PUBLIC LAW BOARD NO. 2960

AWARD NO. 35

CASE NOS. 48 & 49

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Low-boy Operator A. L. Workman and thirty (30) day suspension of Material Yard Foreman M. J. King was without just and sufficient cause and on the basis of unproven and disproven charges. (Organization's File 2D-2280 and 2D-2281; Carrier's Files D-11-24-66 and D-11-24-85)

(2) Claimants Workman and King shall be allowed the remedy prescribed in Rule 19(d).

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the employees and the Carrier involved in this dispute are respectively employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

On August 14, 1981, the Carrier directed a notice of investigation to Claimant Workman. It read in pertinent part as follows:

"You are hereby directed to appear for formal investigation as indicated below:

PLACE: Asst. Div. Mgr.-Engr. Office
600 1st St. NW
Mason City, Iowa 50401

TIME: 10:00 AM
DATE: August 18, 1981
CHARGE: Your responsibility in connection with suspected violation of Rule G, hit and run accident at Fond du Lac, Wisconsin, and conduct unbecoming a Transportation Company employee on August 11, 1981."

Claimant King's notice read as follows:

"You are directed to appear for formal investigation as indicated below:

PLACE: Asst. Div. Mgr.-Engr. Office
600 1st St. NW
Mason City, IA 50401
TIME: 11:00 AM
DATE: August 18, 1981
CHARGE: Your responsibility in connection with incident at Fond du Lac, Wisconsin in connection with suspected violation of Rule G, and suspected failure to report an accident and leaving the scene on August 11, 1981 at Fond du Lac, Wisconsin."

The investigation was convened in Mason City, Iowa, on August 26, 1981, and recessed and reconvened August 28, 1981, and September 3, 1981. On September 8 Workman was dismissed and Claimant King was assessed a 30-day suspension.

A certain amount of background is necessary before discussing the merits. Claimant Workman, on the day in question, was assigned as a "low-boy" operator. Claimant King accompanied him. They preceded from Bolan, Iowa, to Fond du Lac, Wisconsin, with a semi-tractor and trailer to pick up a dump truck and a front-end loader. It is apparent that they arrived at the Fond du Lac shops after closing. The Claimants testified that they loaded the front-end loader and Mr. King, now driving the dump truck, proceeded to "Stretch-Eat and Sleep" Motel where they planned on sleeping. The "Stretch-Eat and Sleep" Motel is a restaurant-motel and truck stop. It is undisputed that on the way to the hotel, they turned the corner at Highway 45 and Scott Street. The record also

indicates that at shortly after 10 p.m., a local citizen called the Fond du Lac Police Department, and according to his written statement, that:

> "I had just left a friend's house at 10 p.m., I was traveling west on Scott Street. I was about half a block east of Hy 45 when a yellow North Western semi-tractor and trailer with a cat-front end loader came to the intersection of Hy 45 and Scott Street. He did a rolling stop, turning right from Hy 45 to Scott Street. He didn't make a wide enough swing causing the rear wheels of the trailer to go up on the curb, catching the aluminum light pole. I had stopped at this time to avoid a collision with him, the pole fell on Hy 45 blocking three-quarters of the road. I went over the railroad tracks to a nearby tavern to call the police. As I poofed (sic - phoned) I saw the dump truck come up to the intersection and go around the pole, and proceed west on Scott Street.

The record also indicates that Fond du Lac City Police Officers Huber and Lichman received a call over the radio at 10:06 regarding the accident and arrived at the scene (three blocks away) at 10:08 p.m. One of the officers (Huber), after clearing the light pole, proceeded to the truck stop, after receiving a report that the trucks matching the description given by the citizen witness were there. He testified that he arrived 12 to 15 minutes after 10 p.m. The other officer (Lichman) stayed at the scene sweeping up glass and upon advice from Huber that the trucks had been located, proceeded to the truck stop arriving there, according to his testimony, at 10:15 p.m. There is no dispute that when the police arrived at the motel/truck stop that the Claimants were seated in the restaurant area of the truck stop and had to be paged.

