

PUBLIC LAW BOARD NO. 7660
AWARD NO. 48

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY
[Former Southern Pacific Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s dismissal of Mr. M. Matthews, by letter dated October 1, 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 T-1445S-708/1619791 SPW).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must now remove the discipline from Claimant M. Matthews’ 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 35 year employee, was working as an Assistant Track Foreman on Gang 8165 in Los Angeles, CA at the time he was brought in and questioned by Corporate Audit on September 29, 2014. A Notice of Investigation dated October 1, 2014 was issued on charges of dishonesty in reporting his residence in order to gain per diem, and dishonesty during the Audit interview. Claimant was withheld from service pending the investigation. The November 3, 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 claiming that his residence was in Bastrop, LA when he stayed at a home he was listed in County records as owning in Gardena, CA, within the 50 mile radius of all of his various work locations. Claimant explained that he lived in Gardena and another location in CA prior to his termination in July, 2012, when he had no money to maintain those homes, and he changed his residence to Bastrop, LA where much of his family lived, including his seriously ill father. He stated that when he was removed from service in 2012, he went home and lived with his father, taking care of him.

Claimant testified that after he was returned to service under a leniency agreement on December 21, 2012, he lived with his mentally ill son in Gardena when he was working in CA, since he was helping him out, and, on occasion, stayed with friends or a girlfriend closer to a job location, while maintaining his residence in LA. He submitted handwritten receipts for rent he paid to his father monthly between December, 2013 and October, 2014, and a quitclaim deed to his Gardena property to his son indicating it was made on November 28, 2012, but signed and notarized on October 14, 2014. Carrier personnel records show that, effective 2/1/2013, Claimant's home and mailing address was 1202 Cullen Drive, Bastrop, LA, and he lists his sister Pat Stokes as one of his emergency contacts.

A transcript of the Corporate Audit interview, and various documents garnered concerning Claimant's residences, were entered into the record in the October 21, 2014 investigation, and one of the auditors testified. These documents establish that the Bastrop address is owned by Patricia Stokes, that Claimant is the owner of record of the Gardena, CA address, and that he submitted per diem payments for numerous dates between December, 2013 and August, 2014 (some or almost the entire month of work days) totaling over \$10,000. From reading the transcript of his interview, it is clear that Claimant was uncomfortable answering the Auditor's questions, was defensive, felt that he was being harassed and intimidated, claimed that his fiancée owned the Bastrop, LA residence and his son owned the Gardena, CA residence, and admitted that his driver's license still bore the Gardena address, which he intended to get changed after its expiration in December.

When faced with the proof of ownership, Claimant insisted that he transferred the Gardena property to his son, but that he was still on the loan and trying to get his son qualified for one, which had not yet occurred. The quitclaim deed, which was notarized a week before the investigation, was never filed with the County. He stated that he did not claim travel expense when he did not go home. Claimant kept asking why he was being

questioned about his address now, when it was the same for 2 years since his return to work. At one point he referenced his son being in a mental institution. He did not dispute that he stayed at the Gardena address when he was working in CA, but considered LA his residence.

Carrier maintains that Claimant received his due process rights to a fair and impartial hearing and notice of the charges. It argues that Claimant was dishonest when he claimed per diem in the amount of over \$10,000 between December, 2013 and August, 2014, to which he was not entitled, as he owned a residence in Gardena, CA within 50 miles from his job locations, 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 CA to LA in order to qualify for per diem payments which he would otherwise not be entitled to. It relies on the precedent establishing the appropriateness of a Level 5 dismissal for engaging in dishonest conduct, and posits that there is no evidence that Claimant was being retaliated against for filing an EEO complaint.

The Organization initially contends that Claimant was denied his right to a fair and impartial hearing, as the charge letter was flawed, it did not receive requested information prior to the investigation, and the conducting and charging officers were the subject of an EEO investigation initiated by Claimant. It argues that the Corporate Audit interview was a formal investigation, and Claimant should have been provided Union representation, noting Claimant's testimony that he was nervous and misunderstood some of the questions, which were asked so quickly. The Organization maintains there is no prohibition against an employee owning or renting over one property or dwelling, and states that, by definition, where an employee chooses to stay while working does not define the employee's residence under Section 3. The Organization argues that Carrier failed to prove that Claimant was dishonest in putting in for per diem from his LA

address, which is his primary residence, and there was no intent to deceive established. It asserts that dismissal is an excessive penalty for a 35 year employee with a clean record.

On the basis of the entire record, the Board concludes that Claimant received a fair and impartial investigation, and had adequate notice of the charges to mount a defense. There is no affirmative evidence that either the Hearing Officer or Charging Officer were acting in retaliation for an alleged EEO complaint filed against them, and Claimant was given a full opportunity to present documents and testimony in support of his position.

We note that Claimant was disciplined for dishonesty both by claiming per diem, and for his inconsistent and contradictory responses during his Audit interview. While the Board can accept Claimant's assertion that, upon his initial termination from employment in 2012, he may well have intended to relocate his residence to LA, as a main connection to CA had been severed, and that he may have gone to help take care of his ailing father at that time. However, after he accepted a leniency reinstatement and returned to service in the Los Angeles District, in late 2012 or early 2013, we are unable to accept his evidence that his residence remained in LA, despite his rarely being able to visit, his continued legal ownership of his Gardena residence (where he actually lived when he was working), and his ongoing commitment to helping to care for his son. At that time, his change of address in Carrier's record to LA did not have a rational explanation.

Claimant's changing stories, and reticence in answering any questions concerning his address or residence during the Corporate Audit interview, leaves the Board with little doubt that he was attempting to evade questions about his residence locations and living situation, which supports the dishonesty charge with respect to the Audit interview. While Claimant's distrust and sensitivity may well be explained by the fact that he was upset by his prior termination, and "mistreatment" at the hands of Carrier, his actions exhibiting a lack of candor serve to support Carrier's conclusion that there was substantial evidence presented that Claimant's change of address and receipt of per diem, was not based on a valid misunderstanding of his rights and entitlements, but an improper

intent to “game the system.” There is no basis to overturn Carrier’s assessment of a Level 5 dismissal for Claimant’s dishonesty in this case.

Accordingly, the claim is denied.

AWARD:

The claim is denied.


Margo R Newman

Margo R. Newman
Neutral Chairperson

Dated: December 9, 2017



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member