

PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

CSX TRANSPORTATION, INC.

Case No. 54

Statement of Claim:

1. Appeal of the May 16, 2004 dismissal of Production Trackman J. Latham (ID No. 518238) as a result of the April 26, 2005 investigation concerning the January 18, 2005 charge of occupying lodging facilities at the Carrier's expense using [his] CLC lodging card at the Red Roof Inn, Jessup, MD, without authority, between December 6, 2004 and December 8, 2004 [System File A04846305/12 (05-0594) CSX].
2. That J. Latham shall be placed back into service and reimbursed for any loss of wages due to the discipline assessed, and all matter relative to the investigation shall be removed from Mr. Latham's personnel file.

Background:

Claimant Jackie A. Latham was hired by the former Baltimore & Ohio Railroad Company on August 8, 1977. In November 2004, he was working as a production trackman with floating gang 6DEN on the Baltimore Service Lane, with a regular schedule of Monday through Thursday, 6:30 a.m. to 4:30 p.m. Claimant's home was in Massachusetts. Members of floating gangs are provided living expenses, company-sponsored lodgings and travel accommodations during their regularly assigned work week.

On November 29, Claimant was displaced from his position with Gang 6DEN by K.M. Hill, and placed on furlough beginning November 30. Claimant subsequently attempted to displace to another gang under Roadmaster D.W. Bush. He contacted Bush

on the morning of Monday, December 6, 2004, and asked for directions to the yard office at Jessup. Bush, however, had been instructed by Engineer Track D.R. Daniels to instruct Claimant to contact Daniels, and not to allow Claimant to work until Claimant had spoken with Daniels. Daniels testified that when Claimant contacted him the morning of December 6, he removed Claimant from service pending a police investigation into a matter involving Claimant that had occurred in Cumberland, Maryland the week before. Daniels stated that he did not discuss with Claimant where he was staying. Later in the week, Daniels informed Claimant that based on the police investigation there would be a formal disciplinary investigation of the matter,¹ and Claimant would continue to be held out of service.

The investigation for the Cumberland Holiday Inn matter was held on January 4, 2005, and during the hearing some of Claimant's testimony raised Daniels's suspicions, causing him to request Claimant's records from the Carrier's CLC company. The records indicated that Claimant had occupied Carrier-sponsored lodgings at the Jessup, Maryland Red Roof Inn from December 5 to December 8, 2004. By letter dated January 18, 2005, the Carrier instructed Claimant to attend an investigation on February 1, 2005:

to develop the facts and place responsibility, if any, in connection with information ... wherein you had been occupying lodging facilities at the Carrier's expense using your CLC lodging card at the Red Roof Inn, Jessup, MD, without authority, between December 6, 2004 and December 8, 2004.

In connection with the above, you are charged with conduct unbecoming an employee of CSX Transportation, fraud and theft. Your actions as indicated above appear to be in possible violation of CSX Transportation Engineering Department CLC Lodging policy, as well as in possible violation of CSX Transportation Operating Rules General Regulations GR-2....

¹ The matter ultimately was presented to this Board for final decision in Award No. 53.

After five postponements at the Organization's request, the investigation was held on April 26, 2005. At hearing, Claimant denied that Daniels had taken him out of service on December 6, testifying:

Mr. Daniels' statements are untrue. I was instructed by Mr. Bush to call ... Mr. Daniels.... I called Randy Daniels immediately. Randy Daniels informed me that there was a situation that had occurred at the Holiday Inn in Cumberland, Maryland. And he said ... the CSX police were investigating and for me not to go to work until I heard from him.

Q: So, what did you think your status was from December 6th until [December] 8th?

A: I was waiting to hear from Mr. Daniels. I just followed his instructions.

...

Q: And when Mr. Daniels told you you couldn't go to work until you heard from him, you thought you could still stay at the CLC?

A: He told me to wait until I heard from him. And that was his instructions, so I waited.

