

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7357
AWARD NO. 4, (Case No. 5)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

**CP RAIL SYSTEM/DELAWARE AND HUDSON
RAILWAY COMPANY, INC.**

**William R. Miller, Chairman & Neutral Member
Timothy W. Kreke, Employee Member
Anthony Stillittano, Carrier Member**

Hearing Date: March 26, 2010

STATEMENT OF CLAIM:

- "1. The discipline [assessment of forty (40) demerits and reimbursement to the Carrier of two hundred seventy-six dollars (\$276.00) by letter dated October 28, 2008] imposed upon Mr. S. Abdu-Shahid for damage and destruction of a Carrier provided motel room at the Best Western in Plattsburg, New York on August 22, 2008, in alleged violation of GCOR Rule 1.9 (Respect of Railroad Company) and GCOR Rule 1.6 (Conduct) was arbitrary, excessive and in violation of the Agreement (Carrier's File 8-00640).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now remove the aforesaid discipline from Mr. S. Abdu-Shahid's record and reimburse him for two hundred seventy-six dollars (\$276.00) which was improperly deducted from his wages."

FINDINGS:

Public Law Board No. 7357, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and that the parties to dispute were given due notice of the hearing thereon and did participate therein.

On August 28, 2008, the Carrier notified Claimant to appear for a formal Investigation on September 5, 2008, which was postponed and subsequently held on September 28, 2008, concerning in pertinent part the following charge:

"...The purpose of this investigation will be to determine your responsibility, if any, on your alleged violation of GCOR Rule 1.9 (Respect of Railroad Company) and GCOR Rule 1.6 (Conduct). For damage and destruction of a Company provided hotel room at the Best Western in Plattsburg, NY on the date of August 22, 2008 while employed on DHDIST 1 as a Foreman."

The subject Rules in dispute are as follows:

"SAFETY RULES

GCOR Rule 1.9

1.9 Respect of Railroad Company

Employees must behave in such a way that the railroad will not be criticized for there actions.

GCOR Rule 1.6

1.6 Conduct

Employees must not be:

- 1. Careless of safety of themselves or others.**
- 2. Negligent.**
- 3. Insubordinate.**
- 4. Dishonest.**
- 5. Immoral.**
- 6. Quarrelsome.**
- or**
- 7. Discourteous.**

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees in cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated."

On October 28, 2008, Claimant was notified that he had been found guilty as charged and the Carrier imposed 40 Demerits and the requirement that he reimburse the Carrier for damages that occurred in his room at the Best Western in Plattsburgh, NY, in the amount of \$276.00.

The undisputed facts of record indicated that on August 22, 2008, Claimant's job assignment was DHDIST 1 Foreman with assigned work location at Plattsburg, New York, with work hours of 4:00 a.m. to 2:00 p.m. and rest days of Friday, Saturday and Sunday.

On August 22nd Claimant left his assigned hotel room at the Inn at Smithfield Best Western in Plattsburg, New York, after which it was reported to the Carrier by Hotel Management that it had been damaged. The hotel subsequently issued a bill to the Carrier in the amount of \$276.00 for its repair of the room.

It is the position of the Organization that several procedural errors occurred in the handling of the instant case which denied the Claimant "due process" including (1.) The Hearing Officer asked leading questions and badgered witnesses. (2.) The Hearing Officer did not render the decision; and, (3.) The Charging Officer rendered the decision. It argued that any of the aforementioned procedural violations was grounds for sustaining the claim without even addressing the merits.

On the merits the Organization argued that there was no evidence in the record to prove or remotely imply that the Claimant was involved with or performed any act of vandalism for which he was wrongfully accused of and improperly punished for by the Carrier. It concluded by requesting that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that the evidence indicates that Claimant was afforded all the contractual rights to which he was entitled. It argued that Claimant was properly notified of the charges, he attended the Hearing, was properly represented and his defense was not hindered, therefore, it reasoned that Claimant was afforded a fair and impartial Investigation.

It further argued that the facts reveal that on August 22, 2008, Claimant checked out of his hotel room which was left in a damaged condition. According to it, Claimant failed to meet his responsibility to ensure that the hotel room was properly taken care of, therefore, he was guilty as charged. It also argued that the discipline was reasonable because the Claimant was a short time employee who had already accumulated ten demerits for other Rules violation. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and will next address the Organization's procedural arguments. Review of the Hearing Officer's conduct indicates that his questioning at times was very pointed, but it did not cross the line of civility. With respect to the other alleged procedural violations the Board will reiterate as previously stated in Award Nos. 1 and 2 of this tribunal, and for the same reasons expressed in those Awards, that this case will be resolved on its merits.

Review of the Transcript substantiates that during the time frame in dispute room 150 was assigned to Bart Fleming and the Claimant. The record further indicates that Fleming did not use the room, thus it was clear that Claimant was responsible for maintaining its condition to a reasonable standard up until vacating the premises.

