PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT

and

UNION PACIFIC RAILROAD COMPANY [SOUTHERN PACIFIC TRANSPORTATION COMPANY (WESTERN LINES)]

Case No: 83
Award No: 83

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. R. Schultz, by letter dated July 28, 2016, for alleged violation of Rule 1.6: Conduct - Immoral 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 RC-1645S-701/1670357 SPW).

2. As a consequence of the violation referred to in Part 1 above, the Carrier must now remove the discipline from Claimant R. Schultz' record, reinstate him to service immediately and compensate him for any and all wage and benefit loss suffered including vacation, insurance and railroad retirement."

FINDINGS:

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the Brotherhood of Maintenance Employes Division – IBT (hereinafter referred to as the "Organization") and the Union Pacific Railroad Company (hereinafter referred to as the "Carrier"). Upon the whole record, a hearing, and all evidence as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing thereon. The Claimant was ably represented by the Organization.

The Claimant, Robin Schultz, was employed by the Carrier on April 2, 1979, and

held the position of Track Foreman when he was charged with violating Rule 1.6, Conduct (Dishonest and Immoral) because he allegedly changed his home address in order to receive $16,000 of per diem allowances he was not entitled to between July 11, 2014 to May 31, 2016.

On June 23, 2016, the Claimant was notified in writing by the Carrier to report for a hearing and investigation, which after a postponement was held on July 21, 2016. On July 28, 2016, the Claimant was notified that the Carrier found him guilty of the charges and he was dismissed from service. The record indicates that the Carrier denied subsequent appeals by the Organization and rendered its final decision on December 4, 2016. An appeal conference was held on April 27, 2017 whereupon the matter was not resolved. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

The Carrier claims that it has established with substantial evidence that the Claimant violated Rule 1.6 and was dishonest when he admitted he lived and worked in Battle Mountain, Nevada (NV), but listed his son's address in Sparks, NV as his primary residence in order to improperly collect per diem allowances. It cites the per diem rule (Section 3) of the relevant Local/National Agreement wherein it 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 Carrier maintains that the Claimant had no expenses related to his Battle Mountain, NV address and that he provided contradictory testimony regarding his work-week living situation, without providing evidence that he had an ownership interest in the Sparks, NV residence. The Carrier asserts that the sole reason the Claimant changed his address to Sparks, NV location was to receive the per diem allowance since that location was more than 50 miles from his work site.

The Carrier argues that arbitral precedent is consistent in upholding dismissals for dishonesty and theft, where proven, especially where there is an admission of such egregious conduct. The Carrier asserts that the Claimant violated the basic trust of the

employment relationship by being dishonest. It claims he knowingly submitted for and received per diem allowances he was not entitled to for personal gain.

The Organization alleges that the Carrier committed a procedural error when it failed to respond to its appeal of the discipline within 60 days as provided for in Rule 44, which it claims requires the Board to dismiss the charges. It maintains that the Carrier did not respond to its appeal, dated October 20, 2016, before December 19, 2016 as required by the Agreement.

The Organization claims the Carrier conducted an investigation prior to the July 21, 2016 hearing when the Claimant was interviewed by the Corporate Audit Department without being afforded representation. It argues that such conduct by the Carrier constitutes a violation of the Agreement by denying the Claimant due process.

With regard to the merits the Organization maintains the Carrier has not met its burden of proof that the Claimant was dishonest. It argues that this Board has held that employees are not dishonest simply because they have more than one residence and claim a per diem allowance. The Organization avers that arbitral precedent requires the Carrier to prove the Claimant intended to be dishonest in order to find him guilty.

The Organization maintains that should the Board find that the Claimant was not entitled to the per diem allowance but without evidence of being dishonest, it should overturn the discipline imposed with a lesser penalty that is corrective and not punitive. It asserts that the Claimant has 37 years of service and a clean disciplinary record, which proves that he is dedicated to his job.

The Board first addresses the procedural errors claimed by the Organization and finds that none are fatal flaws that prevent us from addressing the merits of the claim. The Carrier responded to the Organization's appeal of October 20, 2016 on December 4, 2016. The record indicates the letter was postmarked on December 7 and delivered to the address the Carrier had for the Organization. However, the letter was returned to the Carrier and stamped on December 17, 2016, (still within the 60 day period required by Rule 44) with

"Notify Sender of New Address". The record confirms that the Carrier made its best efforts to comply with Rule 44. The Organization cannot prevail with its claim that it did not receive timely notice where it was unavailable to receive the Carrier's response.

The Organization's contention that the Corporate Audit Department improperly questioned the Claimant and violated the Agreement is baseless. Nothing in the record prevents the Carrier from questioning employees during an internal investigation prior to the issuance of disciplinary charges. Once the Carrier decided to issue charges, the hearing and investigation, as governed by the Agreement, provides the Claimant with due process and the ability to dispute evidence and confront witnesses.

