

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated August 29, 2008, G. A. Brooks, Roadmaster, instructed Andre Ball (“the Claimant”) to attend a formal Investigation in the Roadmaster’s Office in Fredericksburg, Virginia, on September 9, 2008, “to develop the facts and place responsibility, if any, in connection with information that I received on Wednesday, August 27, 2008, wherein you had been occupying lodging facilities at the Carrier’s expense using your CLC lodging card at the Ramada Inn, Fredericksburg, VA, without authority on April 10, 11, 2008 and June 24, 25 & 26, 2008.” The letter stated that the Claimant was “charged with conduct unbecoming an employee of CSX Transportation, fraud, and theft” and that his actions “appear to be in possible violation of CSX Transportation Engineering Department CLC Lodging policy, as well as in possible violation of CSX Transportation Operating Rules General Regulations GR-2.” After three postponements a hearing was held at the stated location on October 1, 2008.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds

that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant began his employment with the Carrier on September 26, 2005, as a Trackman in the Engineering Department on the Baltimore Division. He was awarded the position of Zone Welder by bid on March 24, 2008. He was displaced from the position by a senior employee on March 30, 2008, and on March 31, 2008, went to work in force 5D69 as a Welder. 5D69 is the name for the welder force headquartered in Fredericksburg, Virginia. On May 19, 2008, the Claimant was awarded the position of Welder Track on force 5D63 headquartered in Fredericksburg, Virginia. An employee in a headquartered job is not authorized to use a corporate lodging card for lodging.

On April 10 and 11, 2008, the Claimant was assigned to force 5D69, and on June 24, 25, and 26, 2008, to force 5D63. Both are welding forces headquartered in Fredericksburg, Virginia. Roadmaster Brooks identified copies of three bills from a Ramada Inn in Fredericksburg, Virginia, showing that the Claimant charged lodging to Corporate Lodging Consultants for the following dates: April 10 and 11 and June 24, 25, and 26, 2008. Corporate Lodging Consultants, Inc. (CLC) is the name of the firm that

handles lodging in connection with company business by Carrier employees. Employees who may have to travel as part of their job are given CLC lodging cards. The Carrier policy regarding lodging states, "CLC lodging cards may **not** be used for personal travel or for company relocation purposes."

The Roadmaster testified that he obtained the information regarding the Claimant's stay at the Ramada Inn on August 27, 2008, when he was at the motel in connection with company business on another matter. In response to questioning by the Claimant's representative the Roadmaster acknowledged that on the Monthly Attendance Detail document introduced into evidence, for the period April 7 until the end of the month the Claimant is shown to occupy the position of Zone Welder, which is a floating job that pays expense money and permits the use of a CLC lodging card. The Roadmaster explained that for each of the dates from April 7th, there is an entry "TIE ", Transmitted in Error, on the attendance sheet which signifies that the Claimant had been displaced from the position but not yet removed from the time sheet. "TIE," the Roadmaster stated, "means . . . he's working someplace else."

On June 16, 2008, the Claimant was awarded the position of Welder Helper. That job, the Roadmaster testified, pays expenses and permits the use of a CLC lodging card if you show up for the job. The Claimant, the Roadmaster stated, never showed up for the Welder Helper position. Asked whether he held the Claimant to his former position and did not allow him to report for the Welder Helper job, the Roadmaster testified, "No I did

not.” An employee can be held over on his current job for five calendar days after he is awarded a bid for another job. According to the Roadmaster’s testimony the Claimant chose not to go to the Welder Helper’s position that he was awarded on June 16, 2008. He only found out that the Claimant had been awarded the job, the Roadmaster stated, when he received a phone call from the time keeper asking when he was going to let the Claimant go. At that time, the Roadmaster testified, he immediately called the Claimant on the phone and told him that he was released. The Claimant, according to the Roadmaster, chose not to go to the job but went, instead, to work in Maryland.

The Roadmaster testified that he has never had any problems with the Claimant in the past and that he has never threatened to discipline him in the past. After he received the information from Ramada Inn about the Claimant’s use of his CLC lodging card, the Roadmaster stated, he did not give the Claimant an opportunity to respond why he did what he did. He directly preferred charges against him. Use of a CLC lodging card, the Roadmaster stated, begins when one is physically on the job and not when one is awarded the job.

