NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 21
	)
and	)
	) Award No. 20
UNION PACIFIC RAILROAD COMPANY	)

Martin H. Malin, Chairman & Neutral Member
R. B. Wehrli, Employee Member
D. A. Ring, Carrier Member

Hearing Date: August 26, 1999

STATEMENT OF CLAIM:

1. The dismissal of E. R. Pierce was in violation of the Agreement, based on unproven charges and an abuse of discretion.

2. Claimant Pierce must be compensated for all wage losses incurred during his wrongful dismissal; and all charges and references to this incident must be expunged from his personal record. (System File J-9848.56/11377700)

FINDINGS:

Public Law Board No. 6089, 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 December 12, 1997, Carrier notified Claimant to report for an investigation on December 22, 1997, concerning his allegedly having purchased a bottle of Michelob Lite Beer on or about November 3, 1997, while on duty, in possible violation of Rule 1.5. The hearing was postponed to and held on January 8, 1998. On January 26, 1998, Carrier informed Claimant that he had been found guilty of the charge and was dismissed from service.

The Organization contends that Carrier violated the Agreement because it failed to provide Claimant with a precise statement of the charges and because it prejudged Claimant's guilt, as evidenced by its withholding Claimant from service pending the investigation. The Organization further argues that Carrier violated Claimant's due process rights by relying on a written statement from the store owner instead of producing the owner as a witness subject to cross examination. On the merits, the Organization maintains that Carrier failed to prove the charge by substantial evidence.

Carrier contends that it afforded Claimant a fair and impartial hearing. Carrier maintains that the statement of charges was sufficiently precise, that it acted in accordance with Rule 48(o) of the Agreement and that it acted properly in relying on the store owner's written statement because the store owner refused to appear as a witness and because Carrier lacks subpoena power to compel the attendance of witnesses who are not its agents. Carrier argues that it proved Claimant's guilt by substantial evidence.

We shall consider the Organization's procedural arguments first. The notice of investigation advised Claimant of the precise nature of the charge against him. It provided him with the date and location of the alleged incident, the specifics of the alleged misconduct, i.e. purchasing a beer while on duty, and the name of the Special Agent who was the source of the information leading to the allegations. It further cited the specific Rule Claimant was alleged to have violated. The notice certainly contained ample information to apprize Claimant of the charge against him and enable him to prepare a defense.

We find no evidence of pre-judgement resulting from Carrier having withheld Claimant from service pending investigation. Rule 48(o) authorizes Carrier to withhold an employee from service pending investigation for serious or flagrant violations. Certainly purchasing an alcoholic beverage while on duty is a serious violation. Carrier acted in accordance with Rule 48(o) in this case.

The incident was alleged to have taken place at the Oregon Trail Travel Plaza in Durkee, Oregon. A Carrier Special Agent testified that he interviewed the owner of the store who advised the Special Agent that he sold Claimant a can of beer on the date in question. The Special Agent also testified the store owner advised that he would not appear at the hearing to testify because doing so would pose a hardship to him as a small business owner. The Special Agent obtained a written statement from the store owner which was introduced at the hearing. The store owner was not a Carrier agent and, lacking subpoena power, Carrier had no method of compelling his attendance at the hearing. We find no violation of Claimant's due process rights by Carrier's introduction of the written statement at the hearing.

Accordingly, we turn to the merits of the case. Recognizing that Carrier could validly introduce that store owner's written statement at the hearing is not equivalent to finding that the statement proved the charge. The question remains whether Carrier proved the charge by substantial evidence.

The record reveals that, on the date in question, Claimant was present at the store with two Track Machine Operators. The only evidence that Claimant purchased a beer while on duty consisted of the store owner's written statement and the Special Agent's testimony as to oral statements from the store owner and one of the Track Machine Operators. The store owner's written statement and his oral statement to the Special Agent are hearsay. Although hearsay is admissible and may be considered as evidence of guilt, it must be considered with considerable caution where the declarant, in this case the store owner, is not available as a witness and, as a result, is not subject to cross examination. Such statements, standing alone, generally do not constitute substantial evidence. *See* Third Division Award No. 10191; First Division Award No. 19525.

Both Track Machine Operators testified that they did not observe the Claimant with any beer. The Special Agent testified that when he interviewed the Track Machine Operators, one indicated that he did not see the Claimant with any beer but the other reluctantly advised that he did see the Claimant with a beer. However, that Track Machine Operator testified at the hearing that he did not see the Claimant with any beer and denied advising the Special Agent anything to the contrary. We note that the Special Agent did not take a written statement from the Track Machine Operator. The record thus leaves a dispute between the two witnesses as to what the Track Machine Operator said to the Special Agent.

