PUBLIC LAW BOARD NO. 7660
CASE NO. 32

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PARTIES TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's dismissal of Claimant R. Stratton by letter dated July 9, 2014, for alleged violation of General Code of Operating Rules (GCOR) 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'*(Emphasis in original) in connection with allegations that he dishonestly reported his residence so as to claim per diem he was not entitled to was without just and sufficient cause, unwarranted and in violation of the Agreement (System File T-1448U-702/1611810 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now make Claimant R. Stratton whole by compensating him for all wage and benefit loss suffered in addition to expunging the matter from his personal record."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant, a 6 year employee, was working as a Tamper Operator for on-line Gang 9057. A Notice of Investigation dated June 10, 2014 was issued on charges of dishonesty in reporting his residence in order to gain per diem. Claimant was withheld from service pending the investigation. The July 9, 2014 Notice of Discipline finds Claimant guilty of the charges in violation of Rule 1.6 Conduct (4) Dishonest, and assesses him a Level 5 dismissal. The instant appeal resulted.

In National bargaining in March, 2012, the parties negotiated changes to the rules addressing away from home expenses, recognizing that there were issues resulting from the payment of per diem allowances to defray the expenses of employees headquartered "on-line" on a calendar day basis. In the April 25, 2012 National Agreement, and effective July 1, 2012, the per diem rate was increased, it would be paid only on days an employee performed compensated service, and employees would not be entitled to per diem when their work site reporting location was less than fifty (50) miles from their residence. The pertinent part of the per diem rule (Section 3) of the relevant Local/National Agreement states:

> 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.

Claimant purchased a home in Ord, NE with another UPRR employee in early March, 2012. In April, 2012 he changed his address of record with the Carrier to that house, and all correspondence was sent to that address. Claimant testified that at the time of the purchase he was unaware of the change in the per diem rule. He offered a number of documents indicating his ownership of, and services provided to him, in the Ord location. In an interview with Corporate Audit conducted via telephone on June 2, 2014, the transcript of which was introduced at the investigation (without the presence of any of the Auditors participating), Claimant stated that he also owned a house in Shelby, NE for about a year that he used as rental property, having two tenants at the time, with one having moved out recently, and he was planning to sell the property. Claimant told the audi-

tors that he split his time between Shelby and Ord, spending most of his time around Ord, but sometimes staying at his or his girlfriend's house in Shelby. Claimant only used his Ord address when claiming per diem, regardless of whether his Shelby house was located within 50 miles of his work location. He testified that he doesn't stay in Shelby often, maybe once or twice a month, but is most often in his house in Ord which he considers his residence.

The Carrier argues that Claimant was dishonest when he claimed per diem in the amount of over $11,000. that he was not entitled to, as he had a residence (Shelby) within 50 miles of his work site. It asserts that the language and intent of the per diem rule is clear and disqualifies an employee with a residence within 50 miles of his reporting location from entitlement to per diem. The Carrier believes that Claimant, as well as his fellow employee, intentionally purchased the house in Ord knowing that the per diem rule was going to be changed and in order to qualify for per diem payments which he would otherwise not be entitled to, and that his admission that he owned, and regularly stayed in his Shelby house, proves his dishonesty in always using his Ord address to claim per diem. It points to a June 12, 2014 letter from Labor Relations General Director Handquist to various General Chairmen setting forth the clear interpretation of Section 3 as disqualifying any employee with "a residence" within 50 miles from per diem, and its forwarding by an Allied Federation representative to its members as an acknowledgement of the correctness of that reading of the rule. The Carrier relies on the precedent establishing the appropriateness of a Level 5 dismissal for engaging in dishonest conduct.

The Organization contends that the Carrier is misinterpreting Section 3, which does not say "a residence" but clearly applies to an employee's permanent residence or domicile. It asserts that the Carrier is improperly using the discipline procedure against employees who own or lease multiple houses, as did Claimant, to further its interpretation of the newly negotiated provision, which is not shared by any of the Organization's representatives involved with National bargaining.

The Organization argues that the Carrier failed to prove that Claimant was dishonest in putting in for per diem from his Ord location, which was his primary residence or domicile, as exhibited by many documents showing his use and presence, and the fact that it became his address of record with the Carrier once it was purchased in March, 2012. It notes that the Carrier failed to establish that Claimant purchased the house in Ord knowing of anticipated per diem rule changes, which he denied, and the facts reveal that the purchase was made prior to the publication and ratification of the April 25, 2012 National Agreement containing the changes in the per diem rule. The Organization maintains that it is irrelevant whether Claimant stays in his rental property with his tenant(s) or at his girlfriend's house in Shelby for part of the time in establishing that his permanent residence or domicile is in Ord. It notes that the Carrier offered Claimant (and two other employees) a leniency reinstatement agreement, which was accepted, and then improperly withdrew the offer before it was signed. In any event, the Organization argues that the penalty of dismissal was excessive if it is found that there was some misunderstanding about the application of the new per diem rule to employees who own multiple houses, and it is found that Claimant was mistaken in consistently using his Ord address for that purpose.

On the basis of the entire record, the Board concludes that the Carrier has failed to meet its burden of proving that Claimant was guilty of dishonesty when he used his Ord address to claim per diem entitlements from the time he purchased the house with a fellow employee in March, 2012. In order to prove the charges, the Carrier was obliged to establish that Claimant knowingly bought the property with the intent to use it as his "over 50 mile residence" in order to obtain per diem payments to which he was not otherwise entitled, and that it was not his Section 3 "residence" when he input his per diem claims. The Carrier's argument that Claimant was dishonest is based upon the fact that he also owned a house in Shelby, NE which was within the 50 mile radius of many of his work locations, and that he regularly stayed in it when working in the area. However, Claimant testified at the investigation that he doesn't stay in Shelby that often (maybe

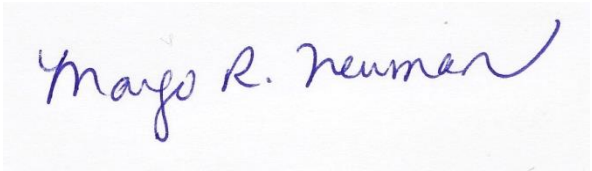
once or twice a month) and that his domicile is in Ord. He also testified that he was unaware of the change in the per diem rule at the time he bought, and changed his residence to, Ord. The transcript of the June 2 audit interview, upon which the Carrier relies in arguing that Claimant regularly stayed at his house in Shelby, reveals that Claimant answered a question indicating that he sometimes stays in Shelby when he works close by either at his girlfriend's place or his rental property with his tenant(s).

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. In the instant case, we are unable to find that the Carrier met its burden of proving that Claimant changed his residence location by purchasing and using his Ord address to qualify for per diem payments when it was not really his "residence," and in an effort to obtain per diem payments to which he was not contractually entitled. Claimant was charged with a violation of Rule 1.6 Conduct (4) Dishonest, with Carrier quoting the section concerning "willful disregard" of its interests. However, we find that the element of intent to deceive or "game the system" has not been established by substantial evidence in this case.

Accordingly, the claim is sustained.

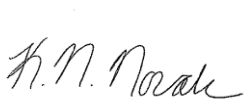
AWARD:

The claim is sustained.



Margo R. Newman
Neutral Chairperson

Dated: October 13, 2016



K. N. Novak
Carrier Member

Andrew Mulford
Employee Member