

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**

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Case No. 457 – Award No. 457 – James  
Carrier File No. 14-13-0251  
Organization File No. 40-SF13D2-1313

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 7, 2013, when Claimant, Timothy James (1773829), was dismissed for his alleged fraudulent use of BNSF corporate lodging from February 24, 2013 through March 1, 2013 while the Claimant was on vacation. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct and Engineering Instruction (EI) 21.1 Lodging Procedures (General).
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from Claimant's record this dismissal and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss, including overtime and vacation, commencing May 7, 2013, continuing forward and or otherwise made whole.

**FINDINGS:**

Public Law Board No. 5850, 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, Timothy James II, had been employed by the Carrier since 2008. On May 3, 2013, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged fraudulent use of BNSF corporate lodging from February 24, 2013 through March 1, 2013, on the Emporia

Subdivision. The Carrier asserted first knowledge on April 30, 2013. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged, in violation of EI 21.1 Lodging Procedures (General) and MOWOR 1.6 Conduct, and dismissed him from employment.

**Engineering Instruction 21.1 Lodging Procedures (General)** provides, in relevant part:

An employee cannot submit an expense report for lodging unless authorized to do so under his or her prevailing labor agreement. All other employees must use lodging that has been arranged through CLC. Employees may use Company provided lodging for BNSF business-related purposes only and may not use the CLC card or reservation services for vacations or other personal reasons.

**MOWOR 1.6 Conduct** provides, in relevant part:

Employees must not be:

4. Dishonest

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

At the opening of the investigation, the Hearing Officer noted that Claimant was not present. The Organization representative requested a brief recess so he could attempt to locate Claimant, which the Hearing Officer granted. The Organization representative was unable to reach Claimant, and requested that the investigation be postponed. The Organization representative acknowledged that he had received the Investigation and Postponement Notices, and that he had thereafter attempted, unsuccessfully, to contact Claimant. The Hearing Officer concluded that the Carrier had provided Claimant with the notice required under the labor agreement and the investigation would proceed.

Carrier Assistant Production Roadmaster Philip Scott Perusse testified at the investigation that he was responsible for RP09, the gang on which Claimant had worked, although he did not assume that responsibility until March 4, 2013, after the events in question. He explained that Claimant was off work on vacation from February 24, 2013, through March 1, 2013, but utilized corporate lodging, for which the Carrier pays, on those dates. Mr. Perusse added that Carrier Rules required Claimant to pay his own lodging expenses as he was on vacation.

Carrier records entered into the hearing record show that Claimant stayed in corporate lodging on February 24, which its personnel tracking system shows as a rest day-no pay, and that he stayed in corporate lodging on February 25, 26, 27 and 28, shown

as vacation days. The records also show that Claimant used corporate lodging on March 1, when he was on vacation, and March 2, when he was on a rest day-no pay. The investigation record further includes a hotel folio receipt showing Claimant's room as "CLC BNSF ONLY" for February 24, 25, 27, 27, 28 and March 1, 2013.

The Carrier's Policy for Employee Performance Accountability (PEPA) sets forth, in Appendix B, a non-exhaustive list of Stand Alone Dismissible violations which may result in immediate dismissal. Appendix B includes, "Theft or any other fraudulent act, which may be evidenced by the intent to defraud BNSF or by the taking of BNSF monies or property not due." Claimant's personal record shows a dismissal assessed May 31, 2013 for absence without proper authority for more than five days. That action is before this Board in Case No. 458.

The Carrier first asserts that the Organization's contention the investigation should have been postponed rather than held with Claimant in absentia lacks merit. While the Organization alleges that the Carrier provided no proof that Claimant was even aware of the investigation, the Carrier notes that the Hearing Officer recessed the hearing to allow the Organization representative to attempt to locate Claimant. Further, the Carrier states, United States Postal Service receipts demonstrate that the Investigation and Postponement Notices were delivered to Claimant's last known address according to Carrier's records. A USPS Track & Confirm indicates that the searched-for items were delivered on May 4, 2013 in Valley Falls, Kansas, the location to which the Notices were addressed.

On the merits, the Carrier states that its records and its witnesses' testimony demonstrate that Claimant utilized Carrier corporate lodging on days on which he was on vacation, and did not pay for the lodging out of his own funds. Claimant, the Carrier adds, was well aware he was not entitled to free lodging on vacation. The Board should not credit the Organization's list of reasons that Claimant should not be held accountable for his conduct, the Carrier stresses. The Carrier asserts that it has proven Claimant's dishonest conduct by substantial evidence.

With respect to the penalty, the Carrier points out, it is well established that dishonesty of this sort, which essentially amounts to theft, is such a breach of the employment relationship that it is cause for dismissal, even for a first offense, and is treated as such under its PEPA. Its decision to assess that penalty against Claimant was reasonable and appropriate, and cannot be considered arbitrary or excessive, the Carrier states. The Carrier urges that the claim be denied.

The Organization asserts that the investigation should have been postponed as the Organization requested, so Claimant could have had the opportunity to attend and defend himself. The Organization adds that the Carrier came forward with no proof that Claimant was even aware that he was scheduled for an investigation, as it provided no certified mail receipts. On this basis, the Organization urges that the claim be sustained.

The Board has carefully reviewed the record in its entirety. First, we find no procedural error in the Hearing Officer's denial, at the opening of the investigation, of the Organization's request for a postponement of the hearing. The representative acknowledged that he had received notice of the hearing, and the Carrier's records show that it gave proper notice to Claimant. The Organization representative was not able to reach Claimant, and the Hearing Officer gave him another opportunity to do so at the opening of the hearing, and again the Organization representative could not reach Claimant. Given the Organization's extensive unsuccessful efforts to contact Claimant after its representative received notice of the charges, it is unlikely that a postponement would have served any purpose. We find no procedural irregularity which denied Claimant of his right to a fair and impartial investigation.


On the merits, the record is clear that Claimant utilized corporate lodging while he was on vacation, a clear violation of Carrier Rules and common-sense principles of which Claimant had to be aware.<sup>1</sup> The Carrier has met its burden of proving the charges against Claimant by substantial evidence, and indeed the Organization, notwithstanding its best efforts, had nothing with which to refute the Carrier's case. With respect to the penalty, we agree with the Carrier that Claimant essentially engaged in theft against his employer, one of the worst offenses an employee can commit. The PEPA's classification of this sort of dishonesty as a first-time dismissible offense is well in line with established precedent in this area, and we see no reason to overturn the Carrier's imposition of this penalty on Claimant.

**AWARD**

**Claim denied.**

  
**DAN NIELSEN**  
Neutral Member

  
**JOY MENDEZ**  
Carrier Member

  
**DAVID SCOVILLE**  
Organization Member

Dated this 31<sup>st</sup> day of October, 2014.

<sup>1</sup> We note some confusion in the charges themselves, in that Claimant was charged with utilizing corporate lodging while he was on vacation beginning February 24, 2013, a date on which the Carrier's records show him on a rest day. We also note that the records show that Claimant utilized corporate lodging on March 2, also designated a rest day, and was not charged with misconduct for that date. These discrepancies do not bear on the overall outcome of the case, as there is ample proof of dishonesty in the overall transaction.