(Car. Exh. B at 20 - 21.) Claimant testified that he called Daniels every day thereafter, and that he only became aware that he was being taken out of service on December 8, 2004, when Daniels told him there would be a formal investigation. Claimant therefore checked out of the Red Roof Inn on December 8. Claimant stated that 2004 was his first year working on floating gangs, and:

Well – like I said earlier, it was my first year on the system, and being on the road. I was so far away from home. I mean, when [Daniels] told me to wait until I heard from him, I followed his instructions.

(Car. Exh. B. at 28.)

The Carrier's General Regulation GR-2 in pertinent part prohibits employees from engaging in dishonest conduct. By letter dated May 16, 2005, the Carrier found Claimant guilty of the charges against him, and dismissed him from service, stating: "Based on your prior personal record ... and the proven offences[sic] in this instance and in light of your previous repetitive offense (discipline letter dated January 18, 2005), it

has been determined that the appropriate measure of discipline is dismissal....” Claimant had been assessed a thirty-day actual suspension by letter dated January 18, 2005, for a similar violation of GR-2.²

The Organization appealed Claimant’s dismissal by letter dated May 28, 2005. After the matter was discussed in conference on July 14, 2005, the Carrier issued a final declination of the appeal by letter dated July 18. Having been unsuccessful in resolving the matter on the property, the parties have presented it to this Board for final decision.

Carrier’s Position:

The Carrier contends that Claimant was afforded a fair and impartial hearing. In response to the Organization’s claim that it did not receive the original charge letter, the Carrier argues that the letter was copied to the Organization’s General Chairman, and the Organization requested several postponements of the investigation, and therefore must have had notice of the charges. In response to the Organization’s assertion that the Carrier improperly failed to produce material the Organization requested under Rule 24, the Carrier argues that Rule 24 does not apply to Rule 25 investigations, and it is not required to reduce testimony to documentation prior to the investigation itself.

The Carrier further argues that the record demonstrates Claimant’s guilt. Claimant occupied the Red Roof Inn in Jessup, Maryland, at the Carrier’s expense, from December 6 to December 8, 2004. Daniels testified credibly and repeatedly that he told Claimant on December 6, 2004, that Claimant was removed from service. The Organization’s claim that Claimant had no wrongful intent in staying at the Inn but rather followed instructions given him by Daniels, who did not direct Claimant to vacate the

² This violation was the subject of the investigation Daniels informed Claimant of on December 6 and 8, 2004, and which ultimately was presented to this Board, which upheld the thirty-day suspension imposed on Claimant in Award No. 53.

Inn, is without merit. As Daniels testified, he was not aware Claimant was occupying Carrier-sponsored lodging when he spoke to Claimant on December 6.

According to the Carrier, Claimant violated GR-2 and committed a fraudulent act by occupying the Red Roof Inn room from December 6 to 8 without Carrier authority, knowing that he had been removed from service. The Carrier argues that Claimant's explanation for his conduct is not credible, and that Claimant must have recognized that he was out of service on December 6, 7 and 8 because he was not working and was not being paid. Claimant was a long-term employee and must have known that employee use of CLC lodging, other than in the Carrier's service, was prohibited. "[I]t is disconcerting that an employee of Claimant Latham's experience would think that he could occupy company provided lodging just to hang out while the rest of his Gang who inhabited rooms at the Red Roof Inn at Jessup, Maryland went to work on December 6, 7, 8, 2004." Car. Subm. at 8. The Carrier points out that Claimant never directly stated at hearing that he thought he had authorization to stay.

It is the Carrier's additional position that Claimant's misconduct in the instant case was a serious offense. According to the Carrier, numerous boards of arbitration have upheld dismissal as an appropriate penalty for such misconduct. Moreover, Claimant had received a thirty-day suspension for a similar infraction committed the previous week in December 2004. Contrary to the Organization's assertion to the contrary, the Carrier submits, Claimant's service record was properly considered only after the determination of his guilt had been made. The Carrier contends that dismissal was warranted in the instant case and should be upheld.

