

PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

CSX TRANSPORTATION, INC.

Case No. 38

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

1. The dismissal of Track Inspector R. C. Barkley for his alleged violation of CSXT Safe Way Rule 21 and EAP contract was without just and sufficient cause, based on unproven charges and in violation of the Agreement [System File A04820604/12(03-0007)].
2. As a consequence of the violations referred to above, Track Inspector R. C. Barkley shall be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

Background:

Claimant Ray C. Barkley was hired by the Carrier on September 20, 1976. At the time of the incidents relevant to this matter, Claimant held a track inspector position in the Pittsburgh East Seniority District. On March 13, 1995, Claimant tested positive for cocaine metabolites. He agreed to enter a five-year rehabilitation and after-care Employee Assistance Program (EAP) plan. While participating in this plan, on October 8, 1999, Claimant tested positive for cannabinoids. After investigation, Claimant was discharged on November 18, 1999. The Organization appealed the discharge, and the matter was processed to arbitration. Public Law Board No. 6239 (Referee Peter Meyers) found that the test documentation was not properly in order, and in light of Claimant's length of service ordered that Claimant be conditionally reinstated:

“and placed back on the Rule G Waiver for another five-year period ... the rules are the same as they were in 1995 and any failure to comply with the conditions of the agreement will result in his immediate termination.”

Claimant accordingly entered into a new EAP contract on May 19, 2000, acknowledging that he would be subject to Short Notice Follow-up toxicological testing and agreeing to “maintain complete abstinence from any mood or mind altering drugs at all times.”

On September 22, 2003, Claimant was given a Short Notice Follow-up drug test and tested positive for cocaine metabolites. At Claimant’s request, a second laboratory performed a split sample confirmation test, which resulted in the same positive finding. By letter dated April 10, 2003, the Carrier instructed Claimant to appear for a formal investigation. After a postponement at the Organization’s request, a hearing was held on December 2, 2003. On December 22, 2003, the Carrier dismissed Claimant from service. By letter dated January 6, 2004, the Organization appealed Claimant’s dismissal. The parties discussed the matter in conference on January 14, 2004, and the Carrier affirmed its dismissal of Claimant by letter dated February 5, 2004. 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 substantial evidence of Claimant’s guilt was presented. Claimant is a three-time offender. According to the Carrier, Claimant had two opportunities to “get a new lease on life” and continue his employment—provided he remained drug-free—and cites this Board, Awards No. 11 and 12, in support of the contention that claimants are not entitled to a third chance in the case of drug and alcohol violations.

In response to the Organization’s argument that the September 22, 2003 test showed a false positive because Claimant was taking prescription drugs, the Carrier asserts that the evidence of record demonstrates that no prescription drug or combination

of drugs would result in a positive for cocaine. Moreover, the Carrier argues, a split sample confirmation test was performed by a second laboratory at Claimant's request, and also had a result of positive for cocaine. The Carrier further asserts that the Organization's various procedural arguments are without merit. According to the Carrier, Claimant was afforded due process, and none of the Organization's objections regard matters affecting the full development of the record.

Organization's Position:

The Organization contends that the Carrier failed to prove the charges against Claimant, and that the Carrier's dismissal of Claimant was arbitrary and capricious. According to the Organization, evidence presented at hearing showed that Claimant was not properly tested on September 22, 2003, that the testing was not one hundred percent accurate, and that Claimant was taking prescription medication that resulted in a false positive. Alternatively, the Organization contends—assuming *arguendo* that Claimant legitimately tested positive for cocaine on September 22, 2003—that Claimant deserved special consideration in light of his history of never missing work and positive performance evaluations. Moreover, the Organization submits, Claimant successfully completed a rehabilitation program as well as after-care after the September 22, 2003 test, partially at his own expense, after the Carrier's EAP representative told Claimant he must do so in order to get back into service.

The Organization also argues that due process was not afforded the Claimant. The Organization asserts that the Carrier did not provide any statements to be introduced at hearing or a list of witnesses as requested by the Organization in advance of hearing so that the Organization could properly prepare its case. The Organization further asserts

that the hearing—which was scheduled to begin at 10:00 a.m., but did not begin until 10:10, was then interrupted and resumed at 10:55—was improperly delayed, and some testimony was not recorded verbatim because of technical problems with the recording device. Finally, the Organization asserts that Claimant was not provided due process because the Carrier did not produce the charging officer, R.J. Baer, at hearing for questioning.

Findings:

It is undisputed that Claimant's reinstatement after his November 18, 1999, discharge was conditional. In reinstating Claimant, Public Law Board No. 6239 (Referee Peter Meyers) required him to enter into a new five-year Rule G waiver agreement (requiring in part that Claimant "maintain complete abstinence from any mood or mind altering drugs at all times"), and specifically warned Claimant that "any failure to comply with the conditions of the agreement w[ould] result in his immediate termination." On September 22, 2003, Claimant tested positive for cocaine metabolites. This Board finds that the Carrier's dismissal of Claimant on December 22, 2003, was warranted.

The Organization argues that the Carrier failed to prove at hearing that Claimant had violated the new Rule G agreement, asserting that Claimant was taking prescription medications that may have resulted in a false positive on September 22, 2003, that the test was improperly administered, and that the test was less than one hundred percent accurate. The Board finds the Organization's argument to be without merit. With regard to the assertion that Claimant was taking prescription medications, not only did Claimant not mention any such medications on the day of the test, the Organization presented no evidence at hearing that the presence of such medications could cause a test result to be

positive for cocaine metabolites. With regard to the assertion that the September 22, 2003 test was improperly administered, the Organization presented at hearing only Claimant's unsupported testimony that the test specimen collector had committed some errors (discarding an initial specimen of inadequate amount, not documenting each specimen on separate paperwork). The errors asserted by Claimant to have been made neither raise any concern that the specimen tested was not Claimant's or was somehow adulterated, nor call into question the eventual test results. With regard to the assertion that the September 22, 2003 test was less than one hundred percent accurate, the Organization failed to produce any evidence at hearing in support of its contention other than copies of articles concerning the accuracy of drug-testing in general. Hearsay evidence that *some* drug-testing may be inaccurate in no way demonstrates that the result of Claimant's September 22, 2003 test was inaccurate. In addition, the positive results of the first test of Claimant's sample were confirmed by a second laboratory, at Claimant's request.

Finally, although the Organization has raised various procedural objections, the Board finds that these objections are without merit. None of the asserted objections implicate any violation of due process or any effect whatsoever on the full and fair development of the record in the instant case.


Claimant avoided dismissal for his Rule G violations twice. This Board has previously stated with regard to employee use of alcohol or drugs in the workplace that "it is universally understood that in the transportation industry, there is no third chance." Award No. 11, P.L.B. No. 6564. The Board is cognizant that Claimant's supervisor, Roadmaster Gary Kunkle, testified at hearing that Claimant was a good worker. Having

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again completed a rehabilitation program, it is to be hoped that Claimant can now remain drug-free. The Carrier, however, is not required to take yet another chance on him.

Award:

The claim is denied.


JOAN PARKER, Neutral Member


CARRIER MEMBER


ORGANIZATION MEMBER

DATED: 05-18-05

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