NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 28
and	)
	) Award No. 22
NORTHEAST ILLINOIS REGIONAL COMMUTER	)
RAILROAD CORPORATION	)
	)

Martin H. Malin, Chairman & Neutral Member
R. C. Robinson, Employee Member
J. P. Finn, Carrier Member

Hearing Date: January 7, 2009

STATEMENT OF CLAIM:

(1) The discipline of dismissal imposed upon Mr. D. Ward for his alleged failure to protect his assignment on October 27, 2006 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier File 08-7-540).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority unimpaired, his record cleared of the charges leveled against him and compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 5564 upon the whole record and all of 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 October 30, 2006, Carrier instructed Claimant to report for a formal investigation on November 8, 2006, concerning his alleged failure to protect his position on October 27, 2006, in violation of Rule Q, Paragraph 1. The hearing was postponed to and held on November 30, 2006. On December 13, 2006, Carrier notified Claimant that he had been found guilty of the charge and dismissed from service.

The record reflects that Claimant was scheduled to report for work at 7:00 a.m. on October 27, 2006. Claimant did not report for work and he did not call in until 7:17 a.m., i.e., after his shift had started.

Claimant testified that he was en route to work when his car's electrical system shut down due to a defect in the alternator which left him stranded on the expressway. Claimant further testified that the battery in his cell phone was dead and therefore he was unable to call in. Claimant maintained that this occurred at 4:17 a.m., that he went to a pay phone and called for a tow truck and returned to his car to await the tow truck. He expected the tow truck to arrive in sufficient time to enable him to report to work in a timely manner. However, according to Claimant, the tow truck did not arrive until around 7:00 a.m. Once the two truck jump started his car, Claimant was able to plug his cell phone into the car to charge it and call in his absence.

Claimant's story on its face is highly improbable. He offered no explanation as to why he was driving to work three hours prior to his scheduled start time. Furthermore, Claimant's own cell phone records contradicted his story. Whereas Claimant maintained that his cell phone battery was dead, precluding him from calling in, his cell phone records showed that he received an in-coming call at 4:46 a.m. which lasted two minutes. Moreover, it was Claimant's responsibility to ensure that he had reliable transportation to make it to work and that he had a reliable means to call in if he were going to be late or absent. Claimant testified that the alternator problem was a recurring one. In other words, he assumed the risk that his car would break down precluding him from protecting his job. That is a risk that Claimant may not shift to Carrier. We conclude that Carrier proved the charge by substantial evidence.

The Organization contends that Claimant was dismissed for an infraction for which he already had been disciplined. The record reflects that on November 3, 2006, the Roadmaster met with Claimant and discussed Carrier's attendance requirements and the procedures for requesting time off. However, the record makes clear that the conference was not disciplinary in nature. Accordingly, we are unable to accept the Organization's double jeopardy argument.

Ordinarily, a single incident of a failure to protect an assignment would not justify dismissal. However, Claimant's record was abysmal. Claimant was hired on April 15. 2002. On June 13, 2003, he was assessed a letter of reprimand for violating Rule Q. Subsequently, he was assessed one-day deferred, three-day, and ten-day suspensions for similar violations. On June 30, 2004, he was dismissed for another violation of Rule Q. On August 30, 2004, Claimant was reinstated on a leniency basis, subject to a two-year probationary period. Claimant returned in a furloughed status. He was recalled to service on September 23, 2004, and furloughed again on November 19, 2004. He was recalled on May 5, 2005, furloughed on October 27, 2005, recalled June 22, 2006, furloughed on July 28, 2006, and recalled on October 19, 2006. The incident in question occurred just over one week after Claimant's most recent recall and after Claimant had rendered less than ten months of actual service since his leniency reinstatement. Claimant has clearly demonstrated that he is incapable of being a reliable employee who protects his assignment. Given his prior reprimand, suspensions and dismissal, all for the same offense, we cannot say that the penalty imposed was arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

J. P. Finn
Carrier Member

R. C. Robinson, Employee Member
Employee Member

Dated at Chicago, Illinois, May 8, 2009