Award No. 23
Case No. 23

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated January 7, 2008, the Assistant Division Engineer-Florence instructed C. T. Marklin (hereinafter "the Claimant") to attend an Investigation on January 17, 2008, at the Carrier's Florence Division Engineering Office in Florence, South Carolina, with Mr. Marklin as principal. The letter stated in pertinent part:

> . . . The purpose of this hearing is to develop the facts and place your responsibility, if any, in connection with information that was received in the Division Engineer Office on December 18, 2007, from CSX Chief Medical Officer, Thomas J. Neilson, indicating that you underwent a Company Short Notice Follow-up test on December 13, 2007. The Carriers Medical Review Officer, Joseph A. Thomasino MD, has reviewed the results of this test in accordance with company policy and applicable federal requirements and has verified the results of this test to be positive for cocaine metabolites.
>
> This will additionally serve to reinstate the charges placed against you in the charge letter dated November 26, 2004 for Company Short Notice Follow-Up toxicological test you underwent on November 11, 2004 which results was positive for cocaine metabolites.
>
> In connection with the above, you are charged with conduct unbecoming an employee of CSX Transportation, and possible violations of your Substance Abuse Treatment Plan (form EAP-1), which resulted from your election to participate in the Carrier's by-pass program. You are charged with a possible violations of CSX Transportation Operating Rule - General Rule G, and CSX Safeway - General Safety Rule - Substance Abuse Rule 21, FRA regulations (49 CFR Part 219.101[)] and/or their successors, in connection with a verified positive for cocaine metabolites on the Company Short Notice Follow-up test given on December 13, 2007.

The letter further confirmed that the Claimant was "being withheld from service pending the results of the above hearing."

At the Organization's request the January 17, 2008, hearing was postponed, and it was later rescheduled to May 7, 2008. The Claimant stated that he did not receive the letter from the Carrier notifying him of the new hearing date but that he attended the hearing because of oral notification from fellow employees of the new date.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was hired by the Carrier as a contract employee (i.e., a member of the bargaining unit covered by the collective bargaining agreement) in May, 1999. In approximately April, 2007, he left the bargaining unit to become a management trainee. On December 13, 2007, he was requested to undergo short-notice followup drug/alcohol testing. The testing was ordered pursuant to a Substance Abuse Treatment Plan that the Claimant had entered into in writing on February 25, 2005, after he had tested positive for cocaine metabolite on November 11, 2004. Upon testing positive in November, 2004, the Claimant was removed from service pending further administrative action. The Claimant testified that he would not have been permitted to return to work had he not signed the Substance Abuse Treatment Plan.

The Treatment Plan included agreement to "Abstain from use of all forms of

alcohol & all mind altering substances at all times" and to "Submit to follow up testing on duty." Further, the Plan provided for attendance of at least three AA/NA meetings weekly, obtaining a recovering male sponsor with permission to speak to the EAP, weekly calls to the EAO counselor for a year and then on a monthly basis, quarterly meetings in person with the EAP counselor, and agreement to "mark off & call EAP immediately" in the event of a relapse. The Plan stated that the Claimant could be required to take urine drug screening/breath alcohol tests "on a short-notice basis" and that "Failure to comply or a positive test result can result in medical disqualification or disciplinary action."

The Treatment Plan also contained the following provisions immediately above the line for the Claimant's signature:

> Properly addressing a substance abuse issue is of paramount concern in the safe discharge of company related duties. I understand that failure to comply with any or all of the treatment recommendations may be grounds for disqualification by the Chief Medical Officer and, in some circumstances, may require release of this document to supervision for purposes of disciplinary action.
>
> I understand that this contract will remain in effect for (5) five years from date signed and I agree to release a copy to the Chief Medical Officer, CSX Transportation.

The urine specimen provided by the Claimant on December 13, 2007, was received at LabCorp, the testing laboratory, on December 14, 2007. The bottle seal was intact according to a form completed by the laboratory. The specimen bottle was placed in temporary storage and later removed from storage for testing. On December 16, 2007, the Certifying Scientist of the laboratory certified that the primary specimen tested positive for cocaine metabolite. The testing method used for confirmation analysis was gas chromatography/mass spectrometry. The Claimant then requested that a reconfirmation test be performed by a second testing laboratory, Quest Diagnostics, on

the split sample urine specimen collected from him on December 13, 2007. The results were reconfirmed by the other laboratory as positive for cocaine metabolite.

