

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 547 – Award No. 547 – J. Browning
Carrier File No. 14-20-0181
Organization File No. 2419-SL13c5-1936

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of John Browning (6581615), for the removal of the Claimant's Dismissal for the alleged violations MWOR 1.6 and EI 21.1 Lodging Procedures. In addition, we request all record of discipline be removed from the Claimant's record. The Claimant shall be made whole as a result of the Carrier's actions.

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, J. Browning, had been employed by the Carrier since 1996. On May 14, 2020, following an investigation, the Carrier determined that Claimant had fraudulently used corporate lodging on multiple dates between July 8, 2018 and August 2, 2019 while working as a Machine Operator and/or Track Supervisor on the Bakersfield and Stockton Subdivisions. The Carrier found that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 1.6 Conduct and EI 21.1 Lodging Procedures (General), and dismissed him from service.

At the relevant time, Claimant was working as a tamper operator. Carrier Division Engineer Samuel Rubio testified at the investigation that on August 12, 2019, he learned from Roadmaster Sara Stroup that Claimant had possibly fraudulently used corporate lodging. Ms. Stroup and Claimant came to his office, and told him that Claimant was experiencing a lot of

personal issues. They decided to refer Claimant to the Carrier's Employee Assistance Program (EAP). Mr. Rubio was aware that Claimant was thereafter on medical leave at some point.

Mr. Rubio explained that he began to investigate Claimant's lodging stays, as employees are entitled to Carrier-provided lodging only under certain specified circumstances, primarily on mobile gangs when they are working more than 50 miles for their residence, or on rest days or weekends, when they end the work week more than 50 miles for their residence. He stated that he has no issues with employees utilizing Carrier-provided lodging for business purposes.

Mr. Rubio stated that the Carrier's payroll systems had red-flagged certain of Claimant's stays in corporate lodging, as he was working on a headquartered assignment at those times and employees on such assignments are generally not entitled to corporate lodging unless a supervisor specifically assigns them away from headquarters.

Mr. Rubio pulled all of Claimant's stays from July 8, 2018 to August 2, 2019, and entered into the investigation record a spreadsheet showing them. He added that the document also showed the pay codes for those dates, such as regular time and overtime, as well as rest day, holiday, personal day, vacation and the like. He stated that a gang's foreman, or another employee if necessary, enters the gang members' time.

Mr. Rubio highlighted numerous stays for which he believed there was no justification; if they were not highlighted, he felt the stays were justified or close enough to justified under the labor agreement.

Mr. Rubio pointed out that the highlighted entries included hotel stays on rest days, vacation days, and holidays. The highlighted entries also showed hotel stays on three and four-day weekends. In particular, he stated, Claimant utilized corporate lodging while he on was personal time, two weeks of vacation and rest days, from Friday, May 31, 2019, to June 16, 2019. Mr. Rubio added that the records also showed Claimant using Carrier-provided lodging when he was not far enough from his home address to be entitled to it.

In all, Mr. Rubio explained, the document showed 79 unauthorized, unapproved stays which violated Carrier Rules, for a total of \$5454.33. He stated that given Claimant's tenure and experience level, he would have been be very versed in the applicable Rules.

Claimant testified at the investigation that he had stayed quite a bit at the Best Western Colonial in Selma, California during the period at issue, although he could not remember any specifics. He maintained that he was unfamiliar with the Agreement provisions governing the use of corporate lodging. He pointed out that much of the time he did not set up the reservations himself; they were made by a senior or promoted employee. He acknowledged that he did make his own reservations once he was headquartered, as well as entering his own time.

He maintained that he did not stay at the hotel during the two-week period described by Mr. Rubio and as far as he knew it could have just been a billing error. Indeed, he stated, the "entire thing" could have been a billing error. He also stated that on July 19 and 20, 2019, shown as rest days on which he utilized Carrier lodging when he was headquartered, he probably would

have made those reservations as part of one or two-week blocks, not knowing whether his assignment would change.

Claimant explained that he had been homeless at the time in question and had been for years, although he was sheltered at the time of the hearing. He also had alcoholism and suffered resulting financial hardship. He added that he had contacted EAP and participated in in-person treatment from September 2019 to March 2020.

Claimant testified that he was not intentionally negligent, insubordinate or dishonest. He explained that the situation came about because he was under duress given his personal situation, which caused his conduct. Because his actions were not not intentional, he maintained, he did not violate Carrier Rules.

Claimant gave a closing statement in which he stated that when potential Rules violations were brought to his attention in August 2019, he did have a feeling that he was probably taking advantage of the lodging system. He stated that his conduct arose purely out of need, and that he had been a dedicated employee. He added that he felt "a little remorseful" that it resulted in the investigation. He asserted that he was willing to make restitution.

Claimant had an extensive disciplinary record back to 1997, including a Rule 1.5 (drug and alcohol) violation in 2002. He had several operating violations from then until 2017, as well discipline for making personal purchases on a Carrier credit card in 2015. He also had a referral to EAP for anger management in 2000.

The Carrier asserts that Claimant fraudulently charged numerous hotel stays between July 8, 2018 and August 2, 2019. The Carrier notes that his Roadmaster, Sara Stroup, questioned some of the charges and, on August 12, 2019, spoke with Division Engineer Sam Rubio about these and other concerns. They referred Claimant to the Carrier's Employee Assistance Program (EAP). The Carrier explains that based on information Ms. Stroup and Mr. Rubio discovered an investigation was scheduled; it ultimately was postponed eight times, with the original Notice issued on August 13, 2019.

