

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 September 17, 2009, the Carrier instructed J. A. Seale (hereinafter "the Claimant") to attend a formal Investigation on September 30, 2009, in the Engineer of Track office in Hagerstown, Maryland, in connection with a report from the Carrier's Chief Medical Officer stating that the Claimant had tested positive at .052 gms/210 liters in a short-notice followup breath alcohol test on September 17, 2009. The letter charged the Claimant "with conduct unbecoming an employee of CSX Transportation, possible violations of your waiver agreement that resulted from you accepting the conditions of your request to waive your rights to charges that were filed against you in a letter dated July 29, 2009 addressed to you from G. Wihite, Division Engineer and violation of Rule G and CSX Drug/Alcohol Use Policy." The hearing was postponed several times at the Organization's request and was held on February 4, 2009, at the Division office building in Cumberland, Maryland.

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, whose service date is May 5, 1976, was employed as a Track Foreman. By letter dated July 17, 2009, the Claimant was instructed to attend a formal Investigation to determine the facts concerning his alleged involvement in an at-fault vehicle accident while operating a company vehicle on May 20, 2009. It was reported to the charging officer on July 15, 2009, that the Claimant fell asleep while operating the vehicle, hit another vehicle, failed to stop, and did not report the incident to his supervisor until three hours after the collision. The letter of July 17 charged the Claimant with various rules violations.

The Claimant, on July 29, 2009, signed a waiver of his rights to a hearing which was accepted by the Carrier on the following conditions: 1. The Claimant agreed to a 30-day overhead suspension for a period of one year. 2. The Claimant agreed to contact an Employee Assistance Counselor and be bound by the latter's assessment, "to include signing a Rule G by-pass offer, participating in treatment program and participate in appropriate monitoring if necessary." If treatment was deemed appropriate by the counselor, the Claimant agreed that he would "be required to sign and abide by the terms and conditions of a treatment contract (EAP 1) if recommended." The Claimant further agreed that if treatment was recommended, it was to be the equivalent of the Claimant's "first verified positive test for the purpose of administering future discipline, if needed." 3. There were additional conditions not here pertinent.

On July 29, 2009, the Claimant was also given a letter addressed to him and signed by his supervisor, which stated as follows:

Because you have been formally charged with a violation of Rule G (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) and/or FMCSA [Federal Motor Carrier Safety Administration] regulations, and in accordance with company policy and FMCSA regulations, you should now select one of the following options:

The Claimant checked the following option:

I will contact one of the Carrier's Employee Assistance Program (EAP) Counselors [name and telephone number of EAP Counselor] within five (5) days of the date the Charge Notice was received and will indicate a willingness to immediately enroll and participate in an approved rehabilitation program, with the understanding that:

- (a) The hearing on the Rule G/CSX Drug/Alcohol Use Policy charge 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 Rule G/CSX Drug/Alcohol Use Policy charge.

He then signed his name to the statement, "I have voluntarily selected the above-indicated options(s)" and dated his signature 7/29/09.

Thereafter the Claimant met with an EAP Counselor and on August 21, 2009, signed a form called Substance Abuse Treatment Plan. In the document the Claimant agreed to maintain abstinence from mood or mind altering drugs and alcohol, to continue one on one counseling, to go for substance abuse evaluation as requested by EAP, and if there were a relapse and he began drinking, to take himself out of service and contact the EAP. The form also included the following statements: ". . . Failure to comply or a positive test result can result in medical disqualification or disciplinary action." ". . . 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 come circumstances, may require release of this document to supervisor for purposes of disciplinary action.”

On September 17, 2009, the Claimant was given a short-notice followup breath alcohol test by a certified breath alcohol technician. He tested .054 gms/210 liters. In a confirmation test on the same machine administered eight minutes later, the Claimant tested .052 gms/210 liters. Both test results were considered positive under the Carrier’s Substance Abuse Treatment Plan that the Claimant had signed and agreed to. On the same date, September 17, 2009, the aforementioned charge letter was sent to the Claimant by certified mail.

In his testimony in this proceeding the Claimant acknowledged that he accepted, signed, and understood the provisions of the waiver agreement dated July 29, 2009. He further testified that he accepted and signed a Rule G bypass agreement dated July 29, 2009, and understood the provisions of that agreement. He acknowledged that he filled out and signed the document called Substance Abuse Treatment Plan and that he understood that he was supposed to maintain abstinence from mind altering drugs and alcohol and was supposed to remove himself from service if he had a relapse and started using alcohol. The Claimant testified that he went for counseling at one of the places recommended by the EAP counselor. He answered, “Apparently so,” when asked if he was under the influence of alcohol on September 17, 2009. He answered, “Yes,” when asked if the test results were correct.

In response to questioning by his Organization representative the Claimant testified that he lost a son in the Iraq war on August 6, 2009, and that that played a major role in his use of alcohol.

In a closing statement the Claimant said that his son was killed during a combat

operation in Iraq, and it was hard for him to handle it for a long time. His brother has tried to encourage him to accept the loss. In January, the Claimant stated, he had a severe case of pneumonia and was hospitalized for seven days. It was then that he realized “with my drinking – it’s not what my son would have wanted.” He is learning to deal with his loss better and applied for disability retirement in early December. It has not been approved, the Claimant stated, but the paperwork has been released. “[E]ven though my son was killed,” the Claimant declared, “I know it’s not an excuse for not following the Rule G bypass. And that’s really all I have to say. Thank you.”

Following the close of the hearing the Division Engineer, by letter dated February 22, 2010, notified the Claimant that he was “found guilty of all charges and the discipline assessed is dismissal from all services of CSX Transportation effective with the date of this letter.”

This is a sad case both because of the loss of a child, who gave his life for his country and for freedom, and because of the end of the railroad career of a long-service employee. The precedents are clear in cases of this kind where an employee tests positive within five years after entering into a Rule G waiver agreement and a Substance Abuse Treatment Plan. See, for example, Third Division Award No. 39363 (dismissal upheld of 31-year employee after testing .02 in followup breath test for alcohol). This Board does not have reasonable discretion to disturb the Carrier’s dismissal action in this case. Any consideration to be shown the Claimant, such as possibly with regard to his disability retirement application, must rest in the discretion of the Carrier.

The Claimant has suffered a double blow. Nevertheless, for whatever consolation it might bring, he must recognize that others have experienced similar shocks in their lives and surmounted them. We commiserate with him and hope that he will find the


resilience and strength to deal with his adversity and continue with his life in a positive way. As he recognized in his closing statement, it is what his son would have wanted and probably expected.

A W A R D

Claim denied.

O R D E R

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

  
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Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois  
May 3, 2010