PUBLIC LAW BOARD NO. 7660
AWARD NO. 41

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 Mr. S. Drew, by letter dated July 1, 2014, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6Conduct in connection with allegations that he dishonestly reported his residence was without just and sufficient cause, unwarranted and in violation of the Agreement (System File M-1448U-402/1610763 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier must now remove the discipline from Claimant S. Drew's record, reinstate him to service immediatelyand compensate him for any and all wage and benefit loss suffered including vacation, insurance and Railroad Retirement."

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 30 year employee, was working in the job title of System Tie and Rail Inspector for on-line Gang 9395 at Salt Lake City (SLC), Utah, but was performing

administrative matters in the office in SLC from Monday through Friday, 7 a.m. to 7 p.m. A Notice of Investigation dated May 30, 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 1, 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 Award 32, this Board set forth the history of the negotiated changes to the per diem rule, and quoted the pertinent part of the new rule (Section 3) contained in the April 25, 2012 National Agreement, effective July 1, 2012 as follows:

> 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.

That rule differed from the prior rule with respect to rate of per diem ($58 vs. $83) and the days it was paid (calendar vs. work days), and added a distance requirement for eligibility, as noted above.

There is no dispute that per diem is intended to defray the expenses of employees headquartered on line. In this case, as in the cases resulting in Awards 32 and 33, Carrier found Claimant guilty of dishonesty on the basis of his claiming that his residence was in one location over 50 miles from his work site, while he owned, and resided part of his time, in another residence within the 50 mile radius. The underlying facts leading to the charge were discovered as a result of a Corporate Audit conducted in May, 2014, and consisted of three interviews with Claimant on May 8 and 14, 2014, and relevant documents gathered and compiled by the auditors. The Corporate Audit investigation (including transcripts of the interviews) was entered into the record of Carrier's June 17, 2014 investigation, and one of the auditors testified.

Claimant testified that he married his current wife in 2003, she was from Mona, Utah, and her family resides in, and owns, various houses and properties in Mona. His wife explained that she owns a residence that she lived in with her prior partner and her son, which she has rented out since marrying Claimant, and that they moved into the house owned by her grandmother before her death in 2001 (and promised to her). Claimant stated that when he got the job working full time in SLC in 2003, which was a 90 mile commute each way, and his wife also got part-time employment in the city, he purchased a home in Magna, Utah, approximately 15 miles from work, where he and his wife stay during the weekdays rather than commuting. Claimant testified that he considers his primary residence to be the Mona house, which they go to on weekends and he is in the process of fixing up. He stated that he tried to change his address of record in Carrier's computer system from the Magna property (which he said he entered sometime after purchasing the property in 2003), to his Mona house prior to the time the per diem rule changed in 2012, but that the computer software system changed during that period; the notations that appear in the computer indicate the Magna address with a date of 1/1/08 and the change to a Mona PO Box on 5/3/12.

Claimant's Manager since June, 2011 testified that he knew that Claimant owned two homes, one in Magna and one in Mona, and that Claimant always said his primary residence was in Mona. He testified that he asked his employees to update their personal information in the system 3 or 4 times since he took over, including around May, 2012 when the new Agreement came out and he told his guys to make sure they had a good current address in the system. Claimant's Manager stated that he cannot tell someone where to claim as their home address. He agreed that he approved Claimant's time, including the per diem and mileage claimed, and had no reason to doubt the entries since he was entitled to claim it since Mona was over 50 miles away. His superior, the Assistant Chief Engineer (ACE), also was aware of, and approved Claimant's pay entries. The Manager testified that a few months prior to the Corporate Audit, the ACE called him and told him to instruct Claimant to state that his home was in Magna until this was all settled. Claimant's Manager

also stated that it was the ACE who called to instruct him to suspend Claimant pending the investigation, and he had no idea what it was based on.

The documents submitted in the Corporate Audit reveal that the deed to the Mona house where Claimant and his wife reside indicate split ownership between his wife's mother and her two siblings, and that the utility bill is still in her grandmother's name. Claimant's wife testified that she pays the utility and tax bills monthly. She submitted statements from her aunt, uncle and mother all indicating that their mother left her house to Claimant's wife, and that she lives there with Claimant when they are not in the city. Claimant submitted into the record his Federal and State tax return for 2013, a 2012 W2 form, his car registration from 2012-2013, garnishment notice, Railroad Retirement letter and other correspondence addressed to him, or submitted, with his Mona address.

