

BEFORE PUBLIC LAW BOARD NO. 7566

CASE NO. 170

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2018-00033
Claimant: T. HJELSAND

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The dismissal imposed upon Mr. T. Hjelsand for alleged violation of USOR General Rule C- Alert and Attentive and USOR General Rule T-Sleeping was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2018-00033 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant T. Hjelsand's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement. Additionally, the Claimant shall have his seniority restored, his accredited months of service and all benefits that were not received during his time out of service.”

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

The Carrier maintains that substantial evidence has shown that Claimant was asleep in the Hi-Rail. The photographs were forwarded from his Foreman to the Production Supervisor, who then forwarded them to Carrier officials. There was no harm by the hearing officer refusing to rule on the objection. Further, the Organization could have questioned the foreman via the telephone because he was available.

The Organization claims a procedural error when the hearing officer refused to rule on the objection and deferred it to the reviewing party. Further, on the merits, there is no substantial evidence in the record. There is an unattributed statement and photographs that have absolutely no authentication. Moreover, Claimant disputed whether he was on duty when the photographs were taken. According to the Claimant, those photographs were probably taken when he was off-duty and waiting in the truck to return to the hotel. Additionally, the Organization argues that photographs show the sun up when taken.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

In PLB 7566 Award 55, this Board addressed a similar situation and sustained the Organization's claim:

A review of the record indicates that there were three passengers in the truck that Claimant was driving on the date in question. A Carrier official read their statements into the record. He did not witness the event. One witness did appear at the hearing but had no knowledge of any damage to the vehicle- other than somebody telling him that it was out of alignment.

Based upon a review of the evidence, the record establishes that the Claimant was denied his right to a fair and impartial investigation because there was no opportunity for the Claimant to cross-examine the witnesses the Carrier relied upon in support of the charges against him. Further, Claimant had no recall of anything out of the ordinary or any incident while driving in the yard. The only witness to testify stated that Claimant was doing 20 mph in the yard and crossed the tracks while travelling too fast. He was unaware of any damage to the vehicle before the event. His only knowledge of damage was a comment by a coworker

Similar to Award 55, the Carrier presented testimony of Production Supervisor Nelson as the only witness at the hearing. He was not at the scene of the alleged infraction and had no personal knowledge of the incident. He received two photographs from Foreman Schock and an email detailing the incident.

The Organization raised an objection to the evidence due to the basic foundational issues. Mr. Nelson also testified that Mr. Schock had prepared a handwritten statement about the incident, but it could not be located. Mr. Nelson did not know when the photographs were taken and the photographs had no time stamp or date. Further, an examination of the photographs indicated that one of them might have been taken during daylight hours. Despite all these questions about the authenticity of the evidence, the hearing officer noted the objections, but refused to rule on the objections.

This Board initially notes that Carrier's argument, that Mr. Schock was available by phone and could have testified about the photographs had the Organization called him as a witness. The Organization does not have the burden of calling witnesses to establish an infraction. The failure to call a witness with specific knowledge of the infractions is not a failure of the Organization, rather, it is a failure of proof.

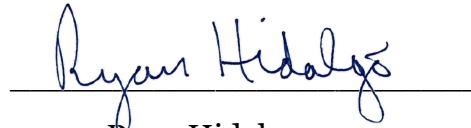
The Organization raised a number of objections about the authenticity of the documents. The hearing officer deferred the ruling to this Board. This Board finds that the evidence is insufficient to establish substantial evidence of the violations. There are a number of questions raised by the Organization that were unaddressed at the hearing -- such as when the photographs were taken and whether Claimant was on duty or waiting to return to the hotel. These questions could easily have been resolved had Mr. Schock been called as a witness and established the date, time, and location of the photographs.

The only thing in evidence are photographs that are unknown in date, time, and location and an email statement. There was no opportunity to question Mr. Schock about his statement and the specifics of the statement were refuted by Claimant. One of the issues involved the time of day when the photographs were taken, because sunlight is visible in the photographs. Mr. Nelson speculated it was the lights from the truck, but it was mere speculation because he was not there when the photograph was taken. Mr. Schock could have testified. He did not and the Carrier's decision to terminate is limited to the evidence of record. The evidence fails to establish substantial evidence of the cited infractions.

Claim sustained.
In Dissent:



John K Ingoldsby
Carrier Member



Ryan Hidalgo
Organization Member



Brian Clauss
Neutral Member

Dated: 12-18-20