

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when on February 26, 2003, Mr. V. M. Andujo was issued a Level S 30-day Actual Suspension and 3 years probation for violation of Maintenance of Way Operating Rule 1.6.
2. As a consequence of the Carrier's violation referred to above, Mr. Andujo shall be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing April 4, 2003, continuing forward and/or otherwise made whole. [Carrier File No. 14-03-0079. Organization File No. 180-13D2-038.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Victor M. Andujo, entered the Carrier's service on February 1, 1993. He was working as a Maintenance of Way Welder on an extra gang temporarily headquartered at Needles, California, on November 26, 2002. This gang was being supplied with Carrier-provided lodging at a hotel in Needles while headquartered there. An irregularity in connection with this lodging arrangement resulted in the Claimant being served with a notice of charges and investigation as follows:

The purpose of this investigation is to ascertain the facts and determine your responsibility, if any, in connection with your alleged violation of Maintenance of Way Operating Rule 1.6, . . . that you allegedly falsified payroll documents, when on November 26, 2002 and November 27, 2002 you allegedly paid yourself for Paycode 46, while allegedly using your Corporate Lodging card.

Maintenance of Way Operating Rule 1.6 reads:

Employees must not be

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

Following several agreed-upon postponements, the investigation was held on March 11, 2003. A transcript of testimony and evidence taken therein was prepared and is a part of the record before this Board.

On the afternoon of November 26, 2002, the Claimant was a member of an extra gang under the supervision of Extra Gang Foreman Pat Lowe. Because of a change in their work plans for that week, Mr. Lowe offered the employees in his gang an option whether to accept camper pay (Paycode 46 in the record), or Carrier-provided lodging and per diem (Paycode 48). All the gang members except the Claimant agreed to accept Paycode 48, an arrangement in which the Carrier would be directly billed for their lodging, and the employee would be paid per diem to cover their meals. The Claimant, however, who had been working under Paycode 46, elected to remain under that Paycode. Paycode 46 (camper pay) is an arrangement under which the employee is paid a greater per diem rate (\$40) than that allowed under Paycode 48 (\$23), but the employee provides for himself an approved camper or trailer instead of Carrier-provided lodging.

The Carrier contracts with another company, Intermotel Leasing Company, called "IML" in the record, which in turn makes arrangements for lodging at various points where such facilities are required. The Claimant contacted IML to make a reservation for him at the hotel in Needles. Although he was under Paycode 46 and the Carrier was not providing his lodging at its expense, he testified that he made the reservation through IML so that he could obtain the discounted rate afforded the Carrier.

When the gang checked in at the hotel, the Claimant was with them. He allegedly signed a form captioned "Lodging Register," which had a sub-title, "Direct Billing Information." This form was offered in evidence by a Carrier witness, Division Engineer Michael Theret. The form showed other data, i.e., the confirmation number, the Claimant's printed name and his employee number, and handwritten notations, date in "11/26/02", date out "11/28/02", and the room number. No charges were recorded on this form.

Mr. Theret also offered another document, the hotel's registration, containing the following printed information: Check-in time 4:30 p.m. on November 26, 2003; arrival date

11/26/02; departure date 11/27/02; number of nights, 1; Desk Clerk Heather; the Claimant's name, employee number, and reservation number. The method of payment printed thereon is "Direct Bill." This registration bears a written signature similar to that on the "Lodging Register" form. The printed number "1" at "Number of Nights" was struck out and a handwritten "2" inserted in its place. At the bottom of this registration form appears an imprint from an identification card bearing the Claimant's name, employee number, and card number. This card is identified in the record as his corporate lodging card.

A third document was offered in evidence by Mr. Theret, the hotel's folio detailing the charges for a guest's stay, and other related data. This form has printed the check-out time, 2:23 p.m. on 11/27/02, the Claimant's name, employee number, and reservation number. the charges for two nights, and the method of payment, "Direct Bill". This form bore a signature resembling those on the other two forms described above. It also bears a note in a different handwriting: "This is a valid receipt [*sic*] from my hotel! Jamie." Mr. Theret testified that this identifies the Manager of the hotel, who sent him the document by facsimile.

