

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41880
Docket No. MW-41938
14-3-NRAB-00003-120247

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. P. Webster by letter dated April 18, 2011 for alleged violation of EI 21.1 Lodging Procedures (General), EI 21.4, EI 21.4.2, EI 21.5.2, EI 21.6, EI 21.6.1 and MOWOR 1.6 Conduct in connection with charges of dishonest conduct and violation of the corporate lodging policies at CLC facilities in Gillette, Wyoming from December 13, 2010 through February 8, 2011 and at a CLC facility in Mitchell, South Dakota from December 24, 2010 through January 3, 2011 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D070-8/10-11-0331 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Webster shall now receive the remedy prescribed by the parties in Rule 40G.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Carrier asserted that the Claimant, who was a Machine Operator, allegedly used a corporate CLC Lodging Card during December 2010 and January and February 2011, at a Company-provided lodging facility in an inappropriate manner, and because of that, charges were brought against the Claimant.

On March 14, the Carrier directed the Claimant to report for a formal Investigation on March 23, which was mutually postponed until March 31, 2011, concerning, in pertinent part, the following charge:

“. . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged dishonest conduct as BNSF employee when you improperly used the corporate lodging facility in Gillette, WY from December 13, 2010 through February 8, 2011, and the improper use of CLC Lodging card when you stayed at the Thunderbird Lodge in Mitchell, SD from December 24, 2010 through January 3, 2011 for your personal use while not working an assigned position.”

On April 18, 2011, the Claimant was notified that he had been found guilty as charged and was dismissed.

The Board notes that this is the first of two discipline cases involving the same Claimant before this tribunal.

It is the position of the Organization that the Investigation was not held in a timely manner because the Carrier did not hold the Hearing within 15 days of its first knowledge of the alleged incidents. It further argued that the same allegations against the Claimant were made in Third Division Award 41881 and there was no practical reason for not combining the two cases except for the fact that the Carrier was attempting to pile on charges. It asks that the discipline be set aside without reviewing the merits.

Turning to the merits, the Organization asserted that the Claimant was a hardworking, career employee who had worked for the Carrier for 34 years and had never been trained on the relevant Rules regarding the use of rooms and under no circumstances did he intend to defraud the Carrier of any money. It argued that the Claimant offered to pay full restitution and was remorseful for his mistake. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that evidence was presented during the Hearing that shows that the first knowledge that an Officer of the Carrier had of the Claimant's actions was on March 14, 2011, when Division Engineer Turnbull became aware of the Claimant's alleged activities; thus, the Investigation being called for on that same date was timely. Secondly, it argued that the two Investigations were not combined even though they involved the same type of allegation because the instant Notice of Investigation concerned the Claimant's actions in the Gillette, Wyoming, and Mitchell, South Dakota, area whereas the other Investigation concerned his activities in the Olive Branch, Mississippi, and Springfield, Missouri, area and because those geographical areas are hundreds of miles apart it was deemed they should be handled separately. It further argued that there was no attempt on the Carrier's part to "pile on" the discipline. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted that the record evidence shows that during the period covered by the charges, the Claimant had stayed at the Gillette facility on a total of 30 days and at the Mitchell facility on a total of 11 days;

stated differently, he had stayed at Company-provided lodging on 41 unauthorized days between the two facilities. Division Engineer Turnbull testified at the Investigation that the Claimant was not even working on any of the days involved and it was uncontroverted that the Claimant resides in Gillette; and even if he had been working, which he was not, he would not have been authorized to obtain lodging at the Gillette facility because it was his place of residence and headquarters point.