In discipline cases, as the one before the Board here, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon review of all the evidence adduced during the on-property investigation, the Board here finds that the record does not support the Carrier's findings that the Claimant was dishonest when he improperly received per diem allowances as referenced in the charges and therefore did not violate Rule 1.6.

The record does not contain sufficient evidence that the Claimant acted knowingly and with an intent to be dishonest. It is well established that to prove that the Claimant perpetrated a dishonest act, the Carrier must provide substantial evidence that he intentionally engaged in a deliberate and willful manner to receive compensation knowing he was not entitled to the allowance. This Board in Award Nos. 32, 33, and 41 held that to prove dishonesty, the Claimant's pernicious intent must be proven. In Special Board of Adjustment No. 180, Award No. 1161 the discipline was overturned where, "The Carrier has nowhere demonstrated that Claimant deliberately tried to 'cheat' it out of additional overtime pay. To the contrary, the evidence of record indicates that Claimant entered the additional time on the good-faith belief that such practice was condoned by Carrier."

In Award No. 41, where we addressed the meaning of Section 3 of the Local/National Agreement, and found 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.

Here, we find no clear evidence that the Claimant intended to receive the per diem allowance under false pretenses or to "game the system". The Claimant testified that his union representative informed him that his residence in Sparks, NV would qualify him for a per diem allowance. While we do not find here that there is sufficient evidence to support the conclusion that the Sparks, NV address constitutes a residence for the purposes of the Section 3 allowance, there is no evidence that the Claimant acted dishonestly when he relied on the erroneous information.

In previous Awards where we found that the second residence did qualify for the per diem allowance, there was reliable evidence that the employee owned or had a legal right to the home. In Award No. 41, where the facts described are similar to the ones in the record here, the claimant produced tax records, car registrations and other documentary evidence that established he resided in a home more than 50 miles from his work location. There the claim was sustained as submitted. Here, the record does not contain such evidence for the purpose of establishing that the Claimant in fact resides at the Sparks, NV address. The fact that he receives mail there alone is not sufficient to prove residence.

The Claimant provided credible testimony that he relied on his union representative's affirmation that he could use the Sparks, NV address to qualify for the per diem allowance even though the residence belonged to his son. The record contains evidence that the Carrier relied on union representatives to inform employees of the per diem rule. We find that absent the required substantial evidence necessary for the Carrier to meet its burden of proof that the Claimant intended to misappropriate per diem payments, his statement suffices to establish he relied on misinformation from his union representative. He notified the Carrier of the address in Sparks, who used it to officially communicate with him. Further, his supervisor of over 20 years, Manager of Track Maintenance Rollin Woods, testified that he did not know the Claimant to be dishonest and that he also knew of the residence in Sparks. Mr. Woods described the Claimant as a good employee with no prior

discipline and someone he could count on.

The facts established here are distinguishable from previous cases where the Board has upheld dismissals of employees found to be dishonest when receiving the per diem allowance. In Award No. 43, this Board found that the claimant had intended to deceive the Carrier and "game the system" when he constantly claimed to have a different address whenever his job location changed. In Award No. 48, we the Board decided that the claimant lacked credibility and his testimony was discredited as having a "lack of candor". Where the intent to be dishonest is established, the Board will not disturb the Carrier's decision. However, the record here does not support the conclusion that the Claimant lacked credibility when he testified that believed he was entitled to the per diem and that he lived at his son's house in Sparks as well as in Battle Mountain. In contrast to the facts described in Award Nos. 43 and 48, there is no evidence the Claimant established the Sparks residence to defraud the Carrier. He believed he was following the rule, as told to him by his union representative, albeit incorrectly, and did not try to hide the Battle Mountain residence from the Carrier.

The Claimant believed that filing the Sparks address with the Carrier would suffice to establish it as a residence and make him eligible for a Section 3 per diem. We find that while he was not dishonest, the Claimant is not entitled to the per diem allowance for the period of July 11, 2014 to May 31, 2016. The Board uses the criteria we relied upon in Awards 32, 33, and 41 that described elements to be considered to establish an eligible residence for the Section 3 allowance. Further, the Claimant acted improperly and with an "Indifference to duty" when he relied on misinformation and failure to exercise due diligence to insure he was meeting the requirements of the April 2012 Local/National Agreement.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Carrier has not established with substantial evidence that the Claimant violated Rule 1.6 and that he was dishonest. However, the Claimant exercised poor judgment and an indifference to duty when he used the Sparks, NV address as to qualify for

the per diem allowance. He shall be reinstated and his seniority and benefits unimpaired, but without back pay for the period of time he has been out of service.

AWARD

Claim sustained in part, denied in part.

Michael Cappone
Neutral Member

Dated: May 14, 2018

Alyssa K. Borden
Carrier Member

Dated: 05/16/18

Andrew M. Mulford
Labor Member

Dated: 5/16/18