Mr. Theret also provided another document, the hotel's registration form, with these printed notations: arrival date 11/26/02; departure date 11/27/02; number of nights, 1; Desk Clerk Yvonne; the Claimant's name, employee number, and reservation number, and the method of payment, cash. In handwriting next to "cash" are these words, "paid 27.50." In the upper left corner is a date and time, appearing to be a notation of the time it was printed by the computer: 02/14/03 5:23 PM. There was a long notation in Jamie's handwriting at the bottom of this form:

This is not a valid receipt from my hotel! Please note in upper left hand corner time & date when this was printed from my computer. Pat Lowe called Yvonne 4 times on 2-14 & requested a receipt stating Victor Andujo paid cash on 11-26-02. You cannot check receipts dating back that far. So Yvonne printed a blank registration, wrote pd. cash. Pat said he needed a copy so Victor wouldn't lose his job. Yvonne thought she was doing them a favor & that he did pay cash on 11-26-02, but did not know for sure & took their word for it. Please see original reg. & receipt from 11-26-02. It shows time/date & direct bill for both nights! Victor also signed receipt. [Misspelling and underscoring in original text].

Mr. Theret also offered in evidence payroll data showing that the Claimant was paid the Paycode 46 camper pay for November 26 and 27, and an e-mail transmission from the Carrier's payroll accounting department pointing to an apparent discrepancy, which read, "On November 26 and 27 the employee claimed camper pay, but he also stayed in corporate lodging on those nights." As the consequence, he testified, the Carrier paid the Claimant an allowance for providing his own lodging (camper pay), and was also billed for the Claimant's stay for the same two nights at the hotel in Needles.

The Claimant readily admitted that he claimed camper pay for the two dates, and stated that he paid cash for one night at the hotel when he checked in on November 26. He further testified that he checked out with the rest of the gang about 6:35 to 6:45 a.m. on November 27, and did not return for the night of November 27. Instead, after working about a half day on November 27, he rode to Barstow, California in a Carrier vehicle driven by Art Cuevas, arriving there about 2:30 to 3:00 p.m.

The Claimant testified that the hotel's Desk Clerk, a new employee, required him to sign the "Lodging Register" form, and to show his corporate card, in order to obtain the discounted rate afforded to the Carrier. He denied signing the hotel's registration form, and said he didn't remember signing the check-out form, although he agreed that it resembles his signature. He stated that he did not receive a receipt for his cash payment, until he realized that he was going to need one for the investigation. He requested that Foreman Lowe obtain it for him. He produced the same receipt that Mr. Theret had submitted. i.e., the one that Jamie said was not valid. Of course, the Claimant's copy did not bear the handwritten notations which appear on Mr. Theret's copy.

Foreman Lowe testified in the investigation as a witness called by the Claimant. He confirmed that the Claimant checked into the hotel on the afternoon of November 26 and checked out the morning of November 27 with the rest of the gang. He testified that he observed the Claimant taking out his wallet and paying money to the Desk Clerk. Truck Driver Cuevas stated that although he did not observe the Claimant paying the Desk Clerk, he had previously heard the Claimant tell Mr. Lowe that he did not want to change to Paycode 48, but he was going to stay on Paycode 46 and pay for the room out of his pocket.

Mr. Lowe testified that the Claimant had his personal possessions with him when they checked out on the morning of November 27. Mr. Cuevas testified that it was an impossibility for the Claimant to be in Needles at 2:23 p.m. on November 27. He said the crew was permitted to take an early quit on the 27th because the following day was Thanksgiving Day. He said he and the Claimant left Needles about 11:30 a.m. to 12:00 noon, and arrived Barstow 2:30 to 3:00 p.m. The Claimant had his personal car parked at Barstow.

As the consequence of the investigation, the Claimant was notified that he had committed the charged infractions, and he was issued an actual suspension of 30 days, and assigned a probationary period of three years. That decision was promptly appealed by the Organization, denied by the Carrier, and the dispute comes before this Board for a final and binding decision.

The Organization argues that the Claimant paid cash for the lodging, and he provided a receipt for the cash payment. He checked out on November 27 and was in Barstow at 2:23 p.m., the alleged check-out time. The Organization further argues that the Claimant presented the Desk Clerk his corporate lodging card for the sole purpose of identifying himself as a Carrier employee.

There is corroboration for these facts, it states, in the testimony of Mr. Lowe and Mr. Cuevas. The Organization believes that the discipline in this case is unwarranted.