It is also undisputed that at or by the time the police officers had confronted the Claimant, they both had alcohol on their breath. Workman later had a blood alcohol level of .17 percent (legally intoxicated in the State of Wisconsin). The Claimants both admitted to having been drinking, but both contend they didn't drink until after they arrived at the

truckstop. The Claimants testified that they arrived at the truck stop at 9 p.m. and drank with friends in the parking lot before proceeding to the restaurant. Workman testified that he had three beers and had opened the fourth can of beer which he had not finished and had five drinks from a bottle of "Jack Daniels" whiskey. Both Claimants deny having been involved with the accident with the light pole. Moreover, King testified that he had to drive around the light pole when he turned the corner. There is no dispute that upon arrival at the truck stop (whatever time that was) the Claimants were off duty. It should also be noted that Mr. Workman was reinstated in March, 1983, and thus, the claim for him is only for time lost.

The Board views the charges as twofold in respect to Mr. Workman. He was charged in connection with his responsibility with, one, the accident, and two, Rule G, i.e being under the influence of alcohol while on duty and operating a Company vehicle. The Board will consider the first portion of the charge as it relates to Workman. The evidence on the Rule G violation will next be considered after which the evidence on Mr. King will then be discussed.

In respect to the accident, the Board believes that there is substantial evidence to conclude that Workman's truck struck the light pole. While the citizen's written statement is technically hearsay evidence, there is a recognized exception to the "hearsay rule" based on unavailability. His statement, therefore, must be admitted and given some weight. The disciplinary hearing was held in Mason City, Iowa, the witness as a private citizen who lives within Fond du Lac, Wisconsin, is not within the Carrier's control to compel him to testify. We would not be inclined to give much weight to his testimony if it was not as specific as it was or if the

recollection of the timing of the calls to the police and the police response did not coincide as they do. Moreover, the statement deserves weight because there is no apparent motive for this disinterested citizen, who had no known connection with the employees or the railroad, to lie. His testimony also corresponds with what was found later. The trucks were found at the truck stop which was down the road in the same direction as he had indicated the trucks had proceeded. It is highly unlikely that he could have seen another Chicago, North Western truck with a Cat on it followed by a dump truck some time later. It is quite significant that a fresh scrape was found near the right rear side of the truck driven by Claimant Workman which corresponded to the point of impact as described by the citizen witness and quite significant that a piece of metal (from the light pole according to the police officer) was found on the truck or the truck bed.

The Union argument fails to overcome the substantial evidence. They argue that Workman or King could not have been involved in the accident at 10 p.m. becuase they were already at the truck stop at that time. The Claimants testified that they arrived and checked into the hotel about 9 p.m. They met with the friends in the parking lot, consumed the alcohol and then proceeded to the restaurant. In support of this assertion, they submit copies of the report which reportedly show that they went off duty at 9 p.m. and a written statement from an employee at the truck stop which indicated that he saw them in the restaurant at 9:15 p.m. The statement read:

> "About quarter after nine I got to the Stretch Truck Stop and I stopped at the station part first, then I come into the restaurant. I am certain that he, L. Workman, was sitting in a booth, that's the only place he ever sits when he comes. And from the restaurant I went back to the station part to punch in for work. After I punched in, I went up to the front and got my pump pads and was standing up by the desk for about ten minutes when a cop came and asked Lynn who was driving an orange truck with a Cat on the back. I

described the guy to the cop and told him that I had seen the guy in the restaurant when I came in before. Lynn then paged for the North Western driver to come up front. The North Western driver Workman came out first and talked to the cop--they talked to each other and then went out to the truck. I'm darn certain that Al and the other guy were in the restaurant when I went to work."

The Board concludes that the Carrier was correct in not giving the Cliamant's testimony and the statement of the truck stop employee more weight than the citizen witness or the testimony of the officers. First, when Foreman King's work report is reviewed, it is quite apparent that although it indicates "nine" (p.m.) as his off-duty time, that a previous pencil entry of 10 p.m. had been erased. Similar erasures appear at other points on the report, i.e, total overtime. The total overtime figure was erased and changed from five hours to four hours which would correspond to the 9 p.m. off-duty time instead of a 10 p.m. off-duty time. Therefore, based on this, it would appear that the Claimants did not arrive at the motel and go off duty until 10 p.m., and it was thus, quite plausible, for them to have been at the scene of the accident around the time it occurred. Second, the statement of the truck stop employee which places them at the truck stop at 9:15 p.m. says nothing about their whereabouts at 10 p.m. It does not indicate that they stayed there until the time the officers arrived. This thus, does not completely exonerate the Claimants because it still leaves open the possibility that they could have been at the truck stop at 9:15 p.m. but left and went to the shops, loaded the Cat, and picked up the dump truck and returned to the motel. It would also appear that such a task could have been accomplished in this time period, because Foreman King's report indicates that loading the Cat and travelling to the motel took 30 minutes. When all the evidence is considered and all the pieces are meshed together, this is apparently what happened. The evidence is substantial enough to erase the presumption of innocence due all employees when accused of wrongdoing.

