PUBLIC LAW BOARD NO. 7660
CASE NO. 34

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 M. Starkey 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-704/1612709 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now make Claimant M. Starkey 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 23 year employee, was working as a Roadway Equipment Operator for on-line Gang 0141. 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 raises the same issue of per diem entitlement for an employee who owns/rents more than one residence under the following language of the new per diem rule (Section 3) of the April 25, 2012 Local/National Agreement which 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 allegation of dishonesty for which Claimant is charged is similar to that presented in Cases 32 and 33, although the underlying facts of Claimant's circumstances are different.

Claimant owned and resided in a house in Palmer, NE before entering into a rental agreement for property near the lake in Loup City, NE, approximately 55 miles away, in November, 2012. He also owns a place in St. Paul, NE, about 12 miles from Palmer, that his daughter and her husband rented after her graduation from college in May, 2012. Claimant stated that he rented his Palmer house to a truck driver from July, 2013 through December, 2013, and sold it to his daughter and son-in-law in January, 2014, with a closing date of March 31, 2014. Claimant explained that while his son finished high school in Palmer (or St. Paul) after he relocated to Loup City, his son often stayed with his daughter or his sister locally until he graduated, and was presently away at college and would come to his rental house in Loup City on the weekends.

Claimant was questioned by Corporate Audit in a recorded phone interview on June 2, 2014 where he admitted staying at his Palmer property during the work week from November, 2012 until it was rented in July, 2013 to make repairs and get it ready for renting, and again during the first few months of 2014 during the cold weather to keep

the water running. Claimant also stayed overnight on occasion after selling his Palmer house to his daughter to help his son-in-law renovate. Claimant admitted understanding that the new rules allowed an employee to collect per diem when his residence is over 50 miles from his work assembly point, and stated that he was guilty of putting in for per diem from his Loup City residence when he was staying in Palmer which was less than 50 miles from his work location on a number of occasions, but he could not say how many times. He also clarified that the person from whom he was renting the Loup City house occasionally would also stay there with him during the rental period.

During the investigation, Claimant offered many documents to establish the change in his residence address to Loup City including a September, 2013 renewal of his driver's license, car and boat trailer registrations, railroad retirement statements and other documents. The Organization also attempted to present into evidence a statement from his daughter, pictures and other documents, which the Hearing Officer refused to accept for the purpose of establishing Claimant's residence.

For the most part, 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. However, in this case, the Carrier points out that Claimant chose to rent a place over 50 miles distant from his normal work locations five (5) months after the per diem rules changed, and he understood that his entitlement to such payment was conditioned about the 50 mile distance requirement. It also asserts that Claimant entered into this rental arrangement in Loup City when he already owned two homes that he was responsible for maintaining, and did not rent out the Palmer house until some 7 months later. The Carrier relies on Claimant's admission to staying at his Palmer residence during the work week for that 7 month period and again during the first few months of 2014, while still using his Loup City rental address as his residence in order to obtain per diem in the amount of over $9,000 between November, 2012 and May, 2014, as evidence of his dishonest intent to obtain per diem by strategically using another address. The Carrier contends that such

dishonesty supports its decision to issue Claimant a Level 5 dismissal under the UPGRADE policy.

In addition to the previous arguments made by the Organization, it asserts that Claimant was denied a fair and impartial hearing since the Hearing Officer outwardly exhibited bias, overruling all of the Organization's objections, and preventing it from entering into the record evidence it believed helped to establish Claimant's residence as his Loup City address. It notes that there is nothing to show that Claimant was being dishonest, just because he had a rental property within a 50 mile radius, as the per diem rule is ambiguous and does not designate which of multiple locations is to be designated by an employee as his residence, and Claimant reasonably chose the one he primarily resides in and hopes to purchase. The Organization points out that Claimant never put in for per diem from Loup City when he lived in Palmer prior to November, 2012. Since Claimant's supervisor acknowledged his good work ethic and his long service with no prior disciplinary record, it asserts that dismissal is an excessive penalty in this case, especially where a leniency reinstatement agreement was offered, accepted, and then withdrawn by the Carrier without explanation.

