

BEFORE PUBLIC LAW BOARD NO. 6239

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

CSX TRANSPORTATION

Case No. 11

STATEMENT OF CLAIM:

Appeal of dismissal of Claimant P. D. Massari as a result of investigation held August 9, 2000, in connection with Claimant's alleged conduct unbecoming an employee, dishonesty, theft, the unauthorized sale or disposal of company material, and the unauthorized use of the company vehicle.

FINDINGS:

Claimant P. D. Massari was employed by the Carrier as a vehicle operator at the time of this claim.

On July 26, 2000, the Carrier notified the Claimant to appear for a formal investigation to determine the facts and place responsibility in connection with his having been at Advance Iron and Metal Company, Inc., at Cleveland, Ohio, with Carrier vehicle 764957 on Friday, June 16, 2000, as well as on Saturday, June 17, 2000, at which time he allegedly sold Carrier material as scrap. The Carrier charged the Claimant with conduct unbecoming an employee, dishonesty, theft, the unauthorized sale or disposal of Carrier material, and the unauthorized use of a Carrier vehicle. The Claimant was to be withheld from service pending the outcome of the investigation.

The hearing took place on August 9, 2000. On August 29, 2000, the Carrier notified the Claimant that he had been found guilty of all charges and was being assessed discipline of dismissal from the service of the Carrier.

The Organization filed a claim on behalf of the Claimant, arguing that the case has several procedural errors. The Organization argues that the Carrier violated Rule 25 when it did not give the Claimant written confirmation as to why he was being held out of service and when it did not properly hold the hearing within thirty days. The Organization also argues that the Carrier's original charge letter presented at the hearing is different from the one that the Claimant and Organization received, resulting in another procedural defect. The Organization further contends that the Claimant was not afforded a fair and impartial hearing. The Organization also contends that the evidence produced by the special agent on the case and presented at the hearing was circumstantial and that there were no written statements or eyewitnesses presented to prove that the Claimant was guilty of the offense with which he was charged. The Organization argues that the Claimant could not be identified by Carrier witnesses as the individual who sold the alleged Carrier material to the Advance Iron and Metal Company, Inc. on June 17, 2000. The Organization maintains that since the Carrier's witnesses did not witness any of the alleged violations, their testimony cannot be used as evidence against the Claimant.

The Carrier denied the claim. The Carrier contends that the Claimant was properly notified regarding why he was being removed from service. The Carrier also argues that it coincided the issuance of its charge letter dated July 26, 2000, with the conclusion of the special agent's investigation and the receipt of the agent's report, which was in the required time frame. The Carrier maintains that it could not take any action against the Claimant until the special agent's investigation was concluded. The Carrier maintains that the Claimant's right of due process was not violated and that he and the

Organization had ample opportunity to prepare for the hearing. The Carrier contends that the special agent's testimony and evidence are clear, to the point, and conclusive as to the Claimant's guilt. The Carrier argues that a June 17, 2000, receipt from the Advance Iron and Metal Company, Inc., which was produced during the investigation, shows that a "Paul" received \$447.60 for 14,920 pounds of steel, which turned out to be steel tie plates and identified as the items stolen from the Carrier. The Carrier further argues that a police officer witness presented first-hand information regarding the Claimant's presence at the scrap dealer on June 16 and provided a positive physical identification. In addition, the Carrier contends that the owner of the scrap yard also provided a positive identification that the Claimant was present at the scrap yard on June 16. The Carrier maintains that the Organization is "grasping at straws" to prove the Claimant's innocence.

The parties being unable to resolve the issues, this matter came before this Board.

This Board has reviewed the timeliness issue raised by the Organization, and we find it to be without merit. The record reveals that the manager had the knowledge of the alleged wrongdoing on July 10, 2000, and the rules require that the hearing be scheduled to begin within thirty days from that date. Since the hearing was held on August 9, 2000, this Board finds that the Carrier complied with the rule that requires the hearing to be scheduled within thirty days. This Board also rejects the other procedural arguments raised by the Organization.

With respect to the merits, this Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Claimant was guilty of conduct unbecoming an employee and dishonesty and theft by

selling Carrier material as scrap on June 16 and 17, 2000. It is clear that the record contains some direct and a great deal of circumstantial evidence that points at the Claimant having been at the scrap yard with Carrier scrap on June 16. However, the sale at issue took place on June 17, and the evidence of the Claimant's involvement in that sale is simply not enough to prove that the Claimant actually was involved in the sale and obtained money in exchange for Carrier property. The eyewitness identifications of the Claimant are from the previous day, not from the date that the actual wrongful transaction took place.

Moreover, there are statements in the record from individuals who have no relationship to the Carrier that attest to the fact that the Claimant was in Erie, Pennsylvania, on June 16 and 17, 2000. One of those statements is from the post commander of the Veterans of Foreign Wars of the United States in Erie, Pennsylvania.

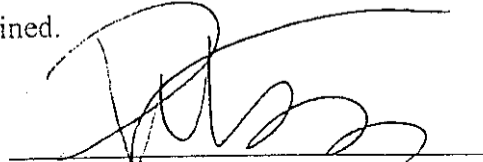
In order to discharge an employee, particularly one with twenty-five years of seniority with the Carrier and an unblemished disciplinary record, the Carrier must come forward with sufficient evidence to support its case that the Claimant engaged in serious wrongdoing. As stated above, although there is some circumstantial evidence that the Claimant may have been in the area, there was not a positive identification by anyone that it was the Claimant who actually sold the Carrier scrap in exchange for money and personally profited from it. Those allegations form the basis of the Carrier's charges against the Claimant. Even the person who saw the truck drive onto the scale on June 16, 2000, was unable to identify the Claimant as that person. With respect to the date of the sale, June 17, 2000, nobody identified the Claimant as the person who sold the Carrier's

scrap.

Since the Carrier failed to produce sufficient evidence to support the acts of alleged wrongdoing on the part of the Claimant, this claim must be sustained in its entirety.

AWARD:

The claim is sustained.



PETER R. MEYERS
Neutral Member