

PUBLIC LAW BOARD NO. 7008

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES DIVISION AFFILIATED WITH
THE TEAMSTERS RAIL CONFERENCE.

- and -

CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

..[W]e hereby request that Mr. C.K. Jernigan, ID#***** immediately be reinstated as an employee with CSXT and all fringe benefit rights and seniority be restored and all matter relative to this Investigation be removed from Mr. Jernigan's personnel file. We request that Mr. Jernigan be compensated with all lost wages of straight time and overtime as a result of the Carrier's decision to remove him from service.

OPINION OF THE BOARD:

C.K. Jernigan (Claimant) was hired by Carrier on April 28, 2003. At the time this dispute arose, Claimant was assigned as a Basic Trackman (Position 5F08-081) headquartered at Charleston, SC. As background information, and pertinent to this issue, on November 8, 2005, during an FRA-mandated Random Toxicological Test which included a Breath Alcohol Test, the Claimant tested positive for alcohol, "well-above" the accepted levels. By letter dated November 17, 2005, the Claimant was charged with: "...violation of Rule G, General Safety Rule 21 and FRA regulations (49 CFR Part 219.101)..." As a result, Claimant Jernigan was instructed to attend a formal investigation, to be held November 22, 2005. However, since this was the Claimant's first verified positive toxicological test, he was offered a "Rule G By-pass Agreement", which he accepted on November 22, 2005. After accepting a By-pass Agreement, the Carrier enrolls the affected employee

in the Employee Assistance Program (hereinafter referred to as "EAP") which provides treatment for the individual's substance abuse problem. During their treatment, the employee is withheld from service, on medical restriction, to allow "sufficient" treatment. When the EAP Manager determines the employee is "fit" to return to active service, they are required to sign a Substance Abuse Treatment Plan, which requires the employee to agree to "abstain from mind altering substances at all times", for a period of five (5) years. The record demonstrates that on January 12, 2006, prior to being returned to covered service, Claimant signed a Substance Abuse Treatment Plan.

Thereafter, on February 25, 2006, Claimant's supervisor, Roadmaster C. Baumgardner, called the Claimant at home, at approximately 0200 hours, to request his assistance in repairing a broken rail on the Claimant's assigned territory. It is not disputed that the Claimant told the Roadmaster that he could not come to work because he "had a few beers" earlier that evening. As a result, Claimant Jernigan was instructed to attend a March 24, 2006 formal hearing. Specifically, the Claimant was charged with: *"...conduct unbecoming an employee of CSX Transportation, and possible violations of [his] (sic) Substance Abuse Treatment Plan (form EAP-1) that [he] (sic) signed on January 12, 2006, which resulted from [his] (sic) November 21, 2005, [sic] election to participate in the Carrier's By-pass program."* Further, the original charges from the date upon which the Claimant first tested positive, November 8, 2005, were reinstated.

The hearing was held, as scheduled, with both the Claimant and his representative present throughout the proceedings. By letter dated April 12, 2006, Carrier informed the Claimant that from the evidence and testimony presented at the March 24, 2006 hearing, he had been found guilty, as charged, and was dismissed from Carrier's service. In a letter dated April 27, 2006, the Organization appealed Carrier's decision, raising a threshold procedural objection: *"CSXT's Assistant Division*

Engineer D. Crook did not provide us with relevant management records for the purpose of researching issues related to enforcing the collective bargaining agreement which includes hearing/investigation records when our request was made prior to the Investigation being held". Regarding the merits of the issue, Vice Chairman R. Griffith asserted that: "Division Engineer B. Fowler dismissed Mr. Jernigan from service without any evidence that the Claimant consumed 'alcohol' ". Specifically, the Vice Chairman maintained: "Under the provisions of the agreement between CSXT and Mr. Jernigan, signed on January 31, 2006, Roadmaster Bumgardner had the ability and authority to have Mr. Jernigan tested randomly for drugs and/or alcohol consumption any time within the five (5) year period under the terms of his signed agreement, which certainly included when he called Mr. Jernigan at 0200 a.m. to repair a broken rail". Finally, the Vice Chairman averred that the Claimant was not drinking "alcoholic" beer, but rather, non-alcoholic beer.

