

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5905

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

)

) Case No. 9

)

) Award No. 8

)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. M. Gevaudan, Carrier Member

Hearing Date: April 20, 2000

STATEMENT OF CLAIM:

1. The Carrier's decision to assess discipline in the form of sixty (60) demerits upon Welder F. A. Otto for his alleged violation of Maintenance of Way Rule 1.22 in connection with absences on January 18, 19, 21, 22, 25 and 26, 1999 was arbitrary and capricious (System File SAC-11-99; UM-11-99).
2. As a consequence of the violation referred to in Part (1) above, the sixty (60) demerits shall be stricken from Claimant's record and he shall be allowed to return to work immediately

FINDINGS:

Public Law Board No. 5905, 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 February 5, 1999, Carrier notified Claimant to report for an investigation on February 11, 1999, concerning his "allegedly violating Maintenance of Way General Rule 1.22 in connection with your absences on the following dates: January 18, 1999 - off 8 hours; January 19, 1999 - off 8 hours; January 20, 1999 - off 8 hours; January 21, 1999 - off 8 hours; January 22, 1999 - off 8 hours; January 25, 1999 - off 8 hours; January 26, 1999 - off 8 hours." The hearing was held as scheduled. On February 16, 1999, Carrier advised Claimant that he had been found guilty of the charges and had been assessed sixty demerits which, when combined with demerits already on Claimant's discipline record brought his total to 120 demerits. Pursuant to Carrier's

policy that an employee who accumulates 100 demerits is dismissed from service, Carrier dismissed Claimant.

The facts are not in dispute. At the time of the incidents in question, Claimant was serving a two year sentence of imprisonment for Class D Felony Battery. Claimant was eligible to work under the Lake County (Indiana) Work Release Program, but Carrier declined to participate in the program. Claimant requested and was granted vacation from January 4, 1999 to January 15, 1999. Thereafter, apparently out of vacation time, Claimant's absences became unauthorized and the investigation followed.

There is no question that Claimant's absences were unauthorized. It has long been recognized that incarceration is not a valid excuse for absenteeism. *See, e.g.,* NRAB, First Division Award No. 24986; NRAB, Second Division Awards Nos. 7777, 9986, 10808; NRAB, Third Division Award No. 29778.

The Organization contends that Carrier was responsible for Claimant's absences because Carrier refused to participate in the work release program. Nothing in the Agreement required Carrier to participate in the work release program. Participation would have required, among other things, that Carrier obtain approval for Claimant to operate a motor vehicle, work overtime, change his work schedule or go anywhere other than the place of employment. It also would have required Carrier to report to the program director if Claimant was injured, if Claimant received visitors at the place of employment, if Claimant was tardy or absent, and if Claimant consumed alcohol or drugs. Carrier's refusal to participate was reasonable.

The Organization contends that the punishment imposed was excessive. It maintains that Claimant should not have been dismissed. However, the punishment imposed was not dismissal; it was the assessment of sixty demerits. It was the combination of that punishment with the sixty demerits already on Claimant's record that resulted in Claimant's dismissal.

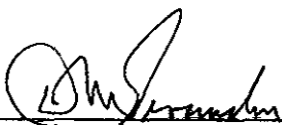
The Board does not review penalties de novo. Our role is limited to determining whether the penalty imposed was arbitrary, capricious or excessive. Considering all of the facts and circumstances revealed in the record, we are unable to say that the assessment of sixty demerits was arbitrary, capricious or excessive.

AWARD

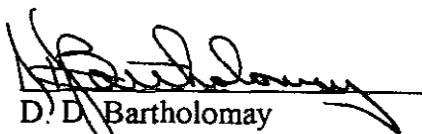
Claim denied.



Martin H. Malin, Chairman



D. M. Gevaudan
Carrier Member



D. D. Bartholomay
Employee Member

Dated at Chicago, Illinois, May 8, 2000.