

PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance  
of Way Employees Division - IBT

and

Union Pacific Railroad  
(Former Missouri Pacific Railroad)

Case No: 046  
Award No: 046

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissed from the service of the Union Pacific Railroad Company) of Mr. L. Matney, issued by letter dated July 23, 2014 in connection with his alleged dishonesty in the reporting of his residence in order to gain per diem, was imposed in violation of Mr. Matney’s due process rights under the Agreement and without the Carrier having fulfilled its burden of proof on the charges (System File UP308LF14D/1612719D MPR).
2. As a consequence of the Carrier’s violation outlined in Part 1 above, Mr. Matney shall receive any and all straight time and overtime hours for the Tamper Operator position on Gang 9701 which Mr. Matney would have worked and been due from the time he was pulled out of service until he is reinstated; have the charge and discipline involved removed from his personnel record; and be reinstated with all rights unimpaired and made whole for all time lost in connection with his disciplinary hearing.”

FINDINGS:

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction of the dispute herein; the parties were given due notice of hearing before this Board and they participated therein.

The Claimant was disciplined pursuant to a Notice of Investigation dated June 20, 2014, and an Investigation held on July 15, 2014 (after one (1) postponement) “to develop the facts and

place responsibility, if any, while employed as Tamper Operator on Gang 9701, you allegedly were dishonest in the reporting of your residence in order to gain per diem. This information was discovered after an internal investigation completed on June 13, 2014.”

In a discipline letter dated July 23, 2014, the Carrier found that “more than a substantial degree of evidence was presented to warrant sustaining all charges brought against you for this violation. Your actions are found to be in violation of Rule 1.6 Conduct, (4) Dishonest, and the part that reads, “*Any act of hostility, misconduct, or 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,*” as contained in the General Code of Operating Rules, effective April 7, 2010. Under the UPGRADE Progressive Discipline Table, this violation requires the assessment of LEVEL 5, which is permanent dismissal. Therefore, your record, as of this date, has been assessed a LEVEL 5 violation of the UPGRADE Discipline Policy and you are hereby dismissed from the service of Union Pacific Railroad Company.”

The Organization appealed the discipline and the Carrier denied the appeals. The dispute was not resolved during a settlement conference and progressed to arbitration. This matter is now before the Board for final and binding resolution. The Board has carefully reviewed the entire record in this case, including the arguments and awards provided in support of the parties’ respective positions, whether or not specifically addressed herein.

The Board finds the Organization’s procedural objection unpersuasive. This Board has previously “conclude[d] that Rule 22 is not intended and cannot be read to include investigations by Corporate Audit. Therefore the Claimant was not authorized a duly accredited representative when questioned by Corporate Audit.” *See*, Public Law Board No. 7633, Award No. 45.

Turning to the merits, “per diem” in the charges refers to Section 3 of the April 25, 2012 Local/National Agreement, which states in pertinent part: “*No per diem allowance will be paid to an employee headquartered on-line or in other mobile service who is working (work site reporting) within fifty (50) miles of their residence.*” The Carrier argues Claimant was dishonest by claiming per diem when he had a residence that he admittedly stayed in that was within 50

miles of his work site reporting location. The Organization argues that the Carrier is reading into the charges its own interpretation of Section 3, namely that if an employee has more than one (1) residence, and any residence is within 50 miles of the employee's work site reporting location, the employee cannot claim per diem.

Claimant's residence address on file with the Carrier is in Sedalia, MO. Claimant gave credible evidence establishing that he resides in Sedalia, MO, and occasionally stays in Kansas City, MO. It is undisputed that Sedalia, MO is more than 50 miles from Claimant's work site reporting location, while Kansas City, MO is less than 50 miles therefrom.


Public Law Board 7660 dealt with a similar issue in Award No. 32 (and No. 33), holding:

From a reading of the language of Section 3, the Board is of the opinion that the provision may be subject to more than one interpretation when applied to employees, like Claimant, who own more than one property. This is a discipline case for dishonesty, not a contract interpretation case with a record that fully develops that issue. As such, the Carrier must establish the intent necessary to sustain the charge. . . . However, we find that the element of intent to deceive or "game the system" has not been established by substantial evidence in this case.

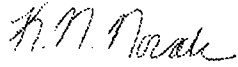
This Board agrees with Public Law Board 7660's analysis. This Board finds, without making a contract interpretation of Section 3, that the record in the instant case establishes that Claimant had a legitimate residence more than 50 miles from Claimant's work site reporting location. The Board has searched the record and does not find substantial evidence of intent to deceive or "game the system".

AWARD:

Claim sustained.

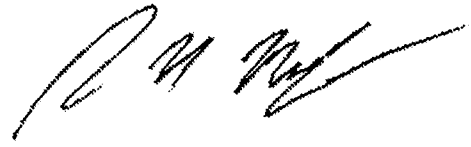
  
Robert Grey  
Neutral Member

Dated: 10/26/17



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Katherine N. Novak  
Carrier Member  
Dated: 10/26/17



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Andrew Mulford  
Labor Member  
Dated: 10/26/17