

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
)	Case No. 5
and)	
)	Award No. 4
NORTHEAST ILLINOIS REGIONAL COMMUTER)	
RAILROAD CORPORATION)	

Martin H. Malin, Chairman & Neutral Member
R. C. Robinson, Employee Member
J. S. Morse, Carrier Member

Hearing Date: November 17, 1997

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The ten (10) day actual suspension assessed Mr. R. Thomas for alleged violation of Rule Q on August 23, 1995 was arbitrary, capricious and on the basis of unproven charges (Carrier's File 08-13-223).
2. The Claimant's record shall be cleared of the charge leveled against him and he shall be paid for all wage loss suffered.

FINDINGS:

Public Law Board No. 5564, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On August 31, 1995, Carrier notified Claimant to report for an investigation on September 7, 1995. The notice charged Claimant with failing to call in prior to the start of his shift on August 23, 1995, in violation of Rule Q, Paragraph 1. Following several postponements, the hearing was held on October 3, 1995. On October 18, 1995, Carrier advised Claimant that he had been found guilty of the charge and assessed a ten-day actual suspension.

At the investigation, Claimant admitted that he did not work on August 23, 1995. He testified that he had his girlfriend call for him on that date. Claimant submitted a signed statement from his girlfriend stating that she called the office at 7:15 a.m. on August 23, 1995, but indicating that she did not know the name of the person with whom she had spoken. The Roadmaster testified that he received no call from or on behalf of the Claimant and that he had inquired in the office if anyone else had received such a call and no one had.

The Organization contends that Carrier failed to prove the charge, whereas Carrier contends that it proved the charge through the Roadmaster's testimony. The Organization also objects that the hearing officer did not render the decision to discipline the Claimant. In the Organization's view, because the case involved a conflict in credibility between the Roadmaster and the Claimant and his girlfriend, having someone other than the hearing officer decide the case deprived Claimant of a fair hearing. Carrier responds that it followed its usual practice and that the Agreement does not require that the hearing officer sign the discipline.

The Board has considered the record carefully. Carrier had the burden to prove the Claimant's guilt by substantial evidence. The record contains the Roadmaster's testimony that he received no call and that his inquiries found no one else in the office who received a call on Claimant's behalf. This testimony supports a reasonable inference that no one called to report Claimant's absence.

The record also contains a written statement from Claimant's girlfriend. The girlfriend did not appear as a witness and, thus, was not subject to cross-examination. On the property, the inference drawn from the Roadmaster's testimony was credited over the written statement from Claimant's girlfriend. As an appellate body, we defer to such on-property resolutions of conflicts in the evidence.

The Organization objects to such deference, however, because the hearing officer who observed the testimony and received the other evidence did not sign the discipline. The Organization cites several awards, including Third Division Award No. 31774, in which the Chairman of this Board sat as referee. In Award No. 31774, "there [was] no indication that the hearing officer made any findings of fact or was otherwise involved in the decision to dismiss Claimant . . ." Because there were issues of credibility of witnesses who gave conflicting testimony, the Board sustained the claim, holding that the claimant was denied a fair hearing when someone other than the hearing officer decided the case.


In the instant case, there too are credibility conflicts to be resolved. However, during handling on the property, Carrier

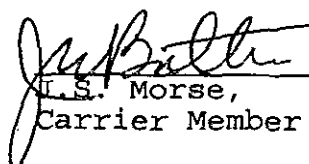
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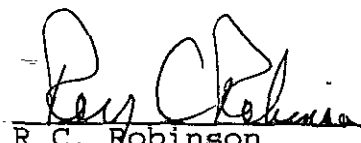
represented that the hearing officer did resolve the credibility conflicts and made recommendations to his superior who, based on a review of the transcript and the hearing officer's recommendations, issued the discipline. Thus, this case is unlike Third Division Award No. 31774 or similar awards. We find no due process violation in the instant case.

AWARD

Claim denied.


Martin H. Malin, Chairman

 12/17/97
J.S. Morse,
Carrier Member

 12-17-97
R.C. Robinson
Organization Member

Dated at Chicago, Illinois, December 10, 1997.