PUBLIC LAW BOARD NO. 7660
AWARD NO. 50

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. J. Valle, by letter dated March 2, 2015, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6 Conduct (4) Dishonest and the part that reads, '… "Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated,' …" (Emphasis in original) (Employes' Exhibit 'A-1') in connection with allegations that he dishonestly paid himself per diem wages he was not entitled to between March 18, 2013 and November 14, 2014 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File RC-1545S-701/1623889 SPW).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall make Claimant J. Valle 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 25 year employee, was working as a Track Foreman on Gang 8719 in the Los Angeles, CA Basin at the time he was brought in and questioned by Corporate Audit on January 23, 2015. A Notice of Investigation dated February 11, 2015 was issued on charges of dishonesty in misrepresenting his work location in order to gain per diem. Claimant was withheld from service pending the investigation. The March 2, 2015 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.

Claimant worked on a one-man gang repairing switches reported on the Safety Hotline, within a territory under the auspices of three different Managers. He worked Monday through Friday, from 7:00 a.m. to 3:30 p.m., and normally got his assignments in

the morning from the computer at City of Industry, CA from Tuesdays through Fridays, and from Colton, CA on Mondays. Claimant parked his company truck in Mira Loma, CA at the end of the day, which is 10 miles from his residence in Riverside, CA, and picked it up in the morning before reporting to work. City of Industry is 37 miles from Claimant's residence, and Colton is 11 miles.

Claimant entered his own time at the conclusion of each day. MTP Krzemien testified that an ARASA supervisor is supposed to approve time for different gangs, but that he trusts employees to charge their time correctly, since approvers don't always look carefully and sometimes employees are on autopay, without approval. It appears that after the person who was Claimant's approver moved to Oregon, there was no one assigned to approve his time. There is no dispute that Claimant received per diem payments of over $25,000 in the 18 month period between March, 2013 and November, 2014, when Krzemien brought the matter of his improper submission for per diem to his attention, and he stopped claiming it. Claimant admitted putting City of Industry as his "gang city" in his time entries prior to the change of the per diem 50 mile rule, and stated that he was told by his approver that if he was going to charge for per diem, he had to enter his work location. His per diem time records indicate that Claimant entered different "gang city" locations daily during the disputed time period, and he explained that he put in his job site location where he worked each day.

A review of the spreadsheet generated from his per diem time records reveals that 49 different entries show a "distance between home and reported gang city" of less than 50 miles. In both his Corporate Audit interview and at the Investigation, Claimant consistently testified that his understanding was that he was entitled to per diem on any day where he drove over 50 miles in the company truck performing his duties, and that he set the odometer of the company truck when he picked it up in the morning. He stated that no one ever questioned his time or per diem submissions, his time was being approved, so he thought he was doing it correctly. Claimant stated that he did not think he

was being dishonest and had no intention of doing so. He admitted being scared when questioned in the Corporate Audit, since he was still in his 18 month probationary period from a prior leniency agreement reinstatement, but stated that he always told the truth. There appeared to be no attempt at deception when answering the questions posed to him.

Carrier maintains that Claimant received a fair and impartial hearing, despite a transcription glitch during the investigation, when the Hearing Officer assured that the record contained all evidence previously furnished. It argues that Claimant was dishonest when he claimed per diem in the amount of over $25,000 between March, 2013 and November, 2014, to which he was not entitled, since his Riverside residence was within the 50 mile radius of both of his reporting locations. Carrier believes that Claimant intentionally changed his work site locations in order to qualify for per diem payments, and did not simply make a mistake, arguing that his accumulated miles theory is not logical and defies the clear language of the per diem rule, which Claimant understood was to defray the cost of meals and lodging. It relies on the precedent establishing the appropriateness of a Level 5 dismissal for engaging in dishonest conduct, noting that Claimant was still serving under the probationary period of a leniency agreement at the time of his dismissal.

The Organization initially contends that Claimant was denied his right to a fair and impartial hearing, since there was an error in transcription creating a time gap in the record. It argues that Carrier failed to prove that Claimant was dishonest in putting in for per diem and changing his work site locations, in accord with his understanding of the change in requirements in the new per diem rule. The Organization points out that Claimant did not intend to deceive anyone when entering his time, and understood that what he was doing was correct because it was never questioned by anyone in management or the person approving his time. It contends that the “work site reporting” location referenced in Section 3 has created a lot of confusion and misunderstanding among employees, and that Claimant’s understanding that it related to where he

performed his work was a simple mistake, and does not exhibit the intention necessary to support a charge of dishonesty. The Organization points out that this would never have occurred if supervisors in charge with reviewing and approving time did their jobs, and notes that Carrier chooses to ignore their role in this unfortunate situation. It argues that dismissal was excessive, since no dishonesty was proven.

On the basis of the entire record, the Board concludes that Claimant received a fair and impartial investigation. After reviewing the documentary evidence, and Claimant's consistent explanation about his (mis)understanding of the 50 mile per diem rule, we are convinced that Carrier has failed to prove that Claimant had the requisite intent to take payments he knew he was not entitled to. While his explanation of what he thought the per diem rule meant is pretty far-fetched, especially in light of the use of the term "residence" in Section 3, Claimant admitted not being familiar with the Agreement. His actions appear to be consistent with his explanation that he began to change his work site reporting location to where his job took him as a result of being told by his approver that this was required under the new rule's mileage provision.

A review of the records shows that Claimant's "gang city" or reporting location changed almost daily to encompass many locations within the territory where he worked. If it was understood that Claimant's job had one (or two) distinct reporting locations, as testified to by Krzemien, then such entries should have been a red flag to anyone reviewing his time submissions. Additionally, as pointed out by Carrier, Claimant did not use locations that were all at least 50 miles from his home. Rather, 49 of his entries were for locations less than 50 miles from his residence. Had Claimant been attempting to "game the system" by entering locations outside the 50 mile radius to claim per diem, there is no reasonable explanation for including many that did not meet that requirement. The fact that his time records were not reviewed, or properly reviewed, by supervision accounts for why Claimant continued to receive per diem payments for what should have been obviously questionable entries. There is no evidence that Claimant did not act

consistently with his (mis)understanding that the 50 miles related to the amount of driving he did in a work day when submitting his per diem requests.

Having found that Carrier did not prove the requisite intent to support the dishonesty charge, the Board turns to the appropriate remedy under the facts of this case. We note that it is undisputed that Claimant received over $25,000 in per diem payments to which he was not entitled, and that his explanation for why he thought he was entitled to the money has no valid basis in either Agreement language or admitted purpose for per diem. Also relevant to our determination is the fact that, at the time of his dismissal, Claimant had not yet completed the probationary period of his leniency reinstatement agreement. Under such circumstances, we agree that Claimant should have the dismissal expunged from his record, that he be required to serve the balance of his probationary period, but that no compensation is appropriate.

Accordingly, the claim is sustained in accordance with the Findings.

AWARD:

The claim is sustained in accordance with the Findings.

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