Supervisor Lomax testified on pages eight and nine of the Transcript about being advised about the damage to room 150 and then going to view its condition. Regarding the room's condition he stated the following:

"...I was made aware of the damages that had occurred and the Company was going to pay for them, and that the Company wants to be reimbursed for the damages. I did go to the hotel and got more explicit examples and pictures of what went wrong. And the sheets were destroyed. The picture frames were broken and thrown on the floor and on the bed. There was excessive cleaning that was needed. The duvet was damaged as was the dust ruffle. Wall sconces, she gave me pictures of the wall sconces that were laying all over the floor broke, pulled off the wall."

Supervisor Lomax's testimony was consistent with the written description of the room made by hotel management.

Supervisor Lomax further testified that when he first discussed the condition of the room with the Claimant that the Claimant told him the room was fine when he left. On page 11 of the Transcript Lomax testified as follows:

"...and I explained the damage to him. He stated that the room was in good condition when he left and that he did not do the damage. And that Leonard Terrell was supposed to stop by and pick up a set of car keys to move a vehicle...."
(Underlining Board's emphasis)

During the Investigation on pages 17 and 18 of the Transcript the Organization entered a written statement in behalf of the Claimant from employee John J. Lavin who stated in pertinent part the following:

"I was woken up around 12:30 a.m. due to loud partying,...,across the hall from my room 152. Then again I was woken around 3 a.m. due to two girls in the hall yelling and screaming. They came from the party that was going on across the hall from my room. I called the front desk and let them know what was going on. I was unable to get back to sleep so I stayed up and packed my stuff and brought it outside to my car where I saw Sadiq. He then went back into the hotel and got his bags and things and brought them

outside to his car. He went back into the room and showed me where he was leaving his car keys for Leonard Terrell. From what I could see through the sliding door there was nothing wrong with the room and no one else was in there...." (*Underlining Board's emphasis*)

Employee Terrell also testified in behalf of the Claimant explaining that he went to room 150 to pick up a truck key in behalf of the Claimant to move Claimant's company vehicle to a job site while Claimant drove his personal vehicle to the same site. He testified as employee Lavin reported that the keys had been left atop of a television and he entered the room through unlocked sliding glass door from the outside. On page 37 of the Transcript Terrell was questioned as follows:

"Q Okay. I wasn't clear on that. So you entered through a walk-in door?"

A It's like an entrance, it's like a thing to the parking lot. From the parking lot, his vehicle was parked in front of 150 and like there's a patio door, I should have said, with no patio. It's just the door.

Q The door was left unsecured?

A Yes. I know I left it unsecured. I know I closed it, but there's no way to lock it...." (*Underlining Board's emphasis*)

On pages 44 through 48 of the Transcript employee Gordon testified that on the evening in question he and several other people entered room 150 through the outside door while Claimant was looking for a lost ATM card, just to say hello. He stated that some of the people were drinking outside in the parking lot, but were not partying in room 150. He also testified that he did not see any damage to the room.

On pages 62 through 64 of the Transcript the Claimant confirmed that he left the company vehicle keys on top of the television and the room was left unsecured as the outside glass door was left unlocked and could not be locked from the outside.

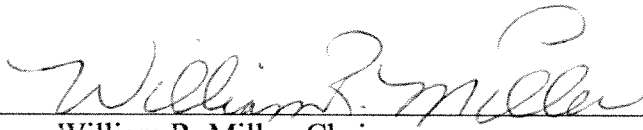
There is absolutely nothing in the record which proves that the Claimant vandalized room 150 on August 28, 2008, however, it is abundantly clear that he left his company vehicle keys in the unprotected room to be picked up by employee Terrell. Claimant testified that he left the room at about 3:00 a.m. and Terrell testified he picked up the keys around 3:30 a.m. which he stated he could not lock. Assuming for the sake of argument that the room was okay when Terrell left, there was a seven to nine hour window of opportunity for anyone to access the room and commit the acts of vandalism. The problem for the Claimant is he was the person who was responsible for creating that window of opportunity. Before vacating the room, Claimant should

have locked the sliding glass door from the inside and left the keys to be picked up by Mr. Terrell with the Hotel Manager. Claimant's behavior was negligent in this instance and he subjected the Carrier to criticism and loss of good will which substantiates that the Carrier met its burden of proof.

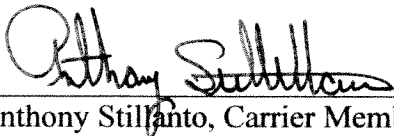
The only issue remaining is whether the discipline was proper. At the time of the incident the Claimant had just over two years of service with ten demerits on his personal record. The Board finds and holds that the discipline was appropriate because it was not arbitrary, excessive or capricious.

AWARD

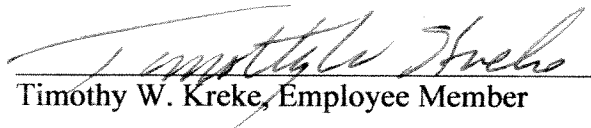
Claim denied.



William R. Miller, Chairman



Anthony Stillanto, Carrier Member



Timothy W. Kreke, Employee Member

Award Date: July 14, 2010