When the Claimant was notified that his drug test came out positive for cocaine metabolite, he claimed that the test was flawed because of a break in the chain of custody at the time the collection of his urine specimen was taken at the Carrier's office. Examination Management Services, Inc. ["EMSI"], the third-party organization that conducts alcohol and drug testing for the Carrier, requested a statement from the collector of the sample. He provided the following statement regarding the collection:

> 12-19-07
>
> To [EMSI Project Manager]
>
> On 12-13-07 @ 7:30 AM I performed a D&A test on Cris Marklin as per Part 40 Collection Guidelines.
>
> The test was set up in C&X Locker Room, and was a Direct Observation Collection.
>
> David Gates was with me on training.
>
> All tests were completed and paper work faxed. Sample was sealed and taken to our office and sent to Lab Corp from there.
>
> /s/ [Signature of Collector]

On January 7, 2008, the EMSI project manager sent an email to the collector's office attaching a copy of the collector's statement, and asserting, "I need for the collector to be a little more specific/provide additional details on this test event. I have been notified by CSX that this will be going to a hearing." The collector then provided a second statement as follows:

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> On Dec 13, 2007 I collected a urine sample from Criss Marklin. After completing the collection and sealing the samples in the sample bag we then walked to another room to a desk to complete the paper work. At that time we discovered that David Gates who I was training sealed all the copies of the C&CFs in the sample bag. Mr. Marklin was with us at all times and watched as we opened the sample bag and removed the copies of the C&CFs using another bag we put the lab copy and urine samples that were sealed and dated and initialed by Mr. Marklin and sealed the sample bag. All this was done in Mr. Marklin's presence. Paper work was then completed and he helped us fax copies to EMSI. Sealed samples were then taken to EMSI office and then sent to Lab Corp.

The term "C&CF" stands for Custody and Control Form. It is a multi-copy form that is partially filled out at the collection site at the time the collection is taken.

Copy 1 of the C&CF form goes to the laboratory that tests the sample. See Carrier Exhibit B, page 91. Copy 2 goes to the Medical Review Officer, who must check the applicable box on the form among the following choices: NEGATIVE, POSITIVE, TEST CANCELLED, REFUSAL TO TEST BECAUSE ADULTERATED [or] SUBSTITUTED; enter any REMARKS; and sign his/her name. See Carrier Exhibit B, page 72.

In the present case the Claimant signed his name on Copy 2 of the Custody and Control Form and dated the form 12/13/07 after the following statement, "I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct."

The collector's signature appears on both Copy 1 and Copy 2 of the Custody and Control Form, is dated 12/13/07, and shows the time 07:45 AM. The collector's signature is preceded by the statement, "I certify that the specimen given me by the donor

identified in the certification section on Copy 2 of this form was collected, labeled, sealed, and released to the Delivery Service noted in accordance with applicable requirements." Both Copy 1 and Copy 2 describe the steps of the collection process. STEP 3 is described as follows: "Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor completes STEP 5 on Copy 2 (MRO Copy)." Copy 1 of the form also contains the signature of the person who received the specimen at the laboratory, the date Dec 14 2007 after the signature, and a check mark in the box for "Yes" after the printed words "Primary Specimen Bottle Seal Intact." Copy 2 of the form in STEP 6 shows that the PRIMARY SPECIMEN tested positive for cocaine metabolite and is signed by the Medical Review Officer with the date 12/18/07.

The Claimant testified as follows regarding the collection process:

> . . . I gave my sample they did not put the samples in the bag prior to me leaving the restroom. We went down to the Roadmaster's office the testing facilitators walked into the job briefing room continued to do their paperwork.
>
> I went back in signed they put their samples in the bag and then walked back into the Roadmaster's office with Mr. Gregory [the Roadmaster]. They came in with a sealed bag and everything was already sealed in the bag. Mr. Gregory asked if there was anything else he needed to do they neglected to get Mr. Gregory to sign the paperwork so they opened the sealed sample bag Mr. Gregory signed the paperwork they faxed the paperwork off put the papers into the bag and then resealed the bag.