As for the 11 days in Mitchell, the Carrier argued that the Claimant admitted that he was not there on Company business, but rather was there to see his mom for Christmas. Furthermore, unchallenged records submitted by the Carrier showed that during a majority of the days that the Claimant stayed at the lodging facilities during the period involved, he was actually on vacation. It reasoned that it is absurd to suggest that the Claimant did not understand that he could not stay at corporate lodging facilities while on vacation and/or not working at his home location. It concluded that the Claimant's actions amounted to dishonest behavior and rose to the level of a dismissible offense. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board thoroughly reviewed the record of evidence and will first address the Organization's procedural argument that the Carrier did not hold the Hearing within 15 days of its first knowledge of the alleged incidents. Testimony was presented by Division Engineer Turnbull during the Investigation to prove that the first knowledge that an Officer of the Carrier had of the Claimant's alleged activities was on March 14, 2011. Division Engineer Turnbull's testimony was not effectively refuted. The Board is not persuaded that the Hearing was held in an untimely fashion. Additionally, the Organization argued that the instant case should have been combined with Award 41881 because both cases involved the same alleged violation. That argument is not without some merit, but there is no showing that because the two cases were not combined that the Claimant was denied a "fair and impartial" Investigation or that his "due process" Agreement rights were violated.

Therefore, the dispute will be resolved on its merits. The evidence presented during the Investigation substantiated that during the period covered by the charges, the Claimant stayed at the Gillette corporate lodging facility on a total of

30 days and at the Mitchell lodging facility on a total of 11 days for a total of 41 days. The record further shows that none of the 41 stays was authorized by the Carrier and the Claimant was not working on any of the days involved. Furthermore, the unchallenged record showed that during a majority of the days the Claimant stayed at the lodging facilities he was actually on vacation. During the Investigation, the Claimant was questioned as follows:

“Debra Smith: With regard to the allegation that you stayed in Corporate Lodging during the timeframe of December 13 through and including February the 8th, staying at not only the Gillette CLC lodging but also Thunderbird lodging in Mitchell, SD, would you please give me an explanation of the events and if you did or did not stay in those.

Patrick Webster: Yeah, with exception the 4th, 5th and 6th of January I didn't, I, I did stay at the Corporate Lodging.

Debra Smith: Why did you stay at the Corporate Lodging?

Patrick Webster: I thought you could.

Debra Smith: Were you on vacation during the timeframe of December 13th through January the 7th.

Patrick Webster: Yes.

Debra Smith: During that time period did you ask anybody's permission to stay at this Corporate Lodging facility?

Patrick Webster: No.

Debra Smith: What about the time that you were in South Dakota? What was the reason that you were staying in South Dakota and using the Corporate Lodging facility?

Patrick Webster: Actually I went back there to see my mom for Christmas and I didn't even know Mitchell had a Corporate Lodging there, but I, all the motels were filled up so as a last resort I called Corporate Lodging and found out they did have one and I did stay there.” (Emphasis added.)

The Claimant's only defense for staying at the Corporate Lodging facilities while not working and/or on vacation was that he thought he could do it. The record is uncontroverted that the Claimant resided in Gillette, and even if he had been working (which he was not), he would not have been entitled to obtain lodging at the Gillette facility on any of the 30 days, because Gillette was his place of residence and headquarters point. Additionally, there is nothing in the record that would suggest that the Claimant had any grounds to believe that he could use corporate lodging while on vacation or visiting his mother.

In the aforementioned testimony the Claimant admitted that his stays at the corporate lodging facilities in Gillette and Mitchell were not for Company business and that he had not requested permission or received authorization from any Carrier Officer to use company credit for his personal hotel stays.

The Claimant at the time of the incident had approximately 34 years of service. It is not plausible to believe that a veteran employee who had worked in the field thought he could stay at corporate lodging without permission while not working. The Claimant's admission of his actions and lack of a believable defense amounts to a tacit confession of guilt. Substantial evidence was adduced at the Investigation so as to warrant the conclusion that the Carrier met its burden of proof that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. As stated above, at the time of the offense, the Claimant had approximately 34 years of service, and during that period of time, he was assessed formal discipline on nine prior occasions. Those assessments included: one formal reprimand, three censures, one 10-Day Record Suspension, one 20-Day Record Suspension, two 5-Day Actual Suspensions and one previous dismissal. The instant violation is also considered to be a stand-alone dismissible offense under the Carrier's disciplinary policy. Therefore, the Board finds and holds that the discipline will not be disturbed

because it was neither contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of June 2014.