Organization's Position:

According to the Organization, due process was not afforded Claimant. The Organization contends that the charge letter issued by the Carrier was not sent to the Organization, that the Carrier did not comply with a Rule 24 request for information prior to the hearing, and that the hearing officer proceeded with the investigation over the Organization's objection. Moreover, the Organization challenges the propriety of the Carrier's reliance on Daniels, the hearing officer in the Cumberland Holiday Inn matter, to provide the basis for the charges in the instant case.

The Organization further argues that Claimant did not engage in misconduct by staying at the Jessup Red Roof Inn after December 6, 2004. According to the Organization, the Carrier knew that Claimant's residence was in Massachusetts, and Daniels's testimony tends to corroborate Claimant's statement that he was following Daniels's instructions by staying where he was. Daniels testified that he advised Claimant that he either would be put back to work with back pay or held out of service pending a formal investigation. According to the Organization, it would have been ridiculous for Claimant to drive home to Massachusetts and then back to Jessup if he was put back to work. Claimant checked out of the Jessup Red Roof Inn immediately once he was informed that he was removed from service pending investigation, on December 8.

It is the Organization's additional position that in light of Claimant's nearly thirty-year record as a valued employee with a relatively clean record, dismissal was not warranted.

Findings:

After a careful and thorough review of the record in the instant case, the Board is satisfied that all necessary due process was afforded Claimant. The Board finds that Claimant was afforded a full and fair hearing, with timely notice of the charges, time to prepare a defense, and the opportunity to produce and examine witnesses and evidence. The Organization's claims that due process was not provided are without merit.

On the merits, it is clear from the record that Claimant had no Carrier authorization or right under CLC policy to occupy the Jessup, Maryland Red Roof Inn from December 6 to 8, 2004, at Carrier expense. Claimant's testimony that Daniels did not tell him on December 6 that he was removing him from service is not credible. Not only did Daniels testify repeatedly and credibly that he told Claimant on December 6 that he was taking him out of service, Claimant could hardly have avoided noticing that he was indeed out of service on December 6, 7 and 8. Claimant certainly did not go to work on those days.

Claimant's assertion that he did not check out of the Inn on December 6 because Daniels did not instruct him to is similarly without merit. Daniels credibly testified that he had no discussion whatsoever with Claimant regarding his lodgings on December 6, and was unaware until January 4, 2005 that Claimant had used Carrier-sponsored lodging after December 6. Moreover—despite Claimant's disingenuous and unpersuasive testimony that he had only been working on floating gangs for a year and therefore was some sort of 'babe in the woods' regarding the rules governing CLC use—it is simply not believable that an employee of some twenty-seven years' experience with the Carrier was unaware that he had no right to stay in CLC lodging while removed from service and

without permission. Daniels's alleged instruction to Claimant to "wait to hear from him" regarding whether Claimant could go to work is a far cry from an instruction for Claimant to continue to occupy Carrier-sponsored lodgings in the meantime. The bottom line is that while it may be understandable that Claimant found it more convenient to stay in his Red Roof room rather than drive home to Massachusetts, he neither sought nor was given Carrier permission to use his CLC card to continue inhabiting that room after December 6.

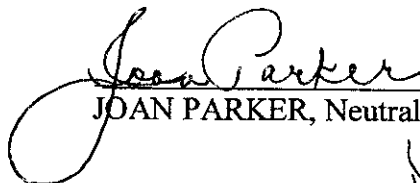
The Board must conclude that Claimant was well aware of the rules regarding his CLC use, and well aware that he had no permission to continue to occupy CLC lodgings after his conversation with Daniels on December 6. The Board must therefore further conclude that Claimant acted intentionally to defraud the Carrier in continuing to occupy the Red Roof Inn lodgings after December 6 without permission, while removed from service. Claimant's conduct violated Rule GR-2's prohibition on dishonesty, and under settled arbitral precedent, dismissal was warranted. Moreover, Claimant had been previously assessed a thirty-day actual suspension for engaging in the same type of conduct at a different location the prior week. The Board concludes that Claimant's dismissal must be upheld.

Award:

The claim is denied.


CARRIER MEMBER

DATED: October 6, 2006


JOAN PARKER, Neutral Member


ORGANIZATION MEMBER

DATED: 10-6-06