Carrier portrays this case as requiring an evaluation of the relative credibility of the witnesses and urges that the Board defer to the credibility determinations made on the property. Generally, as an appellate body, we defer to credibility findings made on the property. However, this case does not present a garden variety credibility contest.

Even if we credit the Special Agent's testimony as to the statement made by the Track Machine Operator, we are left with a record in which the sole evidence of guilt consists of hearsay statements by two individuals. The first individual did not appear at the hearing. The second individual testified at the hearing that he did not see the Claimant in possession of a beer. The only other witnesses, the other Track Machine Operator and the Claimant, each testified that the Claimant did not have a beer on the date in question. Thus, the record is devoid of any direct evidence of guilt. Indeed, all of the direct evidence points to innocence. The hearsay evidence is not so reliable as to allow us to consider it to be substantial in the face of the direct evidence which contradicts it.

Accordingly, we conclude that Carrier's findings of guilt are not supported by substantial evidence. The claim must be sustained.

AWARD

Claim sustained.

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ORGANIZATION MEMBER'S RESPONSE

TO

CARRIER MEMBER'S DISSENT

TO AWARD NO. 20 OF PUBLIC LAW BOARD 6089
(Referee Martin A. Malin)

Initially, it would appear the Carrier Member is inferring that the Referee was the only member of this three-member public law board to conclude the Carrier's findings of guilt are not supported by substantial evidence. For the record, it should be recognized that the Organization member agrees with the Referee, *completely*.

Regarding the Carrier's argument concerning the credibility issue, this is the same tired argument used on the property and before this Board, which has simply been rehashed. Instead of putting forth, again, the detailed arguments of the Organization on this issue, one needs only read the following excerpt from the Award which succinctly and appropriately rejects the Carrier's arguments and position:

> "...the record is devoid of any direct evidence of guilt. Indeed, all of the direct evidence points to innocence. The hearsay evidence is not so reliable as to allow us to consider it to be substantial in the face of the direct evidence which contradicts it." (Underscoring added)

Stating it simply, we should never be persuaded to accept hearsay evidence that is contradictory to direct evidence as the Carrier desired here.

In another attempt to rehash a rejected Carrier argument, the Carrier Member indicates:

> "It is also apparent that the Referee overlooked the offer of the Hearing Officer to recess the hearing so the Store Owner could be contacted to answer questions concerning the statement. However, playing its usual games, the Organization representatives declined the offer to recess and made all kinds of allegations about the statement in the subsequent handling."

It is disappointing that the Carrier Member charges the Referee with *overlooking* a particular point of the Carrier's position while at the same time he wants everyone to *ignore* all the facts associated therewith. That is, when the Carrier introduced this argument, the Organization correctly pointed out that the Carrier's position was expressed without mentioning the fact that the BMWE hearing representative did, in fact, attempt to contact the store owner for information by phone a short time earlier only to find that the store owner was not at his place of business as expected. There were two (2) investigations

held that afternoon. The first involved another written statement from the store owner addressing a different charge unassociated with this case. As already pointed out, when the BMWE hearing representative attempted to call the store owner in that case, he was not available. Hence, the representative correctly concluded there was no logical reason for attempting to call the individual again when such an attempt made during the previous hearing, which ended literally minutes earlier, was unsuccessful.

In any event, one should remember that it is the Carrier's responsibility, in connection with satisfying its burden of proof, to take the initiative in obtaining witnesses and evidence in support of its charges. It cannot shift that responsibility to the Organization representative and, then, claim foul if he is unable to chase down the witness purportedly supporting the Carrier's charge.

Finally, as for the Carrier's remark in this regard that the representatives were guilty of "playing its usual games," the record speaks for itself and illustrates that such an unprofessional comment, as well as the direction thereof, must be categorized as unfounded and inappropriate.

In conclusion, it is apparent the Carrier inappropriately determined that the unnotorized statement purportedly prepared by the store owner was adequate evidence to dismiss an employee even though there was direct evidence to the contrary. The Carrier was wrong. Further, its attempt, now, to support that ill-advised determination by trying to shift its responsibility to others and charging the Referee with overlooking illogical points, must be rejected.

Respectfully submitted

R. B. Wehrli
Organization Member