As we stated in Award 32, 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 or rent more than one property. However, this is a discipline case, not a contract interpretation case, and the Carrier must establish the intent necessary to sustain the charge.

The facts of this case differ from those presented in Cases 32 and 33, in that Claimant herein chose to rent a property in Loup City knowing that his per diem entitlement would be based upon his working over 50 miles from his residence, and that his homes in Palmer and St. Paul were not normally that distant from where he had been assigned to work. Although he first rented, and later sold his Palmer house to his

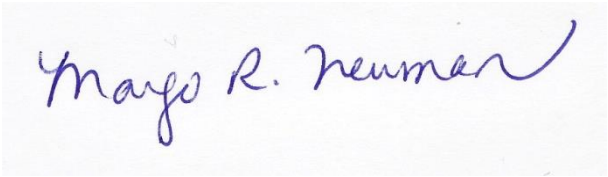
daughter and son-in-law, the record establishes that he spent a lot of his time during the work week from November, 2012 (when he established his Loup City address) until July, 2013, and again from January through March, 2013 at his Palmer house, which was vacant, maintaining and remodeling it for the rental market. While the Board does not doubt that Claimant may have wanted to have a weekend and retirement place near the lake in Loup City for future use, or his claim that he intends to buy his rental house, the fact remains that for a substantial period after he changed his residence to Loup City and used that rental address to obtain per diem payments, he maintained a house in Palmer he regularly frequented.

Even if these facts prove the intent necessary to establish dishonesty of purpose on Claimant's part, the Board is not convinced that, with the possible misunderstanding of the term "residence" in Section 3 as it relates to an employee with multiple properties, a 23 year employee with an excellent record should lose his job and career over this infraction. While there is no doubt that the Carrier is empowered to dismiss an employee for dishonesty under its UPGRADE discipline policy, we believe that was an excessive response under the circumstances, and there are sufficient mitigating factors present to modify the penalty.

Accordingly, we direct that the Carrier offer Claimant reinstatement to a position that his seniority permits him to displace into, but do not order any compensation for the period the Claimant was off work in the interim.

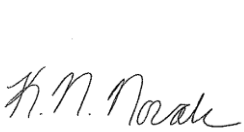
AWARD:

The claim is sustained, in part, in accordance with the Findings.



Margo R. Newman
Neutral Chairperson

Dated: October 13, 2016



K. N. Novak
Carrier Member

Andrew Mulford
Employee Member

PUBLIC LAW BOARD NO. 7660
CASE NO. 99

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY

REQUEST FOR INTERPRETATION OF PLB 7660, AWARD 34

PLB 7660, Award 34 was adopted on October 10, 2016. It held, in pertinent part:

"Even if these facts prove the intent necessary to establish dishonesty of purpose on Claimant's part, the Board is not convinced that, with the possible misunderstanding of the term "residence" in Section 3 as it relates to an employee with multiple properties, a 23 year employee with an excellent record should lose his job and career over this infraction. While there is no doubt that the Carrier is empowered to dismiss an employee for dishonesty under its UPGRADE discipline policy, we believe that was an excessive response under the circumstances, and there are sufficient mitigating factors present to modify the penalty.

Accordingly, we direct that the Carrier offer Claimant reinstatement to a position that his seniority permits him to displace into, but do not order any compensation for the period the Claimant was off work in the interim.

The claim is sustained, in part, in accordance with the Findings."

The original claim requested the following remedy.

"As a consequence of the violation referred to in Part 1 above, the Carrier shall now make Claimant M. Starkey whole by compensating him for all

> wage and benefit loss suffered in addition to expunging the matter from his personal record."

A dispute arose over the implementation of the Award. It is undisputed that Claimant was returned to service without back pay. The issue raised is whether the Carrier's decision to return Claimant at the status of a second triggering/training event with a 36 month retention period was appropriate.

The Organization's position is that when issuing Award 34, the Board did not authorize the Carrier to impose a heightened discipline level or review period upon Claimant. It notes that the Carrier never asserted on the property, or before the Board, that Claimant would be subject to an elevated discipline level or a review period if he was found partially responsible, and argues that it should not be permitted to do so at this time. The Organization asserts that, because it was not raised, this elevated level of discipline could not have been contemplated by the Board when issuing Award 34, and the Carrier should not be permitted to rely upon it in subsequent discipline issued to Claimant.

