

PUBLIC LAW BOARD NO. 7104

BROTHERHOOD OF	)	
MAINTENANCE OF WAY EMPLOYEES	)	
DIVISION – IBT RAIL CONFERENCE	)	CASE NO. 18
vs.	)	AWARD NO. 18
	)	
CSX TRANSPORTATION, INC.	)	

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The dismissal of Machine Operator R.L. McDonald for his alleged violation of Operating Rules General Rule A, General Regulations GR-1, GR-2 (part 4) and CSXT’s Policy on Company-Provided Lodging was without just and sufficient cause, based on unproven charges and in violation of the Agreement [System File D21708207/12(07-0872) CSX].
2. As a consequence of the violations referred to in Part (1) above, on behalf of Machine Operator McDonald, the Organization requests ‘*** that the charge letter and all matters relative thereto be removed from Mr. McDonald’s personal file, he be returned to the employment of CSX Transportation, and be made whole for all losses suffered as a result of the Carrier’s actions.”

FINDINGS:

Public Law Board No. 7104, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, R.L. McDonald, had been employed by the Carrier for approximately 26 years. On May 15, 2007, Claimant was charged to attend an investigation “to determine the facts and place your responsibility, if any, in connection with an audit performed May 14, 2007 on hotel stays. During this audit it was discovered that you allegedly used company provided lodging without authorization between, and including, the months of February and August 2006.” Following the investigation, the Carrier determined that Claimant utilized Carrier-provided lodging without authorization on numerous occasions. The Carrier considered Claimant’s previous record, which included

a termination for theft and improper use of Company assets, for which an arbitration board reinstated him without backpay, and dismissed him from Carrier's service.

The underlying facts of this case are not in dispute. During the period February through August 2006, Claimant worked on force 5A20, a stationary, or fixed headquarters, gang, which does not entitle an employee to travel expenses or Carrier-provided lodging. During that same time period, he also worked on gang 5MR6, a floating crew, for which an employee does receive travel expenses and lodging. Carrier's records show that Claimant had approximately 15 stays in Carrier-provided lodging during the time he was assigned to the stationary gang.

Carrier Roadmaster Dale Hanshew, who supervised the territory in which Claimant was working at the time, testified that there was a vacancy on the floating gang which Claimant asked to fill. He stated that Claimant specifically questioned whether he would be able to use corporate lodging while working on that gang, and Mr. Hanshew told him he could.

Claimant testified at the investigation that during the time at issue he was assigned to Roadmaster Hanshew and primarily worked on section gang 5A20, the stationary gang. He confirmed that he asked Mr. Hanshew if he could work the vacancy on 5MR6, and acknowledged he also asked whether he would be entitled to corporate lodging on that gang. He also acknowledged that Mr. Hanshew told him corporate lodging was available only so long as he was on the floating welding team. He did not dispute that he used corporate lodging on the July and August dates at issue, and explained only that there were a lot of things happening during that period, when he worked floating jobs off and on. He stated that he did not know what had happened, but he would not have stayed in the hotel and broken the rules. He stated he knew something took place that caused him to stay at the hotel, but he just could not explain it. He stated that he did recall that he went from one floating gang to another during that time, although he did not identify the second floating gang.

Claimant also testified that when he received his paychecks he always checked to confirm that he had been compensated for travel expenses when he worked a floating gang, approximately \$167.50 per week. His checks covering the dates at issue did not include travel expense payments.

The Carrier first asserts that all of the Claimant's procedural rights were fully protected and the hearing was conducted in a fair and impartial manner. On the merits, the Carrier contends that it rightfully determined that Claimant was guilty of dishonesty, unauthorized use of Carrier-provided lodging and conduct unbecoming a Carrier employee. The evidence, the Carrier contends, clearly establishes that Claimant used Carrier-provided lodging on numerous occasions when he did not have authority to do so. Thus, the Carrier states, Claimant's guilt has been proven, notwithstanding his denial that he broke any Carrier policy.

The Carrier further asserts that the penalty assessed was fully justified. Claimant's action was nothing short of theft, the Carrier states, which can support dismissal even for a first offense. Moreover, the Carrier notes, it previously dismissed Claimant for theft, and an arbitration board found him guilty of misconduct but returned him to service without backpay. Under these circumstances, the Carrier concludes, its action cannot be deemed arbitrary or unreasonable, and should be upheld by this Board.

The Organization asserts that Claimant made every attempt to obey the Carrier's rules. The evidence demonstrates, the Organization states, that Claimant was unsure as to his right to use Carrier lodging while temporarily assigned to Gang 5MR6, so he questioned his supervisor and had the matter clarified. The Organization points out that Claimant only recalls using corporate lodging while temporarily assigned to Gang 5MR6, and then upon assuming duties on another mobile gang. Clearly, the Organization urges, Claimant used corporate lodging only when he was eligible to do so. In particular, the Organization argues, there was no evidence that Claimant intentionally attempted to deceive the Carrier, even if it were proven that he improperly used Carrier-provided lodging on the dates in question. In conclusion, the Organization asserts that the Carrier failed to show, let alone prove, that Claimant violated any rules, and the claim should be sustained.

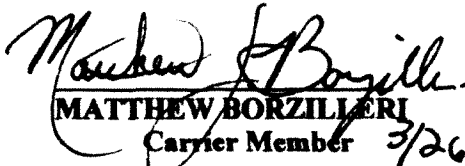
The Board has carefully reviewed the record in its entirety. Carrier's records show that Claimant used corporate lodging on numerous occasions when he worked an assignment which did not entitle him to do so. Claimant specifically asked whether working on the floating gang would entitle him to lodging, demonstrating that he was aware of the distinction. Claimant had no explanation for his conduct, other than to state that he must have been entitled to the lodging on the occasions at issue and would not deliberately deceive the Carrier. However, his actions demonstrate otherwise. In particular, he acknowledged that his paychecks for those times did not include travel expenses, to which he would have been entitled on a job which carried corporate lodging. Thus, his guilt has been proven.

With respect to the penalty assessed, we find Claimant's actions could not have been, as the Organization argues, inadvertent. Given that he deliberately took a benefit to which he was not entitled, and in light of his previous offense, we cannot say that the Carrier's determination that dismissal was warranted is an unfair, arbitrary or discriminatory exercise of the Carrier's discretion.

AWARD

Claim denied.


JACALYN J. ZIMMERMAN
Neutral Member


MATTHEW BORZILLERI
Carrier Member 3/26/09


TIMOTHY KREKE 3-26-09
Organization Member

Dated this 26th day of March, 2009.