

PUBLIC LAW BOARD NO. 7660
CASE NO. 33

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

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 L. Treffer by letter dated July 9, 2014, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6, Conduct (4) Dishonest 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-703/1612029 UPS).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now make Claimant L. Treffer 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, an almost 9 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.

This case is a companion case to Case 32, as Claimant herein is the co-owner of the Ord, NE residence with R. Stratton, who was the Claimant in that case, and was similarly charged. While their investigations were separate, they took place on the same day, at the same location and with the same Hearing Officer. It appears from the record that Claimant herein had his investigation first. Most of the exhibits and types of documentary evidence produced concerning the Ord residence are the same or similar in both cases. Claimant's June 2, 2014 Audit interview was conducted separately from Stratton's, although the questions asked were substantially the same, and the transcripts of that interview were entered into the record at the investigation in the absence of the Auditors.

As noted in Award 32, 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, as well as his driver's license address, 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, and did not learn of the 50 mile requirement in the new per diem rule until late June or early July. He noted that he continued to receive daily per diem under the old rule regardless of his change of residence to Ord.

Claimant stated that he also owns a house in Shelby, NE with a mortgage, where he lived for a few years before buying the Ord location, and considers it investment property because his wife (since 2013) has her photography studio there where she works and stays during the week. He testified that he spends his weekends and most of his off

duty time with his wife in Ord, and is away traveling for work most of the time. Claimant stated that sometimes he stays with his gang in motels where they are working, and occasionally stays in Shelby or with his family depending on how long his hours are and where he is working. He noted that he spends most of his off duty time (especially in the nice weather) in Ord, where he grew up, and bought the house with his good friend since they love to do boating, fishing and hunting near that area, and have built a race car together, but that he also spends time in Shelby during the winter months, when he is sometimes laid off. 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, and earned over \$9,000 in per diem payments doing so. He testified that he considers Ord his irrevocable domicile, and he followed his Organization representative's advice to claim the house where he spends the most time as his residence for per diem purposes.

As noted in Award 32, the pertinent language of the new per diem rule (Section 3) of the April 25, 2012 Local/National Agreement states:

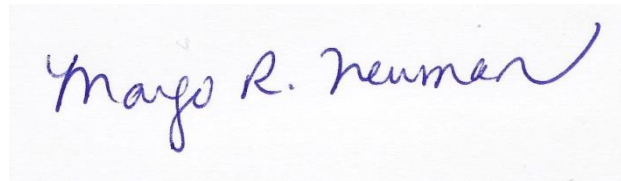
No per diem allowance will be paid to an employee headquartered on-line or in other mobile service who is working (work site reporting) within fifty (50) miles of their residence.

The arguments of the Carrier and the Organization are the same in this case, as they were in Case 32, and we incorporate them herein. For the reasons stated in Award 32, the Board similarly 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. We also reiterate our opinion that Section 3 may be subject to more than one interpretation when applied to employees, like Claimant, who own more than one property. The Carrier charged Claimant with dishonesty. There is no evidence that Claimant knew that the per diem rule requirements were going to change to incorporate a 50 mile limit at the time that he purchased the Ord property and changed his address of

record. As we did in Award 32, the Board finds that the Carrier has failed to establish, by substantial evidence, the intent necessary to prove 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. 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