

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44342
Docket No. MW-45127
21-3-NRAB-00003-180656**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(JOHN WEINLE (Member of Brotherhood of Maintenance
(of Way Employes Division IBT Rail Conference;
(Representing Himself**

PARTIES TO DISPUTE: (

**(National Railroad Passenger Corporation (AMTRAK) –
(Northeast Corridor**

STATEMENT OF CLAIM:

“I believe; like the Union suggested that I should have been put out on medical leave and continue with the programs that I am in until I am able to fit back into the business guidelines of what is suitable to being prescribed by a MD.”

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 is a military veteran who was diagnosed with depression and PTSD prior to coming into the Carrier’s service. As such, he has been prescribed several medications to treat these conditions, including medical marijuana. In February 2017, the Claimant tested positive for marijuana during a periodic testing event. The

Claimant was taken out of service and, as an alternative to an investigation and possible dismissal, was given the opportunity to admit his guilt and sign a waiver. The Claimant signed a waiver on March 23, 2017, admitting his violation of the following Alcohol and Drug Policy (7.3.3) prohibitions:

- 4.1.1: The manufacture, distribution, dispensing, sale, possession, use or presence in the body of illicit drugs or alcohol;
- 4.1.3: The use or possession of any controlled substance or alcohol prohibited by Federal and state regulations;
- 4.1.4: The use and/or possession on the person, on Amtrak property or in Amtrak-supplied lodging, of marijuana or marijuana paraphernalia, notwithstanding any statute, ordinance, regulation, or other law that legalizes or decriminalizes the use or possession of marijuana, whether for medical, recreational, or other use;
- 4.1.7: Reporting for duty or remaining on duty or on Amtrak property when an employee's ability to work safely is impaired by alcohol, controlled substances or illicit drugs.

In addition, the Claimant agreed to the following terms:

“I admit that I violated Amtrak’s Alcohol and Drug Policy as charged. I understand that I am being withheld from service without pay...pending my successful completion of treatment as recommended by the Employee Assistance Program Counselor...I agree to contact the EAP Counselor or Substance Abuse Professional within five days from the date I sign this waiver and follow the counselor’s recommendations. Should I fail to do so, I will accept discipline of dismissal for the above violation.”

The waiver included four requirements that the Claimant agreed to comply with. Requirement #4 concludes, **“I further understand that if at any time in the future I violate Amtrak’s Alcohol and Drug Policy, I will be dismissed from all Amtrak Service.”**

The Claimant began treatment with an EAP counselor, who recommended that he be admitted to an inpatient facility for treatment of an active substance abuse disorder. The Claimant refused to follow this recommendation, because the facility required him to stop all his prescribed medications, including marijuana. Thereafter, in June 2017, the Claimant’s counselor notified him that he had five days to accept the recommendation for inpatient treatment or be reported as noncompliant. On June 27,

2017, the Claimant informed the counselor that he would not accept the recommendation.

The Claimant's union representatives agreed to work with the Claimant. The EAP counselor attempted again to encourage the Claimant to accept inpatient treatment. On October 12, 2017, the counselor notified the Claimant that he had until October 13, 2017, to comply with the recommendation. Having not heard from the Claimant by October 15, 2017, the counselor notified the Carrier that the Claimant was non-compliant with the EAP Treatment recommendations. On October 19, 2017, the Carrier notified the Claimant that he had violated the terms of the waiver and the Carrier's Alcohol and Drug Policy and that he was consequently dismissed.

The Carrier contends that the Claimant's refusal to comply with treatment recommendations triggered one of the self-invoking terms of the waiver that the Claimant signed on March 23, 2017. The Carrier contends there is no dispute that the Claimant failed to comply with the EAP recommendation of inpatient treatment and thus, his dismissal was warranted under the terms of the waiver.

The Carrier also contends that dismissal was appropriate based on the Claimant's prior disciplinary record. The Claimant signed other waivers admitting his guilt in May 2013 and February 2016, in addition to the March 2017 waiver. This is the Claimant's third instance of discipline in less than five years. The Carrier also points out that the Claimant had less than ten years in its service.

The Carrier contends that the Claimant is merely seeking leniency, which is the prerogative of the Carrier. Where the Claimant's dismissal was automatic based on the waiver he signed, it was not arbitrary for the Carrier to choose not to offer leniency, and this Board should not disturb that decision.

The Claimant contends that he is a military veteran who was diagnosed with depression and PTSD prior to joining the Carrier's service. He points out that any medication he was taking was prescribed to him for treatment of those conditions, including medical marijuana. He denies using marijuana before reporting to work. The Claimant contends that he was reluctant to stop taking medication prescribed to him by his treating providers in order to enter an inpatient facility. He contends that he made a reasonable decision under the circumstances.

The Claimant asks that he be allowed to remain on a medical leave of absence while receiving treatment so that he can comply with the Carrier's rules in the future.

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 findings against the 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.

The record shows that the Claimant voluntarily signed a disciplinary waiver in which he agreed, among other things, to follow the EAP counselor's recommendations regarding treatment. The Claimant does not deny that the EAP counselor recommended inpatient treatment and that he refused to comply with that recommendation. As such, there is substantial evidence in the record of the Claimant's failure to comply with the terms of the discipline waiver.

Turning to the discipline imposed, the Claimant acknowledges that he signed a waiver which contained a provision accepting dismissal if he failed to comply with its terms. Although the Claimant believed he had good reason to refuse the recommended treatment plan, there is no dispute that he has refused the recommendation multiple times. The Claimant concluded that continuing use of medical marijuana is the best course for his health, but that continued use is currently incompatible with the Carrier's policies. In light of his short tenure with the Carrier, his previous disciplinary record, and his violation of the terms of the waiver, the Carrier's decision to uphold the terms of the waiver cannot be said to be arbitrary or unreasonable.

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 6th day of January 2021.