The Carrier rejoins that the evidence shows the Claimant executed documents when he checked into the hotel that indicated the Carrier would be billed for the cost of the room. Regardless of his protests, the Carrier argues that it does not require the skills of a handwriting expert to recognize that the Claimant signed all three documents offered in evidence by Mr. Theret. His signature appears on the check-out form, showing that he left at 2:23 p.m. on November 27. This document also shows that the Carrier would be billed for the charges.

The Carrier further argues that the receipt presented by the Claimant, showing that he paid cash, was not based on the Desk Clerk's own knowledge of how the payment was handled, but was instead based on Mr. Lowe's representation that the Claimant had paid cash. Additionally, the hotel's Manager stated that this was not a valid receipt. The Carrier also points out that although the Claimant denied signing the hotel's registration on November 26, it bears the imprint of his corporate lodging card.

The Carrier also states that even if the Claimant did pay cash for his room, he still had the responsibility to be certain the Carrier was not also billed for the same room. More importantly, the Carrier argues, the Claimant knowingly stayed in corporate lodging, collected the higher camper pay per diem, \$40 vis-à-vis \$23, and let the Carrier pay for the room. The Carrier asserts that the Claimant collected \$17 for each of the two days, which he was not entitled to receive. His actions were dishonest and a form of theft. Theft is a dismissible offense and the Carrier was extremely lenient in this case. The Carrier therefore denied the claim.

The Board has studied the transcript of testimony and evidence, carefully considered the arguments of the Parties, and has attempted to reconcile the conflicting testimony and evidence, in hope of finding a rational explanation for these conflicts.

The Board is persuaded that the Claimant signed all three of the documents offered in evidence by Mr. Theret. If, however, one or more of the signatures are forged (and that is not an impossibility, although it appears unlikely), the Board is unable to see any motive for forgery, unless it be an act of dishonesty by another person, discussed below. Two witnesses overheard the Claimant say that he intended to pay cash for his room, and one observed him paying cash to the Desk Clerk for something. If the Claimant did pay cash, however, he should not have signed any documents which bore a notation that the Carrier would be billed for the room. Furthermore, we find it incredible that he would pay cash and not obtain a receipt therefor at the time of payment. This is simply common sense and good business practice.

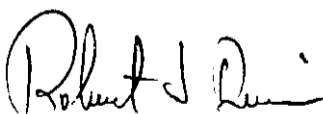
The Board is not persuaded that the Claimant checked out late. Certainly, the totality of the evidence indicates that the hotel billed the Carrier for a late check-out. The folio bears this

printed advice: "I agree to vacate my room by 11:00 AM on the departure date noted above." The hotel's registration form has a printed check-out date 11/27/02, and the number of nights, 1. The "1" was struck out and "2" was handwritten in its place, obviously a change of records by the hotel when it determined the guest had not checked out by 11:00 a.m. But the Board cannot discount the testimony of the Claimant, Mr. Lowe, and Mr. Cuevas, in particular, who said the Claimant was with him in the Barstow area at 2:23 p.m. on November 27.

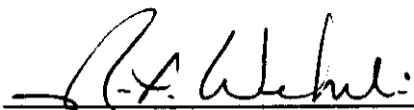
The Board concludes that even if the Claimant paid cash, as he asserts, and as supported by the testimony of others, he erred when he executed documents which permitted the hotel, either intentionally or by inadvertence, to bill the Carrier for the Claimant's stay. Since the Claimant did not have the registrations changed to prevent the Carrier being billed, and since he seems not to have obtained a receipt for his cash payment, the door was opened for an incompetent or even a dishonest hotel employee to pocket the cash payment and bill the Carrier. Thereby, their books balance. It would be a simple matter of showing a late check-out to augment the hotel's revenue. While this analysis is admittedly speculative and unprovable, it brings some rationalization to the clearly conflicting accounts in the record. However, the Claimant's signatures and his failure to provide authentic documentation that he paid cash when he checked in, leaves the Board without reasonable cause to sustain the appeal so earnestly sought by the Organization.

AWARD

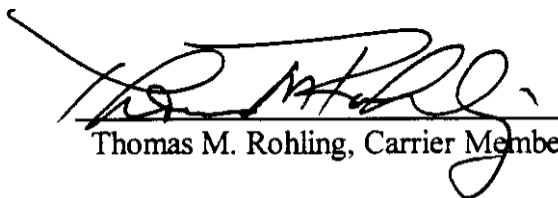
The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

July 23, 2003
Date