

**Special Board of Adjustment 928**

Award no. 486

**Parties to the Dispute:**

**Brotherhood of Locomotive Engineers and Trainmen**

**and**

**National Railroad Passenger Corporation (AMTRAK)**

**(W. Mulhauser – Claimant)**

**Statement of Claim:**

Claim presented on behalf of the Brotherhood of Locomotive Engineers and Trainmen on behalf of Passenger Engineer Wade Mulhauser for rescinding the imposed discipline of: "termination of your employment with the National Railroad Passenger Corporation in all capacities effective immediately" as stated in the attachment to the discipline letter dated December 22, 2005, under the signature of General Superintendent – Central Division Travis Hinton for Don Saunders and with full compensation for time lost, full credit toward vacation entitlement and health and welfare credits during the period held out of work, 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 18 years after approximately 8 years of service with another Carrier.

On September 21, 2005, Claimant was sent a notice to attend an investigation on September 27, 2005, in connection with charges related to a failure to complete the Recommended Treatment Plan of the Carrier's EAP program.

The hearing was twice postponed and Claimant was notified to appear for a December 13, 2005 hearing. Claimant did not appear at the hearing and the Organization cited Claimant's inability to appear and requested a continuance. The request for

continuance was denied and a hearing was held. The Carrier notified Claimant in a letter dated December 20, 2005, that he was guilty of the presented charge and that he was dismissed.

The Organization argues a procedural violation with the charge because it did not adequately detail the non-compliant act or occurrence and rule violation that was the subject of the investigation. The Organization continues that the failure to grant a continuance was error because Claimant had a right to attend under the Agreement. To deny the request to continue was a violation of due process.

The Organization further argues that non-compliance with the EAP Program was not proven because the treatment counselor stated that Claimant was progressing. Moreover, Claimant had to deal with personal setbacks during his recovery period and affected his ability to address his addiction. Further, Claimant's revocation of the release of information to the Carrier cannot be seen as non-compliance when considered in context.

The Organization continues that the discipline is excessive because Claimant was making progress in treating his addiction and had been a long-time employee. When these factors are considered, the discipline of dismissal is excessive.

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.

As to the merits of the instant matter, the Carrier points out that Claimant committed the infractions failure to comply with the Alcohol and Drug Waiver Agreement that he executed on May 4, 2005. Under the provisions of that Agreement, Claimant agreed to comply with the recommendations of the Employee Assistance Program Counselor or designee. According to the Carrier, the executed Waiver Agreement makes the instant inquiry a foregone conclusion and this Board is left with little to do but deny the claim because the Claimant did not comply with the Employee Assistance Program.

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.

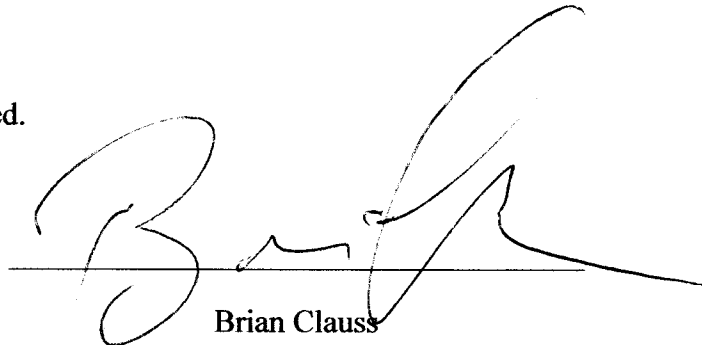
After a review of the record, the Board finds that there were no procedural defects which void the discipline. Claimant was duly notified of the investigatory hearing and it was twice continued. The Organization's request for another continuance was properly denied and the matter went to hearing with Claimant absent. While the statement of the counselor, that Claimant could not appear because it would affect his recovery, could be compelling, that is lost where the investigation is for non-compliance with the Recommended Treatment Plan. Further, the charge was sufficient to apprise Claimant of the nature of the violation under investigation, his failure to comply with the Waiver, and the act or occurrence which Claimant was accused of committing – failing to comply with the requirements of the Recommended Treatment Plan.

The evidence established that Claimant executed an Alcohol and Drug Waiver Agreement wherein he agreed to comply with the EAP Counselors and Recommended Treatment Plan. There is substantial evidence in the record of Claimant's failure to comply with the Recommended Treatment Plan.

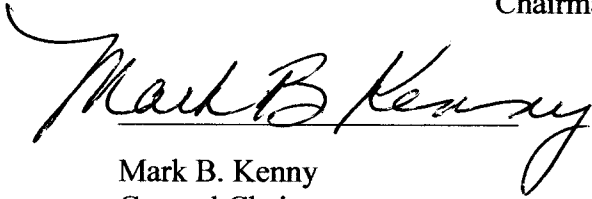
The inquiry before this Board next turns to the imposed discipline. Claimant signed a Waiver Agreement in May 2005 in which he agreed to comply with the requirement and recommendations of the counselors and the Recommended Treatment Plan. Under that Waiver Agreement, Claimant's failure to comply would have a certain consequence.. 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:**

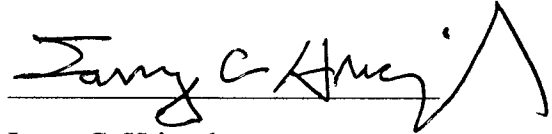
Claim is denied.



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 2<sup>ND</sup> day of JUNE 2008