

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

**NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK) - NORTHEAST CORRIDOR**

Case No. 225

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Bridge Operator Gerald Simpson, Jr. for alleged violation of Amtrak's Standard of Excellence in connection with his alleged failure to follow conditional requirements outlined in an Alcohol and Drug Waiver Agreement signed by him on June 24, 1994 was without just and sufficient cause and in violation of the Agreement (System File NEC-BMWE-SD-4302D).
2. Claimant Simpson shall have his record cleared of the charge leveled against him and he shall be reinstated to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a Bridge Operator, assigned to work at the Portal Bridge on the New York Metropolitan Division.

By letter dated August 20, 2003, the Claimant was notified to appear for a formal investigation and hearing on charges that the Claimant allegedly violated an Alcohol and Drug Waiver Agreement that he had signed on June 24, 1994, in connection with a prior violation of the Carrier's Drug and Alcohol Policy, when he allegedly tested positive for marijuana in a drug test administered following the Claimant's on-duty injury on August 8, 2003. After a postponement, the investigation was conducted on September 19, 2003.

By letter dated October 3, 2003, the Claimant was notified that he had been found guilty of the charges, and that he was dismissed from the Carrier's service. The Organization filed a claim on the Claimant's behalf, challenging his dismissal. The Carrier denied the claim.

The Carrier initially contends that there is no evidence that the Carrier abused its discretion in handling this matter. The record shows that there was no violation of the Claimant's right to a fair and impartial hearing, and there is substantial evidence to support the hearing officer's finding that the Claimant was guilty as charged. In June 1994, the Claimant signed a Drug and Alcohol Waiver Agreement in which he agreed that if he tested positive in any future drug or alcohol test, he would be dismissed from service. The Carrier emphasizes that the Claimant's August 8, 2003, urine sample tested positive for the presence of marijuana metabolites. As a result of this positive test result, the Claimant was medically disqualified from performing service.

The Carrier emphasizes that the Claimant acknowledged the fact that he had marijuana in his system from smoking a cigar mixed with marijuana. The Claimant also testified that he did not dispute the drug test results. The Carrier maintains that the Claimant's proven use of marijuana was in violation of the Carrier's Standards of Excellence governing Drug and Alcohol Use, the Drug and Alcohol Policy, PERS-19, and the Claimant's Waiver Agreement. The Carrier argues that the discipline assessed was consistent with the terms of that Waiver Agreement, in which the Claimant agreed that he

would be dismissed if he failed to adhere to the conditions set forth therein. The Carrier asserts that the Claimant's dismissal was self-executing.

The Carrier goes on to address the Organization's assertion that the Claimant should be granted leniency. With regard to the Claimant's independent drug test, taken on August 14, 2003, which resulted in a negative test result, the Carrier maintains that any subsequent testing subverts the purpose of the test, which is to ensure that employees are not using drugs and/or alcohol while on duty. The Carrier argues that the fact that the Claimant passes the subsequent test does not alleviate the fact that the Claimant's system tested positive for marijuana on August 8, 2003.

The Carrier asserts that the evidence supports the finding of guilt, and there are no mitigating circumstances that require a reduction or removal of the assessed discipline. The Claimant's assertion that he was unaware that the cigar he smoked contained marijuana simply is not credible. The Carrier emphasizes that the Organization's assertions are simply an attempt to mitigate the Claimant's guilt. The Carrier argues that although it is commendable that it has been nine years since the Claimant previously tested positive for prohibited substances, and it is commendable that the Claimant sought rehabilitation and follow-up care, these particulars do not diminish the seriousness of the Claimant's actions.

The Carrier emphasizes that leniency is not a prerogative of the Board. Only the Carrier can grant leniency. The Carrier points out that the Claimant clearly was placed on

notice that the Carrier prohibits drug and alcohol use, and that there would be serious disciplinary consequences for violating that policy. The Claimant failed to comply with the Drug and Alcohol Testing Policy and with the Standards of Excellence governing Drugs and Alcohol when he tested positive for marijuana on August 8, 2003. Based upon the terms of his Waiver Agreement, it was incumbent upon the Claimant to ensure that his system was free of prohibited substances. The Claimant did not comply with the conditions of that Waiver Agreement.

The Carrier maintains that the discipline assessed was consistent with the terms of the Waiver Agreement, and the Claimant's dismissal was self-executing under the terms of that Agreement. Numerous Board awards have upheld dismissal in cases involving failure to comply with the provisions of an Alcohol and Drug Waiver Agreement. The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially acknowledges that there is no dispute that the Claimant tested positive for marijuana metabolites. The Organization asserts, however, that under the unique circumstances at issue, no discipline was warranted in this case. The Organization emphasizes that in more than nine years since signing the Waiver Agreement, the Claimant had not produced one positive test until August 8, 2003. Moreover, although the August 8th test produced enough metabolites to register a positive test result, the Organization points out that the director of the testing laboratory stated that it was a relatively small amount of THC metabolites and consistent with the

Claimant's explanation as to how it entered his system.

The Organization contends that although the Carrier might have been justified in removing the Claimant from service pending treatment and investigation, there was no reason to discipline the Claimant once he satisfactorily completed treatment and the facts were presented. The Organization argues that instead of relying on the evidence gathered at the investigation, the Carrier apparently based its decision to dismiss the Claimant solely on the nine-year-old Waiver Agreement and the fact that he produced a positive test result. The Organization argues that the record indicates that the Claimant ingested marijuana without knowingly doing so, so the Carrier's decision to dismiss the Claimant was unjust and unwarranted.

The Organization emphasizes that the purpose of discipline is to rehabilitate, correct, and guide employees. The dismissal of the Claimant, with nineteen years of otherwise satisfactory service, serves no purpose other than punishment. The Organization maintains that the Claimant is a valued employee and does not deserve to be dismissed under the present circumstances. The Organization argues that an objective analysis and evaluation of the transcript will conclusively establish that the record neither justifies the assessed discipline nor supports the charges against the Claimant. The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of failing to live up to the terms of his Rule G Waiver that he entered into on June 24, 1994. In that Rule G Waiver, the Claimant admitted that he had violated Rule G by reporting to duty with drugs or alcohol in his system. The Claimant agreed to undergo counseling and go back to work with one of the conditions being the following:

I further understand that if I test positive in any future drugs/alcohol test, including tests taken as part of any physical examination, I will be dismissed from all Amtrak service.

The record reveals that the Claimant tested positive for marijuana on August 8, 2003. The Claimant admits to smoking a cigar which was laced with marijuana, although he states that he was unaware that there was marijuana present. His explanation as to why there was marijuana in his system was not convincing to the hearing officer, or to this Board.

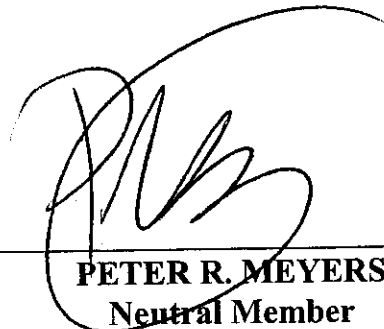
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

This Board has held on numerous occasions in the past that if a Claimant is offered a second chance through a Rule G Waiver and fails to live up to the terms of that Rule G Waiver, he will face dismissal. The Claimant in this case failed to live up to the terms of

the Rule G Waiver by remaining drug and alcohol free. He tested positive after he had agreed that if he tests positive on any future test, he would be dismissed. Therefore, this Board cannot find any basis to sustain this claim. The claim will be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: 10/25/04


CARRIER MEMBER

DATED: 10/26/04