

Special Board of Adjustment 928

Award no. 481

Parties to the Dispute:

Brotherhood of Locomotive Engineers and Trainmen

and

National Railroad Passenger Corporation (AMTRAK)

(J. Daria – Claimant)

Statement of Claim:

Claim presented on behalf of the Brotherhood of Locomotive Engineers and Trainmen on behalf of BLE&T Local Chairman and Passenger Engineer James G. Daria for rescinding the imposed discipline of: "termination of your employment with the National Railroad Passenger Corporation" by letter dated November 22, 2005, under the signature of Howard J. Carter, Jr. Superintendent Operations New York Division. The Organization's claim further seeks: restoration to service with full seniority, vacation rights unimpaired, compensation for time lost, full credit toward vacation entitlement, full entitlement for health and welfare credits during the period held out of service, and clearing of Claimant's record as to any record relative to the alleged violation.

Findings:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934. Special Board of Adjustment 928 has jurisdiction over the parties and the dispute involved herein.

At the time of the incident that led to the suspension in this matter, Claimant was an Engineer and had been employed by the Carrier for approximately 22 years after nearly 12 years of service with another Carrier.

A review of the record shows that the following facts are not in dispute. Claimant was administered a Federally-mandated drug test on August 23, 2005. Claimant tested positive for marijuana metabolites. Claimant was served a Notice Holding Out of Service. On August 30, 2005, Claimant was sent a notice to attend an investigation on September 6, 2005, in connection with four charges related to the above positive drug test. The hearing was twice postponed, once by agreement and once at the Organization's request.

Claimant did not appear at the hearing and it was held in his absence on November 15, 2005. The Carrier notified Claimant in a letter dated November 22, 2005, that he was guilty of the presented charges and that he was dismissed.

The Organization argues that the Carrier committed a procedural error by denying the Claimant's request for an additional continuance. Further, the Hearing Officer pre-judged the matter and treated the investigation as a mere formality as part of a foregone conclusion.

The Carrier counters that Claimant was afforded a fair and impartial hearing that complied with the requirements of Due Process. Proper notice was given and Claimant was thereby aware of the hearing. By failing to appear at the hearing and avail himself to the opportunity to defend against the allegations, Claimant cannot now be allowed to claim that he was denied Due Process because he was not present at the hearing. Further, the record shows that the Hearing Officer conducted a fair hearing in Claimant's absence.

As to the merits of the instant matter, the Carrier points out that Claimant committed the infractions by testing positive for marijuana metabolites. Claimant had previously executed a Alcohol and Drug Waiver Agreement. Under the provisions of that Agreement, a subsequent positive test for a prohibited substance automatically results in a dismissal. According to the Carrier, the executed Waiver Agreement makes the instant inquiry a *fait accompli* and this Board is left with little to do but deny the claim.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

After a review of the record, the Board finds that there were no procedural defects which void the discipline. Claimant was duly notified of the investigatory hearing. The Organization's request for another continuance was properly denied where there were prior continuances and the medical necessity for the continuance was reviewed and found to be insufficient. While the Agreement and due process insure that investigatory hearings are held with Claimants and witnesses present, the failure of a Claimant to appear after being properly notified does not violate the Agreement or due process. The matter properly went to hearing with Claimant absent. There was substantial evidence of the positive drug test in the record to sustain the charges.

The inquiry before this Board next turns to the imposed discipline. Claimant signed a Waiver Agreement in March 2003. Under that Waiver Agreement, a subsequent positive test would result in dismissal. There is nothing in the record that shows the Carrier to be acting

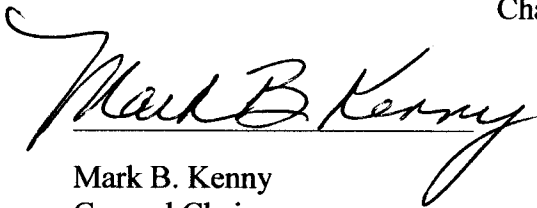
unreasonably, arbitrarily or capriciously by enforcing that Waiver Agreement and dismissing the Claimant. The imposed discipline did not constitute an abuse of the Carrier's discretion.

Award:

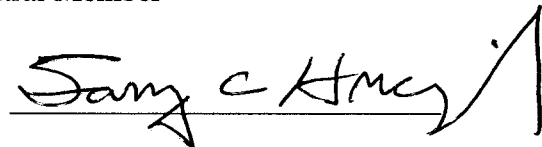
Claim is denied.



Brian Clauss
Chairman and Neutral Member



Mark B. Kenny
General Chairman
BLET
Organization Member



Larry C. Hriczak
Director, Labor Relations
AMTRAK
Carrier Member

Dated this 2ND day of JUNO 2008