

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7357
AWARD NO. 9, (Case No. 10)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

**CP RAIL SYSTEM/DELAWARE AND HUDSON
RAILWAY COMPANY, INC.**

**William R. Miller, Chairman & Neutral Member
Timothy W. Kreke, Employee Member
Anthony Stillittano, Carrier Member**

Hearing Date: March 26, 2010

STATEMENT OF CLAIM:

- "1. The discipline [assessment of twenty (20) demerits and the resulting subsequent dismissal] imposed upon Mr. S. Abdu-Shahid on September 3, 2009, for alleged violation of GCOR Rule 1.15 involving alleged excessive absenteeism on July 27, 28, 29 and 30, 2009 was arbitrary, capricious, on the basis of unproven charges, excessive and in violation of the Agreement (Carrier's File 8-00695).
2. As a consequence of the violation referred to in Part 1 above, the aforesaid discipline shall be removed from Mr. S. Abdu-Shahid's record and he shall be reinstated to service with all rights restored and compensated for all lost wages."

FINDINGS:

Public Law Board No. 7357, 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 dispute were given due notice of the hearing thereon and did participate therein.

On July 31, 2009, the Carrier notified Claimant to appear for a formal Investigation on August 5, 2009, which was postponed and subsequently held on August 17, 2009, concerning in pertinent part the following charge:

"...The purpose of this investigation will be to determine your responsibility, if any, for your alleged violation of GCOR Rule 1.15 involving excessive absenteeism on July 27th, 28th, 29th & 30th, 2009....

The subject Rule in dispute is as follows:

"SAFETY RULES

General Code of Operating Rules (GCOR)

1.15 Duty - reporting or Absence

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be cause for dismissal."

On September 3, 2009, Claimant was notified that he had been found guilty as charged and he was assessed 20 demerits and dismissed due to the accumulation of over 60 demerits.

It is the position of the Organization that the Claimant was denied a fair and impartial Investigation because the Hearing Officer did not render the decision and the Charging Officer did render the decision. It argued that on that basis alone the Board should sustain the claim without even addressing the merits.

Additionally, the Organization argued that on July 27, 2009, Claimant experienced car trouble that disabled his vehicle. Upon learning the extent of the needed repair, he contacted Supervisor Harvey to inform him that he would be unable to report for duty that day, but would return to duty on July 28th. He was unable to make this call prior to the start of his shift, but called the Supervisor at the earliest opportunity. It further argued that later that day, the Claimant learned that he and his family were no longer welcome at the place they had been living. The Organization explained that with limited resources and only a minute or two remaining on his prepaid cell phone, Claimant spent the next two days (July 28 and 29, 2009) trying to find a place for his family to live. For fear of depleting the remaining time on his cell phone, he did not call Supervisor Harvey to report the need to be absent. Lastly, it argued that Claimant showed up for work on July 30th, therefore, he was not absent without authority for that date and further the record indicates he had a justifiable reason for being absent for the other three dates. It closed by asking that the discipline be set aside and the claim be sustained as presented.

It is the Carrier's position that on July 27, 28, and 29, 2009, Claimant failed to protect his assigned position, when he did not report for duty and failed to notify the Carrier. It argued that the testimony of Claimant on pages 22 and 23 of the Transcript confirms that he did not work on the aforementioned dates and he did not notify his immediate Supervisor that he would not be reporting for work.

It further argued that there were no procedural errors on its part and the Hearing was fair and impartial. It concluded that the discipline was appropriate and the 20 demerits tagged on to the additional 40 already earned by the Claimant necessitated dismissal, therefore, it requested that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Organization's allegation that Claimant was denied "due process" is found lacking substance in this instance.

There is no dispute between the parties that at the time of the incident Claimant was working assignment DHUTILITY 1 System Equipment Operator with assigned work location of Bluff Point Yard, near Plattsburg, NY, assigned hours 6:00 a.m. to 2:00 p.m. with rest days of Saturday and Sunday. The parties are in agreement that Claimant did not work his assignment on July 27th, 28th and 29th. Furthermore, there is no argument that Claimant did not call in advance of his July 27th shift that he would either be late or absent nor is there any dispute that he did not notify the Carrier he would not appear for work on either the 28th or 29th. The record is clear that the Carrier met its burden of proof that he was guilty as charged regarding July 27, 28, and 29, 2009, but not guilty in regards to July 30, 2009.

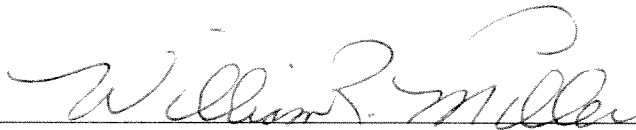
The only issue in dispute is whether or not there is a reason to mitigate Claimant's guilt or to adjust Carrier's discipline. The record verifies that on July 27, 2009, Claimant experienced wheel and brake problems on his personal vehicle, but he did not notify the Carrier until mid-afternoon that he could not make it to his assignment which started at 6:00 a.m. During that same telephone call Claimant also advised his immediate Supervisor he would be at work the following day, however, he did not appear until July 30th. Claimant testified that he did not appear for work on July 28th and 29th because he was forced to move out of his living accommodations.

The Board is not unsympathetic to the problems the Claimant experienced with the vehicular breakdown and his loss of housing for his family, however, there was no justifiable reason the Claimant could not have called his Supervisor on the early morning of July 27, 2009, and told him that his car was in the repair shop nor was there any valid reason that he could not have called prior to the start of his shift on July 28th and advised the Carrier that he could not make it to work. Claimant testified that he had limited financial resources, no access to a

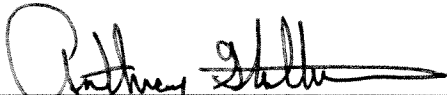

landline phone and only a few minutes left on his pre-paid cell phone which he needed for resolving a family crisis. That testimony lacks credibility because Claimant testified on page 27 of the Transcript that he moved into the Country Inn at Sidney, after being asked to leave his mother's home. It is reasonable to assume that if he could afford a motel, he could have afforded to either use a landline public or motel telephone to advise the Carrier as why he could not come to work. The Board has determined that the Claimant failed to protect his assignment and did not offer any substantive reasoning which mitigates his guilt or allows for an adjustment of discipline. Furthermore, review of the Claimant's disciplinary record reveals that as recently as April 21, 2009, (little over two months before the incident in dispute) Claimant had been absent without permission and was forewarned that his position was in potential jeopardy with 50 standing demerits, if he should have any further misconduct, and with the instant case the Claimant continued to fail to protect his employment. The Board finds and holds that the Carrier exercised discipline in a progressive and corrective nature to no avail and the discipline in this case was appropriate because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman


Anthony Stillito, Carrier Member
Timothy W. Kreke, Employee Member

Award Date: July 14, 2010