The Carrier maintains that the investigation showed 79 unauthorized lodging stays, at a cost of \$5454.33, between July 8, 2018 and August 2, 2019. Carrier Rules are clear, the Carrier stresses, that using Carrier-provided lodging for personal purposes, as Claimant did here, is prohibited.

The Carrier states that Claimant gave confusing hearing testimony, maintaining that he thought he was entitled to lodging when working more than 20 miles from his home, when the applicable Rules clearly provide for hotel stays only when an employee's assembly point is more than 50 miles from his home. The Carrier stresses that on some of the occasions on which he used corporate lodging Claimant was not even 15 miles from his address of record, and that he also stayed in corporate lodging on rest days, holidays, and vacation days. The Carrier notes that although Claimant denied wrongdoing during the investigation itself, he gave a closing statement in which he expressed remorse, detailed his personal challenges and agreed to reimburse the Carrier. This was, the Carrier argues, an admission which is sufficient to meet its burden of proof.

Moreover, the Carrier states, the Organization cannot counter the overwhelming evidence in this case. The Carrier notes the Organization's assertion that Claimant believed he was entitled to lodging when he received meal payment and did not intend to steal. However, the Carrier stresses Claimant's testimony that when the lodging issue was raised in August 2019, he did have the feeling that he was "probably taking advantage of a system," and his explanation that his actions were not malicious but taken out of need because he was homeless. The Carrier further notes that Claimant admitted making his own room reservations.

Further, the Carrier points out, Claimant had been a Carrier Officer and was well aware of the Rules. He clearly violated them.

As for the penalty, the Carrier asserts that it is well established that an employee may be dismissed for theft, which is the misconduct committed here, even for a first offense. The Organization's arguments against dismissal amount to a request for leniency. However, it is well established that granting leniency is up to the Carrier, not an arbitration Board. Therefore, the claim should be denied.

The Organization points out that during the time in question Claimant was homeless and using a post office box as his address. The Organization notes Claimant's contention that he was entitled to corporate lodging on a majority of the dates at issue because he was on a mobile assignment. The Organization notes that an employee on a mobile assignment can use Carrier-provided lodging, and Claimant honestly believed he was entitled to a hotel room on the nights in question because he met the 20-mile threshold for a meal allowance.

The Organization stresses that employees who overstay at Carrier-provided lodging receive a Decline Notification from the Carrier's Payroll/Timekeeping Department and have their paychecks adjusted accordingly. However, no such action was taken in Claimant's case, even though the allegedly violative stays took place for over a year. Moreover, for the majority of the alleged stays, Claimant was a machine operator and his foreman made the lodging reservations.

The Organization also points out that before he was notified of any problem with his hotel stays, Claimant and his Roadmaster, Ms. Stroup, told Division Engineer Sam Rubio that Claimant was having personal issues, and they referred Claimant was to EAP, and he was thereafter placed on medical leave for three months to address these matters. As a result, the investigation was postponed eight times, from August 2019 to April 2020, but shortly after the investigation the Carrier dismissed Claimant.

The Organization asserts that Claimant believed he was entitled to corporate lodging on the dates in question and was never informed otherwise, for over a year. He therefore did not violate any Carrier Rules and should not have been dismissed. For all of these reasons, the Organization asserts, the claim should be sustained.

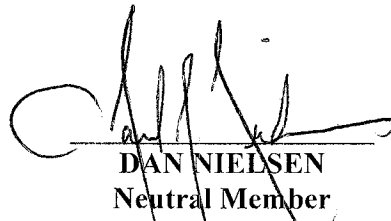
We have carefully reviewed the record in its entirety. This case presents a sad situation, with a 24-year employee apparently falling victim to addiction and other issues, resulting in, among other things, homelessness. However, the Carrier presented a detailed account establishing

that Claimant used Carrier-provided housing on a great number of occasions when he was not on work time or was not otherwise entitled to a hotel stay. Despite his personal situation and asserted lack of memory, Claimant was a long-time employee, had been a supervisor, and had to be aware, as he somewhat admitted in his closing, that his conduct was not permitted. Indeed, it is obvious, even without detailed knowledge of the Rules, that an employee, at a minimum, cannot use his employer-provided lodging when he is on vacation or similar time. Claimant's guilt of the asserted Rules violations has been proven by substantial evidence.

As for the penalty, Claimant, as the Carrier asserts, essentially engaged in theft involving a significant sum. It is well established that theft, even for a much smaller amount than involved here, justifies dismissal, even for a first offense, because it shatters the trust necessary in an employer-employee relationship. His personal situation, while very sad, did not entitle him to have the Carrier fund his housing. Claimant's record shows that the Carrier showed him consideration in previous situations. The Organization's arguments that Claimant should not have been dismissed essentially amount to a request for leniency, which, as the Carrier correctly notes, is the province of the employer, not this Board. The claim will be denied.

AWARD

Claim denied.


DAN NIELSEN
Neutral Member


LOGAN MCKENNA
Carrier Member


JEFFERY L. FRY 03/24/2025
Organization Member

Dated this 24 day of March , 2025.