

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 20
)
)
) Award No. 21
)

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 thirty-day suspension 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 suspension; and all charges and references to this incident must be expunged from his personal record. (System File J-9848.57/11377700)

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 misused a gasoline credit card when purchasing donuts and batteries for employees on or about October 31, 1997, while on duty, in possible violation of Rules 1.1, 1.3, 1.4, 1.9, 1.19, and 1.25. 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 that he was assessed discipline at Level 4 of Carrier's UPGRADE, which

was equivalent to a thirty-day suspension.

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.

The arguments advanced in the instant case are almost identical to the arguments advanced in Case No. 21, Award No. 20, which involved the same Claimant and alleged transactions several days later at the same location. In Award No. 20 we rejected the Organization's procedural arguments. We reject them in the instant case for the same reasons. The notice stated the charges with a considerable degree of specificity and certainly allowed Claimant to prepare a defense. Claimant was properly withheld from service under Rule 48(o), and the use of a written statement from the store owner did not violate Claimant's due process rights.

In Award No. 20, we sustained the claim because Carrier failed to prove Claimant's guilt by substantial evidence. As in Award No. 20, in the instant case Carrier relies on the hearsay written statement of the store owner and the Special Agent's testimony as to the store owner's oral statements. As we indicated in Award No. 20, that hearsay standing alone cannot amount to substantial evidence. We further observe that, unlike Award No. 20, in the instant case there is agreement by the Special Agent and the Track Machine Operators that neither Track Machine Operator at any time implicated the Claimant.

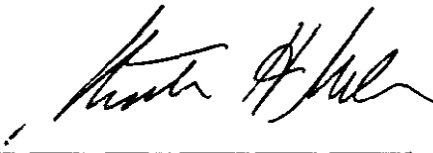
However, the record in the instant case contains a critical piece of evidence that was not present in Award No. 20. Specifically, the record contains the credit card receipt that, on its face, bears Claimant's signature. Claimant did not deny that the signature on the credit card receipt was his; instead he sought to evade questions about the signature. The credit card receipt, as printed out from the register, shows a purchase by the Claimant on October 31, 1997, charged to the credit card, of 29.472 gallons of unleaded gasoline for \$43.00, and \$2.85 for "Other." Hand written next to "Other" is the word, "Donuts." The Special Agent testified that during his interview of the store owner, the store owner retrieved the receipt and wrote the word "Donuts" on it.

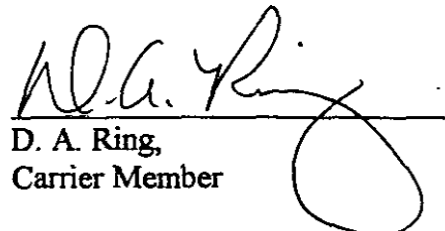
The Organization attacks the veracity of the credit card receipt because of the handwritten addition of the word, "Donuts." However, even without the handwritten addition, the receipt clearly reflects that the Claimant purchased something in addition to gasoline for the truck, using the gasoline credit card issued for the truck.

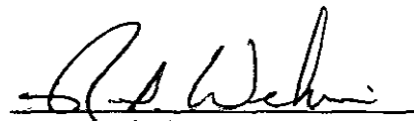
The credit card receipt is a business record and, as such, it is entitled to considerable weight. It provides direct evidence that the Claimant misused the credit card. Furthermore, the Claimant offered no explanation for the \$2.85 purchase. The written statement from the store owner corroborates the inference from the credit card receipt that Claimant used the credit card to purchase items that were unrelated to the truck. Consequently, we find that Carrier proved Claimant's guilt by substantial evidence.

AWARD

Claim denied.



Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

R. B. Wehrli
Employee Member

Dated at Chicago, Illinois, February 26, 2000.