

NATIONAL MEDIATION BOARD
WASHINGTON, DC

SPECIAL BOARD OF ADJUSTMENT 986

NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK) – NORTHEAST CONFERENCE (“CARRIER”)

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE

NMB Case No. 283
Employee: Joshua Danis

Neutral Member: Barbara Zausner
Carrier Member: Richard Palmer
Organization Member: Jed Dodd

STATEMENT OF CLAIM

1- The Carrier’s decision to terminate the seniority of Joshua Danis for his alleged violation of Rule 21-A in connection with an unauthorized absence in excess of fourteen (14) consecutive days, is unjust, unwarranted and in violation of the Agreement.

2- As a consequence of the violation referenced in Part 1 above, Claimant Danis should be reinstated to service immediately with seniority unimpaired, compensated for all wage loss suffered and the dismissal letter of October 19, 2009 rescinded and removed from his personal record.

FINDINGS

Upon the whole record and on the evidence, the Board finds that the parties herein are Carrier and Employer within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

The Claimant in this case, Joshua Danis, was assigned as an Engineer Work Equipment “B” Brush Operator. His last day worked was September 29, 2009. He was informed by letter dated October 19, 2009, that he was “being considered as having resigned from service [and] will be removed from service and will be removed from all seniority rosters based on a Rule 21 – (A)” violation of the Agreement.

The Carrier cites the Claimant’s prior record of discipline which includes counseling, a letter of warning and a reprimand (waiver) for excessive absenteeism. These occurred between August 2007 and July 2009. The Claimant’s seniority dates back to August 1993. The Carrier contends he “absented himself from service for fourteen consecutive days without notification to his Supervisor.” (Brief). Rule 21-A is self-executing.

The Carrier agrees that the Claimant’s application for Family Medical Leave under the Act of that name was approved on June 5,

2009. However, the Claimant did not abide by the conditions set forth in the letter for using that leave. He did not tell his supervisor in advance that he needed to use leave and did not contact his supervisor during his absence. He did not demonstrate that circumstances beyond his control or physical condition prevented his contacting his supervisor.

The Organization cites the Claimant's long service as well as his "talent and skill set." It claims the Carrier failed to consider mitigating circumstances and that dismissal is inappropriate. The Organization does not dispute that the Claimant was absent during the period charged. It points out the Claimant was diagnosed with chronic pancreatitis in February and entered a 30 day treatment program for alcohol addiction in October, 2008. He currently participates in a weekly out-patient program and had been approved, effective June 5, 2009, for FMLA leave.

The Organization further notes that the Claimant is an experienced, diligent, hardworking employee who has established seniority in various classifications in the Track and B&B Departments. The Organization argues that the Carrier was aware of the Claimant's FMLA approval as well as his condition and the reasons for his absence.

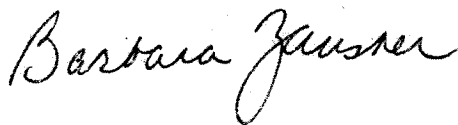
A majority of the Board concludes that the Claimant should be offered reinstatement without back pay, on a last chance basis and

conditioned on his compliance with recommendations of the EAP. This decision is based on the mitigating circumstances asserted by the Organization.

The Board recognizes the significance of Rule 21-A and its self-enforcing provisions. Nevertheless, each case has to be decided on its particular facts and circumstances. The Claimant did not simply walk away from his job. The Board notes that the Carrier was familiar with the Claimant's circumstances. Where, as here, an employee has a disability that might reasonably affect his ability to comply with leave provisions it is fair to consider that as a factor in mitigation of dismissal.

AWARD

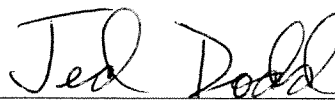
The Claim is sustained in part and denied in part. Claimant shall be returned to service on a last chance basis, without back pay but with seniority and all other benefits intact. His reinstatement is conditioned on his compliance with recommendations of the EAP.



Barbara Zausner, Neutral Board Member
May 27, 2010

 6/8/10

For the Carrier
Richard F. Palmer, Director – Labor Relations

 6/8/10

For the Organization
Jed Dodd, General Chairman