

**Facts**

Claimant J. L. Crowder, with seniority dating from July 30, 2001, worked as a welder helper on the Western and Atlantic Seniority District headquartered in Atlanta, Georgia when the incident in question occurred. His regular hours were Monday through Friday, 7:30 a.m. to 3:30 p.m.

On November 13, 2003, a Federal Railroad Administration random alcohol and drug test was scheduled for all Maintenance of Way employees holding a Commercial Driver's License (CDL). That morning, as Claimant was commuting to work, he felt ill and called his Foreman, A. B. Johnston. He said he was going to be late due to traffic problems, but said nothing about being sick. According to Claimant, during that call,

Foreman Johnston told him that he was going to be given the alcohol and drug test when he arrived at work. As Johnston recalled the conversation, however, he did not mention the drug test at that time; rather, told Claimant about it when he arrived at work.

Claimant reported to work at approximately 7:50 a.m., at which time Johnston undisputedly told him that he had to submit to a random alcohol and drug test. Claimant replied that he was not feeling well and needed to go to the doctor. He also asked what would be the consequences if he did not take the alcohol and drug test that morning. Johnston responded that Claimant could be taken out of service and charged with insubordination. Claimant answered that his stomach was hurting him and that he had to leave work to go to a doctor. Johnston's response was that Claimant needed to bring in a doctor's excuse so that he could take the alcohol and drug test later.

Claimant went to his doctor and returned to work the next day. He submitted a note confirming that he had been examined by his doctor and further indicating that he had undergone an alcohol and drug test on November 14, 2003. Nevertheless, on November 21, 2003, Claimant was charged with "failure to submit to FMCSA random toxicological testing on November 13, 2003...[in] violation of CSXT Operating Rule 501 in that [he] may have been insubordinate." (Carrier Ex. A).

Following a hearing on December 3, 2003, Claimant was dismissed from service. The Organization challenged the dismissal, which was processed in accordance with the Collective Bargaining Agreement. The parties failed to reach agreement, and the dispute was referred to this Board for adjudication.

#### **Contention of the Carrier**

The Carrier contends that Claimant was properly dismissed following a full and

fair hearing in which he was found guilty as charged.

The Carrier argues that Claimant concocted his story about being ill in order to avoid taking the random drug test. It emphasizes that when Claimant called Foreman Johnston to report that he would be late, he said he was stuck in traffic but never mentioned that he was feeling sick. It was only after he was told the consequences for not submitting to the drug test that Claimant said he had to see a doctor immediately. In the Carrier's view, if Claimant had really felt sick while commuting to work, he would not have come in, but rather would have driven to a walk-in clinic or a hospital emergency room.

Furthermore, while Claimant testified that after using the bathroom, he observed that his stool was black and therefore thought it might contain blood, there was no indication of such a condition on the medical report. In fact, Claimant was never even referred for testing by the doctor who examined him. While the Organization contends that Claimant provided the Carrier with a drug screen result that was negative, the Carrier submits that the drug test Claimant took was of no consequence inasmuch as it was performed on the next day. By undergoing the drug screen on November 14, Claimant had ample opportunity for any controlled substances in his body to metabolize and dissipate.

In the Carrier's view, Claimant's behavior amounted to a refusal to take a drug test, an offense for which employees are routinely dismissed from service in the railroad industry. In support of this position, the Carrier cites several arbitration awards.

#### **Contentions of the Union**

The Organization contends that Claimant was not insubordinate or dishonest. Nor did he leave work on November 13<sup>th</sup> to avoid taking a drug test. Rather, he was genuinely ill and felt that he needed to see a doctor promptly. After arriving at work at 7:50 a.m. on

November 13<sup>th</sup>, Claimant told Johnston he felt sick. They had a casual conversation in which Johnston commented on possible discipline if Claimant did not stay long enough for the testing. But when Claimant said he needed to go to see a physician immediately, Johnston told him to be sure to bring in a doctor's note so that he could be tested at a later time. Likewise, when Claimant called Roadmaster White after seeing the doctor on November 13<sup>th</sup>, White said he would talk to the personnel in the division office and see about setting up another drug screen for him.

The Organization submits that none of Claimant's superiors told him that he would be dismissed if he failed to undergo the drug test on the morning of November 13<sup>th</sup>. Had Claimant clearly been told that he would be discharged for not taking the test, he would have waited prior to leaving the property. In light of the vagueness of the instructions given to Claimant, the Organization contends that discharge was too severe a penalty.