Claimant testified that he never told the auditors that he did not live in Mona, but that he bought the place in Magna to use while working rather than commuting, and that he used his per diem payments to pay for his place in Magna because he understood that is what it was intended to do - pay for his lodging and expenses when away from home. He admitted that his driver's license had his Magna address, indicating that the State law required that if he was there more than 50% of the time, which he acknowledged he was. Claimant testified that he was not dishonest to the auditors, and never was dishonest in his pay submissions to Carrier. He understood that he was entitled to submit for per diem from his permanent residence in Mona, and his Manager and ACE knew he was doing so and approved his time.

Carrier argues that Claimant was dishonest when he claimed per diem in the amount of $37,000 between June 2012 and March 2014, to which he was not entitled, as he owned a residence in Magna, 15 miles from his work site, where he spent all of his working time. 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. Carrier believes that Claimant intentionally changed his residence address in its

records from Magna to Mona in May, 2012 in order to qualify for per diem payments which he would otherwise not be entitled to. It points to a June 12, 2014 letter from Labor Relations General Director Hanquist 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. Carrier relies on the precedent establishing the appropriateness of a Level 5 dismissal for engaging in dishonest conduct.

The Organization contends that Carrier is misinterpreting Section 3, which does not say "a residence" but clearly applies to an employee's permanent residence or domicile. While objecting to Carrier's attempt to enter the Hanquist letter into the record after the hearing, it points to General Chairman Below's response to such letter disagreeing with Carrier's interpretation, noting that there is no prohibition against an employee owning or renting over one property or dwelling, and stating that Carrier cannot dictate which property an employee chooses to live in or occupy. The Organization asserts that 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, and that this is a contract interpretation case under the guise of a disciplinary matter.

The Organization argues that Carrier failed to prove that Claimant was dishonest in putting in for per diem from his Mona residence, which is his primary residence or domicile. The Organization maintains that it is irrelevant the amount of time Claimant stays in his Magna house in establishing that his permanent residence or domicile is in Mona. It notes that Claimant always informed supervision that his residence was in Mona, and he continued to submit his per diem and travel expenses from there for about 2 years, all of which were approved by his Manager and ACE without exception. The Organization asserts that Claimant had no intent to deceive anyone, and did not do so, and that, if there was any misunderstanding about what was appropriate under the new per diem rules, it was

held by supervision as well as employees. The Organization argues that Carrier did not meet its burden of proving dishonesty, citing PLB 7660, Awards 32 & 33, and that, even if it is found that there was some misunderstanding about the application of the new per diem rule to employees who own, or reside in, multiple houses, dismissal is an excessive penalty for a 30 year employee with a clean record.

On the basis of the entire record, the Board concludes that Carrier has failed to meet its burden of proving that Claimant was guilty of dishonesty when he used his Mona address to claim per diem entitlements from June, 2012 to March, 2014. As noted in Awards 32 & 33, in order to prove the charge, Carrier was obliged to establish that Claimant knowingly changed his address of record to his Mona residence 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. Carrier's argument that Claimant was dishonest is based upon the fact that he owns a house in Magna, Utah which is 15 miles from his work location, and that he regularly stays in it during his work week.

However there is no doubt about his wife's connection to Mona and her family who lives there, or the fact that they lived there before buying the house in Magna due to the lengthy commute, and come back on weekends. Regardless of the legal ownership of the Mona house, there appears to be agreement by the listed deed holders, that the property was intended for Claimant's wife, and that they both reside there when not working in the city, and consider it home. Claimant has used his Mona address in a variety of legal documents and for important Carrier-related correspondence. His Manager knew of his two houses, confirmed the fact that Claimant always advised him that Mona was his home, and continued to approve his submission of per diem without any question after the change in the Rule.

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 reside in, 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, 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 using his Mona 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 never hid what he was doing, and felt that he was entitled to use his per diem payments to secure lodging closer to work so that he would not have to make the 180 mile round trip commute daily. Whether that was a proper use of per diem, or what was intended by the parties in agreeing to modify the per diem payment, is not at issue in this case. Claimant was charged with a violation of Rule 1.6 Conduct (4) Dishonest, with Carrier quoting the section concerning "willful disregard" of its interests. Since we find that the element of intent to deceive or "game the system" has not been established by substantial evidence in this case, we overturn the Level 5 discipline imposed.

Accordingly, the claim is sustained.

AWARD:

The claim is sustained.

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Margo R. Newman
Neutral Chairperson

Dated: November 27, 2017

K. N. Novak
Carrier Member

Andrew Mulford
Employee Member