

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43901  
Docket No. SG-44821  
20-3-NRAB-00003-180253**

**The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when the award was rendered.**

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(Illinois Central Railroad Company**

**STATEMENT OF CLAIM:**

**“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Canadian National (formerly Illinois Central):**

**Claim on behalf of A.X. Estrada, for reinstatement to service with compensation for all time lost, including overtime from the time he was scheduled to return to work, with all rights and benefits that he would normally be entitled to, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 35, when it issued the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on January 10, 2017. Carrier’s File No. IC-BRS-2017-00004. General Chairman’s File No. IC004-17. BRS File Case No. 15755-IC.”**

**FINDINGS:**

**The Third 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.

The Claimant was hired by the Carrier on December 15, 2014, and at the time of the events that resulted in his termination, he was working as a Signal Maintainer at the Kirk Yard in Gary, Indiana. On June 2, 2016, the Claimant was required to undergo a random drug and alcohol test, and he tested positive for THC (marijuana), at 226 ng/mL. He was removed from service. He signed a waiver of investigation that stipulated that he was dismissed from service; however, the dismissal would be held in abeyance while he underwent treatment. His return to work was conditioned on other stipulations. The Claimant entered and completed a treatment program. However, when he took a DOT return-to-work drug screen on December 13, 2016, his results came back positive for THC at 26 ng/mL.

The Carrier's standard for drug use is zero tolerance. That is, *any* level of drug metabolites, no matter how small, is considered a positive test and cause for discipline. As a result of Claimant's drug test, the Carrier sent him a Notice of Investigation, dated December 21, 2016.

The investigation was held on January 10, 2017. The Claimant testified that he had successfully completed his treatment program and that he had not used marijuana for months. The record included a drug test taken on July 21, 2016, while the Claimant was in treatment, that showed a positive result for THC, at 28 ng/mL. The Claimant's positive result in December 2016 was slightly less, at 26 ng/mL.

The Carrier determined following the interview that the Claimant had violated USOR, General Rule G—Drugs and Alcohol. By letter dated January 17, 2017, he was notified of the Carrier's decision and that the penalty assessed was dismissal from service effective immediately.

The Organization filed a timely claim. The parties having been unable to resolve the dispute through the grievance process, the matter was appealed to the Board for a final and binding decision.

The Carrier contends that dismissal was appropriate. The record is clear that the Claimant tested positive for drugs during a return to work test on December 13, 2016. Following a positive drug test for marijuana on June 2, 2016, he had signed a waiver holding dismissal for that positive test in abeyance while he underwent treatment. The test was performed by a reputable laboratory, and there is no evidence that it was improperly conducted. The Claimant has demonstrated a pattern of irresponsible and dangerous behavior, and the Carrier cannot be expected to keep in its employ an individual with such poor judgment. The disciplined was warranted—arbitral precedent has well established that carriers are not obligated to bring back repeat drug offenders.

From the Organization's perspective, dismissal was harsh and excessive. The Claimant's drug test results demonstrate that he was not in violation of USOR General Rule G, Drugs and Alcohol. In June 2016, he tested positive at a THC level of 226 ng/mL. As he progressed through the program, he improved, and a test result on July 26, 2016, indicated a THC level of 28 ng/mL. His return to work drug screen on December 13, 2016, indicated a THC level of 26 ng/mL. The threshold for a positive test established by the Federal Railroad Administration is 50 ng/mL, and his results were well below that level. The Claimant testified that he had been taking supplements to help him put on weight, which made him lethargic and contributed to retention of liquids and fats. Each person's metabolism and body are different, which contributes to a wide spectrum of time that it takes for substances to leave a body. The progression of the Claimant's test results clearly establishes that he was no longer using marijuana. Claimant's December test result was almost half the level considered positive by the FRA, and it should have been deemed a negative result. The facts and evidence in the record demonstrate that the Claimant followed all instructions and successfully completed his substance abuse program. The last remaining metabolites in his system were not indicative of a true positive result, and the Claimant should have been returned to service as scheduled on December 13, 2016.

With respect to drug use, USOR General Rule G, Drugs and Alcohol, states:

“. . . While on duty or on company property, the use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is

*prohibited. Employees must not possess, sell, use or have in their bodily fluids any illegal drug or controlled substance....* (Emphasis added.)

The Carrier has issued a Substance and Alcohol Free Environment (SAFE) policy handbook to supplement Rule G, which sets forth in more detail the Carrier's Drug and Alcohol Rules and Regulations.

There is no dispute that the Claimant's December 13, 2016, drug screen was properly conducted and that it returned a result showing the presence of THC metabolites at 26 ng/mL. The fundamental issue before the Board is whether that test result should be considered positive or negative. On the one hand, the Organization points out, the federal DOT standard for a positive marijuana test is 50 ng/mL. On the other hand, the Carrier asserts that it has adopted more rigorous standards than the federal government, which is its right to do, and that any level above zero is, from its perspective, a positive test.

Whatever the federal standard, a carrier is entitled to impose and enforce stricter standards, which the Carrier here has done. While it is clear that the Claimant made significant progress during his course of treatment—his THC levels dropped from 226 ng/mL to 26 ng/mL—the fact remains that the test revealed the continued presence of THC in his system. The Board may not second-guess the Carrier's judgment in this regard, and must enforce the test standard as promulgated by the Carrier. The Carrier regularly conducts training on its drug and alcohol policy, and employees know, or should know, what the Carrier's standards are and that they are significantly stricter than the federal standards.

The Claimant appeared before the Board and testified credibly as to his course of treatment. However, the Board notes, he stated that he regularly used CBD-based oils and lotions to alleviate pain associated with an on-the-job injury. The Board is not medically qualified to make any judgment in that regard, but the Claimant's testimony raises the possibility that he continued to test positive at a minimal level for THC derivatives as a result of legal CBD products<sup>1</sup> being absorbed into his system through his skin. Such a possibility is speculative only and cannot form the basis for the Board to overturn the Carrier's existing standards. But it does suggest that,

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<sup>1</sup> Medical marijuana is legal in the state of Indiana.

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whether by the Carrier or by the Organization, employees should be advised of this possibility in order to avoid results such as occurred in this unfortunate case.

**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 Third Division**

Dated at Chicago, Illinois, this 28th day of January 2020.