### **Opinion**

Both Claimant and his supervisors bear blame for what occurred on November 13<sup>th</sup>. If Claimant truly felt ill on his way to work and needed to see a doctor, he should have called his boss, said he was going for medical attention, and gone directly to the doctor's office. The fact that he phoned Foreman Johnston and said he would be late due to traffic, without mentioning his physical condition, raises suspicion about the truthfulness of his claim that when he arrived at work he was truly sick. Moreover, Claimant did not demonstrate that he was so ill that he could not have taken the drug screen prior to leaving work to go to the doctor.

On the other hand, Johnston was less than clear with Claimant as to the consequences of his failure to undergo the drug screen before leaving the property. It is true that when

Claimant asked what would happen if he did not take the drug test then, Johnston said Claimant might be taken out of service and charged with insubordination. But when Claimant replied that his stomach was really hurting him and that he was going to leave and go to a doctor, Johnston's response was to remind Claimant to bring back a doctor's excuse so that his drug test could be rescheduled. Moreover, when Claimant called Roadmaster White after seeing the doctor, White said he would talk to people in the Division Office and see about setting up another drug screen.

The following testimony from Foreman Johnston is revealing:

Smith: And I believe it was your testimony that he questioned you about the consequences if he didn't submit to the test?

Johnston: That's correct.

Smith: And your response...was: "Well, if you're going to the doctor be sure to bring back an excuse so you can take the test later." Is that what you said?

Johnston: Yes sir, that's correct.

Smith: Do you believe as his foreman and him working for you, do you believe whenever you told him to be sure to bring back a doctor's excuse so he could take the test later, do you believe that that was satisfactory for him in his mind for him to leave and go to the doctor?

Johnston: I guess it was. He told me that he was feeling bad and he said he was going to a doctor and that's when I told him that if he's gonna do that to be sure to bring a doctor's excuse back and he can get retested.

Smith: Let me ask you this question. At any time during your conversation with him, did he tell you, "No, I'm not gonna take the test?"

Johnston: No sir, he did not.  
(Carrier's Exh. B, at 13.)

Given this record, the Carrier erred in concluding that Claimant was insubordinate. Claimant was not given clear instructions to stay on the property and take the drug test before going to the doctor. Equally important, he was not told in clear terms that his failure to submit to the drug test prior to leaving work would result in his dismissal.

The Organization also argues persuasively that if Claimant had stayed at work on November 13<sup>th</sup>, undergone the drug test, and tested positive, he would have been entitled to the provisions of the Bypass Agreement. Had that occurred, no discipline would have been assessed, and Claimant would have kept his job, subject to specific conditions.

In summary, as was stated above, both Claimant and Foreman Johnston made mistakes. Johnston, by the words he used, implied that Claimant could leave work to go to the doctor and take the drug test at a later time. Claimant, on the other hand, should have been more forthcoming when he first called in by telling Johnston that he was ill and going directly to the doctor. He also failed to demonstrate that once he arrived at work he was too sick to take the drug test prior to going for medical treatment. Thus, he was not blameless either.

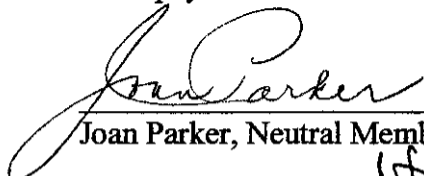
For all of the foregoing reasons, the Board will direct that Claimant be reinstated to service without back pay, subject to the following conditions:

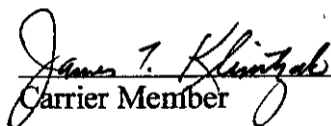
1. Within twenty days of receiving notice from the Carrier, Claimant must meet with a Carrier Employee Assistance Program (EAP) Counselor for an evaluation and must submit to whatever recommendations or program he/she prescribes, including periodic random alcohol and drug testing.
2. Claimant's failure to comply with the recommendations or program prescribed by the Employee Assistance Counselor, if established by formal investigation, shall result in this Award being amended to be a denial of the claim herein.

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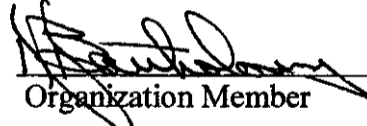
Award

The claim is sustained in part and denied in part. Claimant shall be reinstated without back pay in accordance with the terms set forth above.

  
Joan Parker, Neutral Member

  
Carrier Member

Dated: 06-21-05.

  
Organization Member

Dated: 6-21-05