In respect to Mr. Workman, the remaining charge is Rule G. As previously mentioned, there is no dispute that at the time the police arrived, the Claimant was already intoxicated. The ciritical question is then how much time elaspsed between his arrival at the truck stop and the arrival of the police and whether there was enough time for Workman to reasonably have consumed enough alcohol to become intoxicated to the level of .17 percent. Mr. Workman claims to have gone off duty at 9 p.m. and drank after that. If the Board could believe that, we would agree with the Union in that the Rule G violation was not established. However, as previously noted above, it cannot be concluded that he was off duty at 9 p.m. as he was operating the truck at approximately 10 p.m. when the accident occurred. The Board should note that even accepting the fact that he was operating the truck at 10 p.m., the possibility is not precluded that he consumed enough liquor between his arrival at the truck stop and the confrontation by police to become intoxicated. However, the Claimant did not claim to having done so. Thus, this defense is not available to him. He claims to have consumed alcohol after going off duty at 9 p.m. This not being true, we are left to conclude, lacking an adequate explanation for his intoxication, that the Claimant was in fact intoxicated while on duty. Had he testified that he went off duty at 10 p.m. and consumed the liquor before the police arrived, we would agree that a Rule G violation would have been difficult to establish.

The Board should also note affidavit from the Fond du Lac City Attorney indicated that he could not prove that the Claimants were under the influence while operating their vehicles; this has not been given much weight. The fact that the evidence was insufficient to prosecute Mr. Workman has no direct bearing under the circumstances of the case.

The burden of proof of criminal cases is beyond a reasonable doubt which is a much stricter standard than the Carrier's required to sustain. Based on the substantial evidence test, the Carrier sustained the burden of proof in respect to Mr. Workman.

In respect to Claimant King there is no evidence that he was under the influence of alcohol while on duty. He was not taken into custody by police nor was there any blood test to determine if he was under the influence of alcohol. The officers did testify that he had alcohol on his breath but this is not conclusive, standing alone, that he was in violation of Rule G. It is apparent that because his penalty was only for 30 days, he was disciplined only for failing to report the accident and leaving the scene.

It is the Board's opinion that to prove that King was guilty of leaving the scene or failing to report the accident that the Carrier would have to establish that he saw Workman's truck hit the light pole or that he had some other knowledge of the incident. A careful review of the record reveals that such knowledge cannot be established. There is no doubt that King was following behind Workman; however, King contends that there were three or four vehicles between them and that the distance between them was as much as two blocks. He also testified that there may have been a lapse of 45 seconds to two minutes between the time that Workman's truck went around the corner and when his truck went around the corner. Even the written statement of the citizen witness leaves open the possibility that King was far enough behind Workman that he might not have observed Workman strike the pole. The citizen witness, in his statement, indicated that after he saw the semi truck strike the pole that he proceeded over the railroad tracks to a nearby tavern and as he parked the car, he saw the

dump truck go around the pole. It is difficult to tell, based on this statement, how much time elapsed between the time the truck hit the pole and when he parked his car at the tavern. The burden is on the Carrier to show, under these circumstances, that King was close enough to Workman's truck to observe him cause the accident. However, the citizen's statement is not specific enough, particularly because it is hearsay nature, to prove that King saw the accident and thus, does not preclude the possibility that King, as he testified, did not see the accident.

Thus in respect to King, it is concluded that the Carrier did not show substantial evidence that he had knowledge of the accident and therefore, it cannot be concluded that he was guilty of failing to report the accident or leaving the scene of that accident. It should also be noted that King testified that Workman did not mention the accident to him at the truck stop.

AWARD

The claim involving Workman is denied. However, the claim involving King is sustained to the extent indicated in the Opinion. The Carrier is hereby ordered to comply with this award within 30 days.

Gil Vernon, Chairman

J. D. Crawford, Carrier Member

H. G. Harper, Employe Member

Dated: June 28, 1983