

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41883
Docket No. MW-41993
14-3-NRAB-00003-120290**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. S. Robles by letter dated June 7, 2011 for alleged violation of EI 21 Lodging Procedures in connection with alleged violation of BNSF lodging policies on April 19 through 21, 2011, when you allegedly ‘. . . reserved 16 single-occupancy rooms when compliance with BNSF policy would have required only 3 single-occupancy and the remainder as double-occupancy room reservations, while working as a Foreman on TUCX0005 in Alliance, Nebraska.’ Was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-26/10-11-0432 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Robles 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.

At the time of the alleged incident the Claimant was working as a Foreman and was responsible for making hotel room reservations for his crew members. It was alleged that he improperly reserved too many single occupancy rooms for the latter portion of April 2011, and because of that, charges were brought against the Claimant.

On April 28, 2011, the Carrier directed the Claimant to report for a formal Investigation on May 4, which was concluded on May 13, 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 violation of BNSF lodging policies when you allegedly reserved 9 single-occupancy rooms at the Alliance, Nebraska Holiday Inn Express, April 24 - 29, 2011, when compliance with BNSF policy would have required only 3 single-occupancy rooms for the foreman on your gang, and when you allegedly reserved a room for yourself and did not stay in the reserved room on Tuesday, April 26th, while working as a Foreman on TUCX0005 in Alliance, Nebraska. BNSF company officer first knowledge of the alleged violation of company policy was Thursday, April 21st.”

On June 7, 2011, the Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a three-year Review Period.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation for multiple reasons, such as the adding of dates outside of the charge letter during the actual Hearing and the new charge made during the

Investigation that the Claimant had improperly left his Company-reserved room on April 26, thereby costing the Carrier additional money while he returned home. Simply put, the Organization asserted that the Carrier tried to pile on trumped-up charges, which showed that the Hearing was patently unfair, and because of that it, asks that the discipline be set aside without reviewing the merits.

Turning to the merits, the Organization argued that the record shows that the Carrier did not meet its burden of proof. It argued that it was not refuted that the Claimant reserved all rooms for business purposes and that he complied substantially, if not strictly, with the requirement that he document the same. In summation, it argued that the evidence showed that the Claimant:

*** Had a valid reason to book the allegedly “extra” single rooms that he did.**

*** Properly documented the lodging arrangements made (even if not on the prescribed bureaucratic form, which he had no knowledge of, was not proven to have been trained upon the use of, and had apparently not been using all along anyway, without issue).**

*** Properly advised the members of his gang to cancel any single rooms that they could not validly use, in accordance with the Carrier’s policy (which placed such cancellation responsibilities completely upon the employee whose room was involved and not upon the Foreman).**

Lastly, the Organization argued that the Carrier cannot assert a lack of knowledge regarding the Claimant's practices of booking rooms because the record shows that the Claimant did nothing different in this instance than he had done for many prior months with no complaint from the Carrier. Therefore, penalizing the Claimant at this late date without ever instructing the Claimant to handle his room reservations in a different manner was not justified and is patently unfair. Additionally, it asserted that if the Carrier had proven the charges, which it did not do, the assessed discipline was excessive because there was no proof that the Carrier was financially harmed. The Organization requested that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that there were no procedural errors in the handling of the Claimant's case and the Organization has not shown that it did anything that prejudiced the Claimant's contractual rights. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted that the evidence shows that the Claimant made more single room reservations than he should have. It argued that it is clear in the Engineering Instructions that all employees, except the Foreman and Assistant Foreman, should have double occupancy rooms, and despite the fact that the Claimant understood that requirement, he went ahead and booked too many single rooms for employees who should not have been afforded single occupancy. It reasoned that because of that violation it properly disciplined the Claimant in a corrective manner and in accordance with its progressive discipline policy. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the record of evidence and will first address the Organization's procedural arguments. The Organization argued that during the Investigation, the Hearing Officer attempted to build upon the charges by a discussion of other dates that were not covered by the Notice of Investigation. Our review of the transcript reveals that the Organization's argument is not without some merit. However, our examination of the June 7, 2011 discipline letter does not show that the Claimant was assessed discipline for any time period that was not covered by charges. Therefore, the Board finds that in the instant case the Claimant was not deprived of his "due process" Agreement rights, nor were there any other technical violations that rose to the level so as to warrant setting aside the discipline. Nonetheless, the Board does exercise its right to forewarn the Carrier that in the future it should keep its review to the time period set forth in its Notice of Investigation, because an expansion of charges could, under some circumstances, indicate an unfair effort to pile on charges and deprive the Claimant from being able to mount an adequate defense, which might lead to setting aside discipline on a technical basis. However, the instant case will be resolved on its merits.

The Carrier alleged that the Claimant had violated its lodging policies when he used a Carrier account to reserve nine single occupancy rooms at a Holiday Inn Express during the period of April 24 through April 29, 2011, when he should have only reserved three single occupancy rooms for two Foremen and one Assistant Foreman with all other rooms being reserved as double occupancy for the remainder of the crew. Other charges were made, including the allegation that the

Claimant reserved a room for himself but chose not to use the room; however, the record established that the Claimant was only found guilty of having reserved too many single occupancy rooms. The testimony of Carrier Officer M. Lott established that the Claimant should have reserved three singles and seven doubles. His testimony further indicated that the Claimant did not use the proper form for making hotel reservations for his gang, but instead listed the crew members individually on a blank piece of paper that he gave the hotel. The Claimant specifically testified:

“Sergio Robles: Yeah, but I make the reservations and they, the guys know that they have to double up. I state that in my briefings every morning on Mondays. ‘You guys all double up. You know, you know who's in the singles and who is not.’ And they put their name on there.” (Emphasis added.)

The Claimant and the Organization asserted that no single rooms ended up being used by those with no right to them. The Carrier acknowledged in the Investigation transcript that it had no information to counter that statement. Additionally, during the on-property handling of the claim there was no contention that the Claimant's error cost the Carrier any money. The record further substantiated that on April 22, Carrier Officer Lott was aware of the number of rooms that the Claimant had set aside for the period of April 24 through April 29, but did not choose to discuss the matter with the Claimant.

The Board is persuaded that the Claimant erred when he booked too many single rooms, which amounted to eight rather than nine as alleged in the Notice of Investigation. And it was careless on his part to rely on his crewmembers to double up – which they may or may not have done, because the record is devoid of that information. However, the Board is troubled by the fact that the Carrier made no effort to correct the situation even though it had prior knowledge that the employees were actually occupying the rooms. We are further troubled by the fact that there was no showing that anyone improperly occupied a single room; nor was there any evidence submitted to show that the Carrier was financially harmed. As said before, in the final analysis, we find that the Claimant booked too many single rooms for his crewmembers for the period of April 24 through 29, 2011, but there was no showing that any of those rooms were actually occupied by individual employees rather than on a double occupancy basis.

The only issue remaining is whether the discipline was appropriate. At the time of the incident, the Claimant had approximately 20 years of service with one active Level S Record Suspension on his disciplinary record. The Claimant violated a portion of EI 21, but there was no showing of ill intent on the part of the Claimant to harm the Carrier; nor was there any showing that the Carrier was unintentionally harmed by the Claimant's actions. Therefore, the Board finds and holds on a non-precedential basis as a consequence of mitigating circumstances that the discipline assessed was excessive and contrary to the intent of the Carrier's Policy for Employee Performance Accountability (PEPA). Accordingly, it is hereby reduced to a "Formal Reprimand."

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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