PUBLIC LAW BOARD NO. 7660
AWARD NO. 43

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. J. Hernandez, by letter dated August 27, 2014 for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6 in connection with allegations that he dishonestly reported his residence in order to gain per diem was without just and sufficient cause, unwarranted and in violation of the Agreement (System File MK-1448U-902/1618077 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier must now remove the discipline from Claimant J. Hernandez's record, reinstate him to service and compensate him for all wage and benefit loss suffered."

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 17 year employee, was working as a Fuel Truck Driver on System Gang #9056. A Notice of Investigation dated August 27, 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, which occurred on September 18, 2014. The October 8, 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, Carrier found Claimant guilty of dishonesty on the basis of his continually changing his residence address in SAP to his address that was outside the 50 miles radius when his work location changed to within the 50 mile radius of his other residence. The underlying facts leading to the charge were discovered as a result of a Corporate Audit of Claimant's per diem payments and residence listings between August 12, 2012 and June 23, 2014, and a telephone interview conducted with Claimant on August 18, 2014. The Corporate Audit investigation (including a transcript of the interview) and relevant documentation was entered into the record of Carrier's September 18, 2014 investigation, and one of the auditors testified.

The evidence of Claimant's per diem payment submissions shows that he listed his address in Lakewood, Colorado on certain dates in August and September, 2012, and changed it to Evans, Colorado on 9/23/13 and 10/8 & 9/13 when his work location changed to Arvada and Denver, which was 10-13 miles from Lakewood but 52 miles from Evans. Claimant changed his address back to Lakewood between 10/11 and 10/28/13, when his work location changed to Milliken, which was 13 miles from Evans but 50 miles from Lakewood. He changed his address back to Evans on 11/8/13 when he began working in Plainview and then Denver, which were 25 and 13 miles from Lakewood respectively, but 59 and 52 miles from Evans. Claimant's address remained in Evans during the duration of his work in Denver (and Aurora) until 6/16/14, when his work location changed to LaSalle, which was 2 miles from Evans and 52 miles from Lakewood, and Claimant changed his residence address back to Lakewood.

In response to questions during the Audit interview, Claimant stated that he believed the Evans residence was owned in his son and his son's wife's name, but that he stayed with his son so he could help him financially get his house. He said the Lakewood residence was his wife's townhouse, but that they helped young couples from his church allowing them to occupy a few bedrooms at different times, while he and his wife always kept the master bedroom. Claimant admitted staying in Lakewood when he was working close to Denver but going back to Evans on his days off, and that he could stay in either place he chose at any time. He admitted putting in for per diem on some occasions when he stayed within the 50 miles. At the Investigation, Claimant testified that the reason he changed his residences, was that he was having personal problems with his spouse and wanted to save his marriage. During the Audit interview, as well as at the Investigation, Claimant admitted understanding the 50 mile per diem radius rule.

Carrier argues that Claimant was dishonest when he claimed and received per diem in amount of over $10,000 between September 2013 and June 2014, to which he was not entitled, by continually changing his residence address to a location over 50

miles from his job assignment, regardless of where he was actually residing, 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 raises certain due process arguments including that the Audit interview was a formal hearing without Organization representation, there were dual roles of the accuser and trier of fact, and that the Hearing Officer showed bias and did not permit the introduction of proffered evidence concerning where Claimant stayed during specified periods. It 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 over one property or dwelling, and stating that Carrier cannot dictate which property an employee chooses to live in or occupy at any given time. The Organization argues that Carrier failed to prove that Claimant was dishonest in putting in for per diem from both of his residences, that he complied with Carrier's Rule requiring him to update his address, that it did not meet its burden of proving dishonesty, citing PLB 7660, Awards 32 & 33, and that, dismissal is an excessive penalty in this case.

On the basis of the entire record, the Board concludes that Carrier has met its burden of proving that Claimant was guilty of dishonesty when he continually changed his address in Carrier's records when his job location changed, between September, 2013 and June, 2014, in order to qualify for per diem payments. In this case, unlike the

situation in Awards 32 & 33, Carrier established that Claimant knowingly changed his address of record between his residence in Lakewood and Evans to coincide with the change in his work site locations, 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. It was not coincidence that, during the period of each work location change, the residence claimed was outside the 50 miles radius and the other was inside that radius. Additional evidence of dishonest intent was shown by Claimant's changing stories about the reasons for his frequent address changes during his Audit interview and at the Investigation. The transcript of the Audit interview reveals a clear understanding by Claimant that he had been caught in changing his address in order to qualify for per diem payments, and his attempts to say that he would do things differently if it created a problem.

In this case, the evidence supports a finding that the element of intent to deceive or "game the system" has been established by substantial evidence, and we uphold the Level 5 discipline imposed, as it is the appropriate penalty under Carrier's UPGRADE policy for a Rule 1.6 violation. Accordingly, the claim is denied.

AWARD:

The claim is denied.

Margo R Newman
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Margo R. Newman
Neutral Chairperson

Dated: December 9, 2017

K.N Novak
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K. N. Novak
Carrier Member

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Andrew Mulford
Employee Member