

PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance
of Way Employees Division - IBT

and

Union Pacific Railroad
(Former Missouri Pacific Railroad)

Case No: 047
Award No: 047

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. D. Peters, by letter dated October 29, 2014 for alleged violation of GCOR 1.6 Conduct, (4) Dishonest in connection with alleged dishonesty in the reporting of his residence in order to gain per diem, was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP516JF14/1616706D MPR).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now dismiss all charges and remove the discipline from Claimant D. Peters’ record, compensate Claimant for all time lost (straight, overtime and otherwise), immediately return Claimant to service, credit Claimant any and all time lost in connection with Railroad Retirement, vacation and hospitalization, compensate Claimant for all expenses incurred, provide Claimant with per diem, mileage and provide all other relief as contemplated under Rule 22(f).”

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 September 26, 2014, and an Investigation held on October 14, 2014 (after one (1) postponement) “to develop

the facts and place responsibility, if any, that while employed as Work Equipment Mechanic on Gang 9928, at Fort Worth, Texas, you were allegedly dishonest in claiming per diem you were not entitled to receive. This was discovered following an internal investigation completed on September 12, 2014.”

In a discipline letter dated October 29, 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 objections unpersuasive under the facts and circumstances of this record. The Board has not relied upon the documents complained of in the Organization’s letters dated February 2 and April 8, 2015.

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 dishonestly claimed and received per diem pay when working only 21 miles from his residence.

Public Law Board 7660 dealt with a related 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 by substantial evidence that Claimant was negligent in the reporting of his residence, in violation of Rule 1.6 (4) Dishonest as cited by the Carrier, resulting in payment of per diem to which he was not entitled.

Claimant was hired by the Carrier on August 11, 1993. On all relevant dates prior to November 7, 2008, Claimant’s online work site reporting location was in El Paso, TX. Pursuant to the Agreement, on or about November 7, 2008 he received a five-day notice changing his online work site reporting location to Miller Yard, Dallas, TX. Sometime thereafter, on a date not in the record, Claimant began reporting to the Carrier’s Mopac Road facility in Ft. Worth, TX, at the Carrier’s direction. There is no record evidence that Claimant was ever notified his work site reporting location was officially changed from Dallas to Ft. Worth. Claimant gave un rebutted testimony that he never received a five-day notice for this change. The Carrier presented no proof that Claimant did receive a five-day notice for this change. It is undisputed that no grievance was filed regarding same. Claimant continued reporting to the Carrier’s Mopac Road facility in Ft. Worth virtually every working day until the instant dismissal.

It is undisputed that on all relevant dates Claimant resided in Burleson, TX. It is undisputed that on all relevant dates Claimant’s residence and mailing addresses on file with the Carrier were a PO Box in Crowley, TX. The Carrier does not dispute that Claimant was entitled to per diem when his work site reporting location was Miller Yard, Dallas, TX. However, the Carrier charges that upon Claimant’s regular reporting for work to the Mopac Road facility in Ft.

Worth, TX, Claimant was no longer eligible for per diem because the distance was, admittedly, under 50 miles from his residence (approximately 21 miles). It is undisputed that Claimant continued to list Dallas, TX as his work site reporting location, and continued to receive per diem pay from the Carrier.

The record establishes by substantial evidence, and Claimant admitted, he should have been aware of the advent of the 50-mile requirement, either from ratification of the successor Agreement, or ratification of the April 25, 2012 Local/National Agreement. In mid-2012, Claimant noticed an increase in per diem in his payroll, and he inquired of his Manager whether he was still entitled to per diem. Claimant gave un rebutted testimony that the Manager replied the next day, that being a Restricted Mechanic, Claimant was still entitled to per diem. This Manager was dismissed from the Carrier's employ in the Fall of 2013 (for reason(s) unrelated to the instant claim). He did not testify at the Investigation. Claimant interpreted the Manager's reply to mean Claimant could continue submitting per diem claims as he had been doing for years. The Carrier argues that the Manager's reply meant that Claimant's job title (Restricted Work Equipment Mechanic) was still eligible for per diem, but was not an authorization to claim per diem if not entitled to it. The Board agrees with the Carrier, but finds it reasonably possible from the record evidence that Claimant and the Manager genuinely misunderstood each other, resulting in ambiguous miscommunication which Claimant relied upon. However, as Claimant acknowledged in his testimony, he should not have relied solely upon his Manager's reply.

The Carrier argues it has the right to rely upon honest and accurate reporting of residence and mailing addresses by its employees. The Board agrees. The Carrier points out that Claimant had a PO Box on file for both his residence and mailing addresses, and that a person cannot reside in a PO Box. The Board agrees. However, the Board notes that despite Claimant having a PO Box on file for both his residence and mailing addresses for all the relevant dates – years – of record, the Carrier never took issue with same.


The Organization argues that the Charging Manager (who was the sole Carrier Investigation witness) testified that Claimant should have been – but was not – afforded notice and the opportunity to rectify his per diem submissions. Notably, this Manager testified that when Claimant's supervisors marked his per diem submissions unapproved, the per diem claims

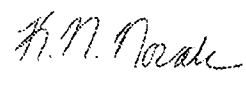
“still went through”, resulting in per diem payments to Claimant, with no record evidence that Claimant was ever informed (prior to the instant charges) that any per diem claim was improper or marked unapproved.

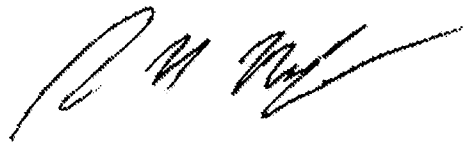
There is substantial evidence in the record that Claimant was negligent in the reporting of his residence, in violation of Rule 1.6 (4) Dishonest as cited by the Carrier, resulting in payment of per diem to which he was not entitled. However, under the specific facts and circumstances of this record, the Board does not find substantial evidence of intent to deceive or “game the system”. In light of the entire record, including the mitigating factors noted above, and Claimant’s 21 years of virtually unblemished service, the Board concludes that the dismissal should be modified to a long-term suspension. Claimant is reinstated to service with full seniority unimpaired, but without back pay or benefits.

AWARD:

Claim sustained in accordance with the Findings.


Robert Grey
Neutral Member
Dated: 10/26/17


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


Andrew Mulford
Labor Member
Dated: 10/26/17