According to the transcript, the hearing officer then asked the Claimant, "About how long were the samples out of the yard?" The Claimant answered, "I would say between 8 to 10 minutes. Which I stated in an email to Ms. Barnett on December 19th I do believe somewhere in there." The Board believes that the phrase "out of the yard" is probably an error in the transcription because it does not make sense in the context. Perhaps the Claimant was asked how long the samples were out of the bag.

The hearing officer next asked the Claimant, "Was the bottle itself sealed?" The

Claimant answered, "At the time the bottle was closed with the clasp the little strips of tape that go over with my initials on them were placed on the bottles in the job briefing room, because there was no light in the bathroom in the Charleston Roadmaster's office, or very dim light."

The Claimant signed his name on the Custody and Control Form on which he certified that each specimen bottle used was sealed with a tamper-evident seal in his presence and that the information provided on the form and on the label affixed to each specimen bottle was correct. In his own testimony at the Investigation, the Claimant did not state anything that contradicted his written certification. He acknowledged that the sample bottles were closed with a clasp and that strips of tape with his initials on them were placed on the bottles in his presence. The Board understands that to be the sealing and labeling of the sample bottles.

The Claimant also testified, "I went back in signed they put their samples in the bag and then walked back into the Roadmaster's office with Mr. Gregory." Nowhere in his testimony did the Claimant state that the samples were put in the sample bag, or that the bag was sealed, outside of his presence. The fact that he stated "I went back in signed they put their samples in the bag" would indicate that he observed the samples being placed into the bag.[1]

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[1]The Claimant also testified, "They came in with a sealed bag and everything was already sealed in the bag." If that testimony was intended to convey that the sample bottles were put in the sample bag in the job briefing room outside of the Claimant's presence, who was in the Roadmaster's office, it would appear to contradict his testimony in the immediately preceding sentence. The Board understands the prior sentence to mean that the Claimant saw the collector and the trainee put the sample bottles in the sample bag. More important such testimony was clearly contradicted by the Roadmaster's credible testimony that the collector "followed [the Claimant] right in" to the Roadmaster's office from the job briefing room (Tr. 42). See text below where the Roadmaster's testimony is discussed. Plainly the Claimant was not in the Roadmaster's office separated from the collector while the latter was in the job briefing room placing and sealing the specimen bottles in a sample bag. The Claimant and the collector (and

According to the Claimant's testimony he also watched as the sealed sample bag was opened, certain papers were put into the bag, and then the bag was resealed. The Claimant stated that because of the dim light in the bathroom where he provided a sample, the strips of tape with his initials on them were not placed on the sample bottles there but rather in the briefing room. According to the Claimant's testimony, however, he walked together with the collector and the trainee to the job briefing room where the labels were affixed to the specimen bottles. At all times therefore from the time he provided his specimen until the specimens were placed in the bottles and sealed and labeled, the Claimant was together with the collector and the trainee.

From the Claimant's testimony, it appears that the sample bottles were placed in a sample bag and sealed for the first time in the job briefing room and that the bag was opened and the contents moved to a second bag in the Roadmaster's office. In this regard the Roadmaster credibly testified that the collector followed right behind the Claimant when they walked from the job briefing room to the Roadmaster's office. (Tr. 42). This was not a situation, therefore, where the Claimant waited in the Roadmaster's office while the collector sealed the sample bottles in a bag in the job briefing room outside the Claimant's presence. Rather the Claimant and the Collector were together in the job briefing room and they were together in the Roadmaster's office. The Board finds that the evidence establishes that the Claimant and the collector were together at all times from the time that the Claimant provided the urine specimen until the sample bottles were sealed in the sample bag for a second time.

It is not clear from the record whether the specimen bottles were sealed in the

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the trainee) were together at all times.

washroom and only the labels were affixed in the job briefing room, or both the sealing and the labeling were done in the briefing room. However, no one else was providing a specimen at the same time as the Claimant, so his specimen could not have gotten mixed up with anybody else's. Nor is it remotely likely that in the short walk from the washroom to the job briefing room the Claimant's specimen would have been mishandled.

There is no reasonable doubt in this case that the specimen bottles that were sent to LabCorp for testing were those of the Claimant. In addition, the person who received the specimen bottles at LabCorp checked "Yes" that Primary Specimen Bottle Seal Intact. The Board finds that there was no break in the custody of the specimens provided by the Claimant for drug testing and that the specimen bottles received for testing at LabCorp were those of the Claimant.

