

PUBLIC LAW BOARD NO. 7104

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| BROTHERHOOD OF |) | |
| MAINTENANCE OF WAY EMPLOYEES |) | |
| DIVISION – IBT RAIL CONFERENCE |) | CASE NO. 20 |
| vs. |) | AWARD NO. 20 |
| |) | |
| CSX TRANSPORTATION, INC. |) | |

STATEMENT OF CLAIM:

Claim of the System Brotherhood that:

1. The dismissal of Welder Helper J.A. Mason for alleged violation of CSX Operating Rule G and Safe Way Rule 21 in connection with the FMCSA Short Notice Follow-Up Toxicological testing conducted on December 13, 2005 is excessive, unjust, unwarranted and cannot stand [Carrier's File 12(06-0870) CSX].
2. As a consequence of the unjust dismissal, it is requested that Welder Helper Mason " . . . be immediately reinstated to active service, and that he be compensated for all earning opportunities and other benefits deprived him. * * * "

FINDINGS:

Public Law Board No. 7104, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The Claimant, J.A. Mason, had been employed by the Carrier since 1997. He was a participant in the Carrier's bypass program, offered to employees who have been charged with violations of Carrier's Rule G and/or Safe Way Rule 21, as a result of a positive test for cocaine metabolites on May 13, 2005. Carrier Rule G and Safe Way Rule 21 provide:

Employees reporting for duty, on duty, on CSX property, or occupying facilities provided by CSX are prohibited from having in their possession, using or being under the influence of alcoholic beverages or intoxicants.

Employees shall neither report for duty nor perform service while under the influence, of, nor use while on duty or on CSX property any drug, medication, or other substance, including prescribed medication that will in any way adversely affect the employee's alertness, coordination, reaction, response, or safety.

The illegal use and/or possession of a drug, narcotic, or other substance that affects alertness, coordination, reaction, response, or safety is prohibited while on or off duty.

As a participant in the bypass program, Claimant was subject to FRA Short Notice Follow-Up Toxicological Testing, and on December 13, 2005, he again tested positive for cocaine metabolites. As a result, on January 6, 2006, Claimant was notified, by letter, that he was charged with violations of Rule G and Safe Way Rule 21. After postponements, the investigation was held on August 5, 2006. Thereafter, the Claimant was found guilty of the violations alleged and dismissed from Carrier's service.

The facts of this case are not in dispute. During the hearing, the Carrier presented medical documentation of Claimant's positive test result for cocaine on December 13, 2005. Claimant acknowledged the positive test at the hearing, as well as his earlier positive result and acceptance of a bypass agreement. Claimant also admitted that he had violated Carrier Rule G and Safe Way Rule 21.

The Carrier first asserts that all of the Claimant's procedural rights were fully protected and the hearing was conducted in a fair and impartial manner. On the merits, the Carrier contends that substantial evidence supports the conclusion that Claimant was guilty of violating Rule G. The Carrier points out that Claimant admitted his guilt during the investigation, as he acknowledged his first positive result, his participation in the bypass program, and his second positive result. Arbitration boards in this industry, the Carrier notes, consistently hold that an employee's admission is sufficient to satisfy the Carrier's burden of proof. Thus, the Carrier concludes, there is ample evidence to demonstrate that Claimant is guilty of the charges.

With respect to the penalty assessed, the Carrier points out that numerous Boards on Carrier property, on numerous occasions, have recognized that an employee who tests positive for a prohibited substance while subject to a bypass program is subject to dismissal. That result, the Carrier concludes, should obtain in this case, and the claim should be dismissed.

The Organization does not dispute that Claimant tested positive for cocaine on the two occasions at issue. However, the Organization states, following the second test Claimant immediately entered an in-patient substance abuse rehabilitation treatment program, which was the reason the investigation was postponed several times. Following his completion of the program, the Organization points out, Claimant requested that the Carrier provide him one more opportunity to demonstrate that he could be a valued employee, but the Carrier declined to do so.

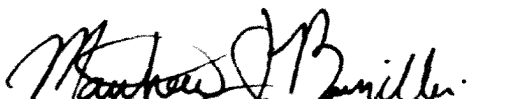
The Organization states that it does not dispute the seriousness of Claimant's offense, but urges that under the particular circumstances present in this case dismissal serves no purpose but to punish Claimant. Arbitration Boards in this industry, the Organization points out, have long held that the purpose of discipline is to rehabilitate, correct and guide. Following his first positive result, the Organization notes, Claimant sought treatment before even entering the Carrier's bypass program. When those efforts were unsuccessful, as demonstrated by the second positive result, Claimant entered an in-patient treatment plan before the Carrier could even schedule an investigation in this matter. Surely, the Organization urges, such efforts should not go unrecognized, and caselaw recognizes that an employee's prompt effort to seek treatment mitigates against the penalty of dismissal. For these reasons, the Organization concludes, the claim should be sustained.

The Board has carefully reviewed the record in its entirety. There is no dispute, as Claimant admitted, that Claimant was guilty of the Rule G and Safe Way Rule 21 violation in this matter. Given that fact, the record demonstrates that Claimant failed to comply with the conditions for retention of his employment following his previous positive test result. While we recognize Claimant's extensive efforts to address his situation, innumerable arbitration awards support the Carrier's right to discharge an employee who has tested positive while subject to the conditions of a bypass program, and it is well recognized that leniency is the prerogative of the Carrier, not this Board. The Carrier's decision to dismiss the Claimant cannot be found arbitrary, capricious or unjust.

AWARD

Claim denied.


JACALYN J. ZIMMERMAN
Neutral Member


MATTHEW BORZILLERI
Carrier Member 3/23/09


TIMOTHY KREKE
Organization Member 3-23-09

Dated this day of , 2009.