

PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance
of Way Employees Division - IBT

and

Union Pacific Railroad
(Former Missouri Pacific Railroad)

Case No: 048
Award No: 048

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 Claimant J. Johnson, issued by letter dated October 2, 2014 in connection with his 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 UP517JF14/ 1616870D MPR).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now dismiss all charges, remove the discipline from Claimant J. Johnson record, compensate Claimant for all time lost (straight and overtime), immediately return Claimant to service immediately and grant 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 October 2, 2014, and an Investigation held on October 21, 2014 (after one (1) postponement) “to develop the facts and place responsibility, if any, while employed as an Assistant Track Foreman on Gang 2333, at Fort Worth, Texas, on the Fort Worth Subdivision, you were allegedly dishonest

in the reporting of your residence in order to gain per diem. This information was discovered after an internal investigation completed on September 25, 2014.”

In a discipline letter dated October 31, 2014, the Carrier found that “the following charges against you have been sustained: While employed as an Assistant Track Foreman on Gang 2333, at Fort Worth, Texas, on the Fort Worth Subdivision, you were dishonest in the reporting of your residence in order to gain per diem. This information was discovered after an internal investigation completed on September 25, 2014. This is 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. Pursuant to the current Union Pacific Discipline Policy, you are hereby notified that the current violation requires assessment of Level 5, which is PERMANENT DISMISSAL. Therefore, your record has this date 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 letter dated April 8, 2015. Additionally, 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 changing his residence address on file with the Carrier to Marshall, TX, while in fact residing in Crowley, TX, in order to claim per diem. It is undisputed that Marshall, TX, is 179 miles from Claimant’s work site reporting location, while Crowley, TX is 13 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 does establish by substantial evidence, “the element of intent to deceive or ‘game the system.’” Claimant’s changes of address coincided with Claimant’s bidding activity on assignments which were entitled to collect per diem. On April 2, 2014 Claimant, a two (2) year employee at the time, changed his residence address on file with Carrier from Crowley, TX to Marshall, TX; then bid on an assignment for which residence in Marshall, TX would entitle him to per diem, but Crowley, TX would not; then changed his residence address on file with Carrier from Marshall, TX back to Crowley, TX. On July 9, 2014 Claimant changed his residence address on file with Carrier from Crowley, TX to Marshall, TX; then bid on an assignment for which residence in Marshall, TX would entitle him to per diem, but Crowley, TX would not; then changed his residence address on file with Carrier from Marshall, TX back to Crowley, TX.

Claimant acknowledged that he began residing continuously at his Crowley, TX address in October 2013, and resided there, rather than Marshall, TX, at all relevant times. Claimant claimed he made these on-file residence address changes with the Carrier because he was having problems receiving his mail at the Crowley, TX address – from October 2013 through August


2014 –, so he used the Marshall, TX address (where he lived previously, and where his parents still reside, over 179 miles away from Crowley, TX) to ensure he would receive mail sent to him, including work-related mail sent by the Carrier. The Carrier found Claimant's conduct to be a dishonest effort to circumvent the per diem policy, and the mail-delivery-problem explanation to be "implausible".

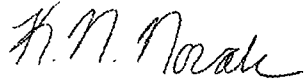
Claimant provided no probative evidence in support of his mail-delivery-problems-for-11-months defense. Claimant admitted he knew that he could change his mailing address on file with the Carrier, without changing his residence address on file with the Carrier. Yet, for an alleged mail delivery problem, Claimant chose to change his residence address, not his mailing address. The Board notes these changes coincided with bids entailing per diem from the Marshall, TX address, but not from the Crowley, TX address, and that per diem is based upon residence address, not mailing address. The Organization contends there is no proof that Claimant had knowledge of the April 25, 2012 Local/National Agreement, or intended to defraud the Carrier regarding per diem. However, Claimant's own testimony and deliberate conduct provide substantial evidence otherwise.

There is substantial evidence in the record that Claimant was dishonest in the reporting of his residence, in violation of Rule 1.6 (4) Dishonest as cited by the Carrier, in order to gain per diem. The Board defers to the Carrier's decision that Claimant's dishonesty has broken the essential bond of trust in the employer-employee relationship. Therefore, the discipline assessed by the Carrier was not arbitrary, capricious, or an abuse of discretion under the facts and circumstances of this record, and will therefore not be disturbed by this Board.

AWARD:

Claim denied.


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