

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 205, (Case No. 205)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing March 3, 2016, when Claimant, Rontriez Pulido (0286443), was dismissed for using corporate lodging while on vacation and off duty without prior authorization from supervision during the weeks of January 18, 2016 and October 26, 2015 in San Bernardino, California. The Carrier alleged violation of Engineering Instruction 21.1 – Lodging Procedures (General).**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant’s record this dismissal and he be reinstated, if applicable, with seniority, health insurance benefits, vacation, all rights unimpaired and pay for all wage loss including overtime commencing January 18, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.
(Carrier File No. 14-16-0209) (Organization File No. 2419-SL13D2-161)**

FINDINGS:

Public Law Board No. 7048, 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 the dispute have participated in accordance to the Agreement that established the Board.

The facts indicate that during the week of January 18, 2016, Claimant was employed as a Bridge and Building (B&B) Helper. It was alleged that during the aforementioned week Claimant was on vacation and utilized Carrier corporate lodging while he was on vacation without prior

authorization and because of that allegation the Claimant was directed to attend a formal Investigation on February 4, 2016, which was mutually postponed several times until February 16, 2016, concerning in pertinent part the following charge:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged use of Corporate Lodging while on vacation and off duty without prior authorization from your immediate supervisor during the week of January 18, 2015 in the city of San Bernardino, California. The date BNSF received first knowledge of this alleged violation is January 20, 2016.

This investigation will determine possible violation of EI 21.1 Lodging Procedures (General).

On March 3, 2016, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the position of the Organization that the record shows that the Claimant was using his vacation time to obtain his commercial driver's license ("CDL) at a training facility authorized by the Carrier. The Organization argued that the Claimant believed that his attainment of a CDL was for the betterment of both the Carrier and himself and thought that it was permissible to use Carrier lodging. It asserted that while attending the training course the Claimant received a text from his Foreman asking the Claimant if he was staying at corporate lodging and the text stated that his Supervisor did not think he could use corporate lodging. Upon receiving that information the Claimant contacted his immediate Supervisor T. Alvarez and explained to him that he was trying to obtain his CDL and if it was not okay for the Claimant to use corporate lodging the Claimant would pay out of pocket for the room. According to the Claimant Mr. Alvarez told him he wasn't sure and that he would get back with the Claimant as to who should pay for the lodging. The Organization asserted that Mr. Alvarez did not get back with the Claimant to advise the Claimant that Claimant should pay for the room himself, therefore, the Claimant assumed the lodging would be paid for by the Carrier. Upon return to work the following Monday the Claimant was advised that he was not entitled to corporate lodging for the previous week and was removed from service with no opportunity to pay for the aforementioned lodging despite the fact that he had previously offered to pay. The Organization reasoned there was no showing that the Claimant purposely attempted to defraud the Carrier of monies as his total hotel cost was \$220.00 that Claimant was willing to pay if instructed to do so. It concluded there was no basis for discipline and requested that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that on January 20, 2016, the Claimant's Foreman realized the Claimant was utilizing Carrier corporate lodging while on vacation beginning Monday, January 18th after which the Foreman texted the Claimant in order to confirm what he had learned. The Claimant then called his Structures Supervisor A. Alvarez on January 20, 2016, and Mr. Alvarez advised the Claimant that while the Claimant was on vacation he was not entitled to use corporate lodging. The Carrier argued that the Claimant had two years of service and was well aware, in that period of time, he was not entitled to free lodging while on vacation. It asserted that Claimant's behavior was dishonest, therefore, the discipline exercised in this instance was reasonable. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was afforded his "due process" Agreement rights. The case will be resolved on its merits.

Before addressing the merits of the case the Board notes that there will be no review of the week of October 26, 2015, because the Carrier made no attempt to present adequate evidence and/or testimony that the Claimant was in violation of its Rules during that period of time. The Carrier might have been persuaded by the Organization to drop that time period because the Organization argued without rebuttal that the October, 2015 dates of Claimant's alleged misbehavior were untimely, see as one example, page 13 of the transcript. Therefore, the only time period properly before the Board involves the week of January 18, 2016.

There is no disagreement between the parties that during the week of January 18th the Claimant was on vacation and he used that vacation time to attend a Carrier authorized training center in San Bernardino, CA, to become CDL qualified. The evidence indicates that the Carrier had allowed the Claimant to attend the same training facility three times before wherein it paid the Claimant his salary and afforded the Claimant corporate lodging. After the third failed attempt Supervisor Alvarez informed the Claimant the Carrier would no longer pay for the Claimant to get his CDL and, if he wanted it, he was on his own. The week beginning January 18, 2016, was the Claimant's fourth try at securing a CDL.

On page 12 of the transcript, Supervisor Alvarez testified that the Claimant called him on January 20th and told him he was on vacation and using corporate lodging. Alvarez went on to say that he told the Claimant he was not entitled to corporate lodging while on vacation and asked the Claimant whatever made the Claimant think he was entitled to such. In that testimony Alvarez inferred that he knew what the Claimant was doing in San Bernardino, without ever really saying it, when he stated: **"...Uh, he (Claimant) stated that it didn't feel like much of a vacation. Um, and I told him that, uh, re- whatever you choose to do on your vacation is your business..."** On page 22, Alvarez became more direct and testified that the Claimant told him exactly what he

was doing while on vacation. Alvarez also testified on pages 18, 21, 51 and 52 that he told the Claimant he would get back to the Claimant by the end of the week. Alvarez asserted that he was going to get back to the Claimant to instruct the Claimant to report to his office while Claimant testified that Alvarez was going to get back to the Claimant to advise the Claimant whether the Carrier would pay for his hotel stay.

It is curious that if Alvarez intended to call the Claimant back by the end of the week to simply inform the Claimant to report to his office on the following Monday, then why didn't Mr. Alvarez do that in their telephone call of January 20th? Despite that unanswerable question it is apparent that Mr. Alvarez either told the Claimant that Claimant was not authorized to use corporate lodging or told the Claimant he would advise him later that week.

It is apparent that the Claimant was transparent about his activities and what he was doing on his vacation and there was no intent to misuse Carrier monies, however, it is equally clear that the Claimant did not secure prior authorization from his immediate Supervisor for corporate lodging for the week of January 18, 2016, and was hoping for a belated approval from his Supervisor. Claimant did not receive a call or that belated approval from Mr. Alvarez prior to checking out of corporate lodging. Under either scenario, Claimant's rendition of the January 20th telephone call or Alvarez's version, the Claimant made a poor decision not to pay for the hotel stay himself because no matter what Alvarez actually said the Claimant should have understood that he had not secured authorization for corporate lodging. It is clear that the Carrier met its burden of proof regarding the week of January 18, 2016, whereas, it did not meet that burden of proof for the week of October 26, 2015.


The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately two years of service with no prior discipline. Use of corporate lodging without prior authorization equates to the spending of Carrier monies without approval and dismissal would not be out of line with the Carrier's Policy for Employee Performance Accountability (PEPA), however, in this instance because of the unique circumstances wherein there was no intent of dishonesty on the part of the Claimant and on a non-precedential basis the Board finds and holds that the discipline was excessive and it is reduced to a lengthy suspension which is corrective in nature and in accordance with the spirit of PEPA. Claimant will be returned to service with seniority intact, all benefits unimpaired, but with no back-pay. Claimant is forewarned that he needs to be careful to abide by all Carrier Rules and Policy following reinstatement.

AWARD

Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 1/5/18