The Carrier points out that Claimant was found guilty of the charge of dishonesty under its UPGRADE Policy, and was returned to work due to mitigating factors, not exoneration of the charges. It maintains that Claimant was placed at the status of a second triggering/training event with a 36 month retention period under the following provision of its Managing Agreement Professionals for Success (MAPS) Policy, which supplanted its UPGRADE Policy under which the disciplinary charge was brought, and was effective September 15, 2015.

> 3.7 Arbitration Decisions: If a dismissed employee is returned to service as the result of a court decision or an arbitration decision or award, the conditions of the decision or award will be controlling for the purposes of adjusting the employee's record. If a decision or award is silent with regard to the employee's record, the employee's record will

> revert to the status of a second triggering/training event with a thirty-six (36) month retention period. The time spent in dismissed status will not apply to the retention period of a prior violation.

The Carrier notes that there was a similar provision under its prior discipline policies, including UPGRADE, and that the Organization has been long aware of its existence. It contends that the application of such provision to employees returned to service but not exonerated has been consistent and previously upheld as appropriate, citing SBA 279 Award 1044 (which it argues is *stare decisis*) and SBA 1127, Award 10.

The Organization has made clear that it is not asking the Board to rule on the validity of the Carrier's policy. The narrow issue presented is whether the remedy directed by the Board in Award 34 reasonably contemplated that Claimant would be placed at a level on the discipline scale commensurate with the conduct with which he was found guilty. There is no reason for this Interpretation to consider in detail whether the Organization had prior notice of the Carrier's MAPS Policy or whether it has been consistently enforced, both contentions raised by the parties in their on property correspondence leading up to this Interpretation request.

While the Organization is correct that Section 3.7 of the MAPS Policy was not specifically raised by either party during the on property handling of the claim resulting in Award 34, which was adopted by the Board a year after MAPS effective date, the matter of the application of this provision has been previously addressed in SBA 279, Award 1044. That case was between the same parties under the same Agreement and discipline policy. Therein, the Board held, in part:

> ….. It is clear that Carrier's well-publicized policy in regard to arbitration decisions returning employees to service, while unilaterally promulgated, has been in effect and implemented by Carrier for a number of years.

> The Organization is correct that Award No. 1042 did not authorize this action, but, at the same time, the issue did not arise in the course of rendering that decision. Additionally, the Board is unaware of any challenge to this aspect of the MAPS policy at the time the procedure was initially promulgated.
>
> The appropriate course of action would be for the parties to address the issue in future negotiations or, conversely, to raise the issue at the time of a hearing before a Board. Given what has transpired here, the Board is unable to render a decision supportive of the Organization's interpretation.

In the normal course of on property correspondence, the Carrier routinely enters the parts of its discipline policy relating to the charged conduct and corresponding penalty, as well as any cited Rule violations. It urges that its action be upheld. The entire discipline policy, including what would happen should the Board partially sustain the claim but not exonerate the employee, is not discussed or included in the record. The Organization, as it did here, requests that Claimant be made whole and that the discipline be expunged from his/her record. Sometimes, it argues that the discipline was excessive and requests that it be modified. The Organization does not address what should happen to a Claimant found guilty of the charge, but returned to work based upon mitigating factors that it has pointed out should be considered.

It appears that the question of interpretation became an issue in this case when Claimant was charged with violating another Rule within the retention period and dismissed. The just cause inquiry raised in that case is subject to a different claim, where the appropriateness of the penalty will be assessed based upon the nature of the violation and Claimant's past disciplinary record, including his placement upon his return to work under the MAPS Policy. See, SBA 1127, Award 10.

Under all of these circumstances, we deny the Organization's request to find that the Carrier's decision to return Claimant at the status of a second triggering/training event

with a 36 month retention period did not comply with its obligation in effectuating the remedy directed in Award 34. Under the findings of SBA 279, Award 1044, we conclude that the Carrier's challenged action was appropriate.

Margo R. Newman
Neutral Chairperson

Dated: 10/31/2018

K. N. Novak
Carrier Member

Andrew Mulford
Employee Member