It is a Carrier rule, and, according to the Carrier, universally accepted in the railroad industry, that an employee is afforded only one opportunity to receive substance abuse treatment; and that failure to abide by the treatment plan during a five-year period subjects the employee to dismissal from employment. The procedure at the Carrier for entering into a treatment program for substance abuse after testing positive for drugs is called "Rule G bypass." Carrier General Rule G prohibits the illegal use and/or possession of a drug, narcotic, or other substance that affects alertness, coordination, reaction, response or safety, while on or off duty. Violation of the rule is considered a major offense. Failure to pass a valid drug test is considered a Rule G violation. Employees who fail a drug test for the first time are generally permitted to avoid discipline by entering into a Substance Abuse Treatment Plan and adhering to its terms. This is known as a Rule G waiver or bypass.

The Claimant contended at the hearing that his participation in the Substance Abuse Treatment Plan dated February 25, 2005, was voluntary on his part rather than as part of a Rule G bypass program. In support of the Claimant's position, the Claimant and the Organization both rely on the fact that the Carrier was unable to produce any documentation that, prior to the present case, the Claimant ever received a charge letter stating that he tested positive for an illegal drug or that he agreed to participate in a Rule G bypass program. Nor could the Carrier produce a signed copy of the document that employees who enter into Rule G bypass program normally sign.

The Carrier, however, did produce documentary evidence that the results of a follow-up test for drugs on the Claimant performed on November 11, 2004, while he was on duty were positive for cocaine metabolite. The Claimant also acknowledged that he tested positive in the November 11, 2004, test and, because of the positive test, was removed from service. (Tr. 51, 48). The Claimant thereafter entered into a Substance Abuse Treatment Plan written contract on February 25, 2005, as a condition of being permitted to return to work (Tr. 49).

The essential fact is that the Carrier has already given the Claimant an opportunity to correct his drug-abuse problem by participating in a Substance Abuse Treatment Plan dated February 25, 2005, after testing positive for an illegal drug in a follow-up test. That plan specifically provided that "a positive test result can result in medical disqualification or disciplinary action." Carrier Exhibit 10. The Claimant tested positive for cocaine metabolite in a valid follow-up test conducted on December 13, 2007, during the five-year period that the Substance Abuse Treatment Plan contract of February 25, 2005, was in effect. The Board has shown that it has a policy to dismiss employees who test positive for drugs a second time after being given a chance to participate in a substance abuse

treatment program following a first positive test. See Public Law Board No. 6564, Case No. 11 dated February 17, 2004, involving these same parties. The Carrier's dismissal of the Claimant in the present case was consistent with that policy. The policy is a reasonable one and, according to published arbitration awards, similar to policies at other carriers in the railroad industry. The Board finds no basis for disturbing the Carrier's dismissal action in this case.

The Organization's final argument is that the Claimant was not given proper notice of the hearing that was held in this case on May 7, 2008. The hearing in this case was originally scheduled for January 17, 2008. The Claimant acknowledges receipt of notice of that hearing. The hearing was postponed at the request of the Organization. However, the Claimant had moved, and, despite being given notice of the new address, the Carrier neglected to send the notice of the postponed hearing to the correct address. The Claimant nevertheless appeared at and participated in the hearing held on May 7, 2008, after fellow employees notified him that it was scheduled to be held. While it is unfortunate that the notice of the postponed hearing was not sent to the correct address, the Claimant did receive notice of the original hearing. He therefore had approximately four months to prepare a defense to the charges. He also appeared in person and participated in the May 7 hearing.

Since the original notice of hearing was properly served on the Claimant, the remedy for improper notice of the postponed hearing would not be dismissal of the charges but an order to reconvene the hearing and take testimony a second time. In the absence of a showing that the Organization or the Claimant has additional evidence to present of an exonerating nature, the Board sees no purpose in reconvening the hearing. Nor has the Organization or the Claimant requested to reopen the hearing. The Board

finds that since the Claimant received the original notice of hearing in this case; had adequate time to prepare a defense; and appeared in person and participated in the hearing held in the case on May 7, 2008; the failure to provide proper written notice of the May 7, 2008, postponed hearing is not a sufficient basis for dismissing the charges or overturning the discipline administered by the Carrier in the case.

## AWARD

Claim denied.

## ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
February 17, 2009