

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13345

Docket No. 13170

98-2-96-2-92

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Sheet Metal Workers' International Association

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

- "1. The Carrier violated the provisions of the current and controlling agreement, and in particular Rule 23 of said agreement, when they improperly dismissed Sheet Metal Worker Jacob Rent for 'Failure to pass a return to work physical, by testing positive for marijuana', following an investigation that was held on November 9, 1995.**
- 2. That accordingly, the Carrier be required to return Mr. Rent to service without compensation for and all time lost and that he be made whole for all benefits, such as, but not limited to vacations, holidays, seniority, medical and dental benefits and any other fringe benefits he may have been deprived of due to his dismissal from the service of the Carrier."**

FINDINGS:

The Second Division of the Adjustment Board, 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

Claimant, a 17 year employee, was dismissed from service following an Investigation conducted on November 9, 1995 on charges of failing to follow the Carrier's Professional and Personal Conduct and Alcohol and Drugs Standards. At the time in issue, Claimant had been off work for two months during which time he had surgery for prostate cancer.

The record reflects that Claimant was given a return-to-work physical on September 15, 1995 that included a drug test, the results of which indicated that he tested positive for marijuana metabolites at 145 ng/ml. He was sent a certified letter from Carrier's Medical Director instructing him to rid his system of prohibited drugs by entering Carrier's Employee Assistance Program (EAP) or retesting within a 30 day period. The letter also noted that Claimant would only be permitted one retest within the 30 day period and, if it was positive, he would not be permitted to enter the EAP and would be subject to dismissal.

Claimant declined entering the EAP and chose to retest, which he did on October 17, 1995. The consent form signed by Claimant at that time indicates that if the confirmatory test result was positive, Claimant would be subject to dismissal for failure to follow instructions and comply with Carrier policy. At that time he tested positive for marijuana metabolites at 28 ng/ml, which showed up in the confirmatory test which tests levels over 15 ng/ml. Claimant had undergone his own drug screens at a different laboratory in the interim while attempting to clear his system, and finally tested negative on October 13, 1995 in the initial screening, which he was told was the same level (50 ng/ml) as that tested by Carrier's laboratory; no confirmatory test was run. It was at that time that he scheduled his retest to meet the 30 day deadline. Claimant was informed that it could take as long as 30 days to rid his system of marijuana, and that his surgery and low metabolism could make it more difficult.

The record contains evidence from Claimant's co-workers and General Foreman supporting his good and reliable work ethic. Claimant's wife testified that Claimant's use of marijuana increased when he attempted to relieve the pain associated with his cancer surgery, and that he stopped smoking to rid his system of the drug and understood how it was not helpful in dealing with his health problems. The record reflects that Claimant entered into a chemical dependency counseling program after his

dismissal and that he was found by his therapist in February 1996 to have complied with all treatment expectations as verified by drug screens.

Carrier argues that it has shown that Claimant is guilty of the charges, because the Organization never contested the results of the drug tests. It contends that the evidence reveals his continuation to use marijuana after September 15, 1995 and the fact that its use was not totally related to the stress associated with his illness. Carrier notes that leniency is the sole prerogative of Carrier and asserts that Claimant was granted leniency once when he was permitted to retest or enter the EAP, and that Carrier policy does not entitle him to be granted leniency twice, citing Public Law Board No. 3991, Award 20; Second Division Award 7267; Third Division Award 28525. Carrier argues that Claimant's entering a program after the fact is an insufficient basis to circumvent the discipline, relying on Public Law Board No. 4788, Award 17 and Public Law Board No. 3783, Award 273.

The Organization argues that this is a perfect case for the grant of leniency, because Claimant is a long-term excellent employee whose positive drug testing was the result of extenuating circumstances. It notes that Claimant's admitted use of marijuana is directly linked to his prostate cancer diagnosis and the pain associated with surgery, and occurred while he was off duty. The Organization contends that the test results show a significant drop in the marijuana metabolite level, showing that Claimant was attempting to rid the drug from his system in compliance with Carrier's direction. It asserts that a combination of surgery and slow metabolism prevented Claimant from complying within the 30 day time limit imposed, and contends that Carrier's denial of leniency in this case is unreasonable.

Based upon the record as a whole, we find that Carrier sustained its burden of proving that Claimant was guilty of the charges for which he was dismissed. There is no question that Claimant tested positive for marijuana metabolites in September 1995, was instructed to rid his system of the drug, understood the terms upon which he was to be retested after turning down the option of entering the EAP, and failed to meet the required level under the confirmatory test. Claimant was clearly informed what the consequences would be when he opted to be retested and prior to the retest itself.

While the consequences of Claimant's failure to rid his system of marijuana metabolites to less than 15ng/ml by October 17, 1995 are devastating in this case, and Claimant's efforts to deal with his substance abuse problem are commendable, as is his

lengthy work record, the fact remains that this case was handled on the property as a request for leniency reinstatement and was argued before the Board on the same basis. The Board has long held that reinstatement of an employee based on leniency is within the sole discretion of the Carrier, and it will not substitute its judgment concerning the appropriate penalty where the discipline imposed is not arbitrary, capricious or excessive. See Second Division Awards 13161, 12573, 7267; Third Division Awards 31937, 31935, 31932, 25705. Because the Board is not empowered to grant leniency, we have no alternative but to deny the claim.

AWARD

Claim denied.

ORDER

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

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 24th day of November 1998.