In his denial of the appeal, Director Wilson responded to the Organization's assertion regarding pre-investigation discovery maintaining that: *"The provisions of Rule 25 have been interpreted to mean, at the time of the hearing, the employee and his representative will be present to hear the testimony and view any materials, which may be pertinent to the matter under investigation. Rule 25 does not specify that either the testimony or the materials will be provided in affidavit form or as material evidence as a court of law may require in advance of the hearing". Regarding the merits of the issue, Carrier argued that: "This was not the Claimant's only violation of Carrier's substance abuse policy. Mr. Jernigan had previously signed, and agreed to, the terms and conditions of Carrier's Substance Abuse Treatment Plan in connection with a previous incident within the last five (5) years. Moreover, testimony by the Claimant indicated that he had consumed*

a 'couple of beers' that night, but did not know if they contained alcohol, or not. The fact remains that the Claimant admitted he was under the influence on the date in question. Given the severity of the charges, the discipline assessed was fully appropriate".

Careful review of the record evidence demonstrates that the Claimant's "due process" rights as provided for under Rule 25 (Discipline) were fully protected. On the threshold issue of "pre-investigation discovery", the language contained in Rule 24[i] does not require the Carrier to provide summaries of testimony or investigative materials to the Organization prior to the hearing. Consequently, we find no evidence of a fatal due process violation on this record.

Turning to the merits of the issue, on November 8, 2005, the Claimant tested positive for alcohol during a mandated FRA random drug test. Thereafter, the Claimant opted to take the Rule G-By pass, and memorialized same in a document dated November 17, 2005. Specifically, the document which the Claimant signed stipulated that:

1. I will contact one of the Carrier's EAP Counselors within five (5) days of the date the Charge Notice was received and will indicate willingness to immediately enroll and participate in an approved rehabilitation program with the understanding that:
 - (a) The Hearing on the CSX Rule G Drug/Alcohol Use Policy will be held in abeyance.
 - (b) I will continue to remain out of service until the appropriate supervisor approves my return to service.
 - (c) I will be carried on the Carrier's records as being off due to "disability"; and,
 - (d) 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 CSX Rule G

Drug/Alcohol Policy charge.

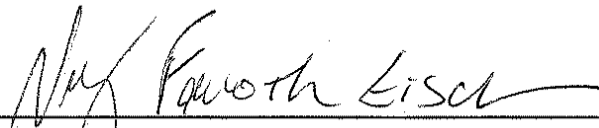
It is not disputed that Claimant signed his name under the line on the document which stated: "I have voluntarily selected the above-indicated option".

The Carrier clearly demonstrated that the Claimant violated CSXT Operating Rule G, General Safety Rule 21 and FRA regulations (49 CFR Part 219.101) when he violated his Substance Abuse Treatment Plan by consuming "several" alcoholic beverages the evening prior to February 25, 2006. In fact, during the hearing the Claimant admitted that on the morning of February 25, he told his supervisor that : "I told him that I could come in, but I'd rather not be driving a company vehicle. He asked if I had been drinking, and I told him I had had a 'few' beers earlier. Chris told me to 'stay your ass at home'". When asked what "type" of beer he was drinking, the Claimant replied,: "Coors". The Claimant went on to note that Coors did make a non-alcoholic beer, but Jernigan admitted that he did not know "which kind" he was drinking.

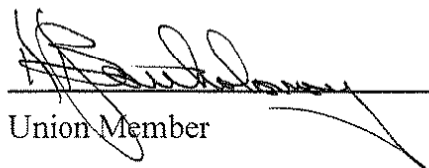
Although the Organization argued that the beverages the Claimant consumed on the evening of February 24 were non-alcoholic, there is no evidence on this record to demonstrate such. Claimant voluntarily signed a document in which he agreed to: "*....maintain complete abstinence from all mind and mood altering substances, including alcohol*". When Claimant informed the Roadmaster he was unable to work on February 25, 2006, because he "had a few beers", such admission was clearly in violation of the Substance Abuse Treatment Plan he entered into slightly more than a month prior. Therefore, this claim must be denied.

AWARD

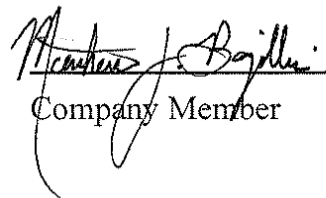
Claim denied.



Nancy Faircloth Eischen, Chairman



Union Member



Company Member