Kenny Opfer, Engineer of Track and the Roadmaster’s supervisor, testified that the supervisor of the R-3 (the Welder Helper) job that the Claimant bid on called and wanted to know why they hadn’t released the Claimant to show up on the R-3. Mr. Opfer called the Roadmaster, he stated, who said that he did not know that the Claimant had bid the R-3. A couple of days later, Mr. Opfer testified, the Claimant informed him that he wanted

to work one of the floating welder jobs in Jessup, Maryland. He told the Claimant, Mr. Opfer stated, that it was fine with him but that the Claimant had to get released from the R-3 in order to do that.

Mr. Opfer testified that the Claimant did go and work the vacancy in Jessup but that he did not know whether the Claimant got released from the R-3 position. The Monthly Attendance Detail for June, 2008, shows that the Claimant worked on the Jessup job, for which he was entitled to and received expenses, on June 30, 2008. The attendance sheets after that date were not introduced into evidence.

Mr. Opfer testified that most supervisors get notification off of the computer when an employee gets another job. "They check it," he stated, "whenever the awards come out." Most of the time, Mr. Opfer stated, employees will come to the supervisor and notify him that they bid off and were awarded another job.

The Claimant testified that on April 10 and 11, 2008, he was working on the 5D69 force. He was awarded the 5DR5 Zone Welder position on March 24, 2008, and displaced from it on March 30, 2008, he acknowledged. He further acknowledged that on June 24, 25, and 26, 2008, his time was carried on the 5D63 force. The Claimant testified that 5D63 and 5D69 are headquarter gangs that are not paid floating expenses and not entitled to use the CLC card.

The Claimant testified that the first time he was awarded the R-3 job the Roadmaster did not release him to go to the job. The second time he was awarded the R-

3 job, the Claimant stated, the Roadmaster again held him back and did not release him until the R-3 job moved to Tennessee. At the time he was awarded the bid, according to the Claimant, the job was in Fredericksburg, which is near where he lives. By the time he was released, the Claimant testified, the job had moved to Tennessee. According to the Claimant, since he was not permitted to go to the job when it was in Fredericksburg, he did not want to go through the process of calling the timekeeper and getting directions to the hotel when, had he already been on the job, he could just have gone with the gang.

The hearing officer asked the Claimant, "Why did you feel you were entitled to stay at the hotel?" He answered as follows:

Because I had a bid on job and that's what I wanted—I would like to have had the expense money also, but being the person that I am, I felt like I was entitled because I was still helping him [the Roadmaster] out and I was still had the job—I mean I bid on the job for the purpose of leaving but at the same time I was still helping him out so I felt like I was entitled to some of my expenses.

The hearing officer further questioned the Claimant if he asked the Roadmaster whether he could stay in the hotel seeing that he was being held over. The Claimant said that he did not ask. "You could have asked him ?", the hearing officer asked the Claimant. "I should have asked him," the Claimant responded.

The Roadmaster was recalled to testify and stated that the gang that the Claimant bid on was working in Fredericksburg at the time the Claimant was awarded the bid and

that had the Claimant reported on that job he would have been entitled to expenses and the use of the CLC lodging card. The Roadmaster insisted that the Claimant did not inform him of the bid award and reiterated that he did not know of the job award to the Claimant until the timekeeper on the gang called and inquired why the Claimant had not been released. The Roadmaster acknowledged that it was strange that the Claimant would not have informed him that he was awarded the position considering that he could have continued to work in the same location and receive expense money and lodging.

It is the Carrier's position that the Claimant was provided a fair and impartial investigation and that it produced substantial evidence that he was guilty as charged. The Claimant, the Carrier argues, admitted his guilt in his answer to the hearing officer, set out in the text above, when asked, "Why did you feel you were entitled to stay at the hotel?" An employee's admission of guilt, the Carrier asserts, satisfies the Carrier's burden of producing substantial evidence thereof.

The Board agrees that in his testimony the Claimant admitted that he improperly used his CLC lodging card. At the same time, however, he stated that he felt that he was entitled to use the lodging card because he had been awarded a bid on a floating job that paid expenses and lodging and that by staying over in his existing job he was helping out the Roadmaster. The Claimant was clearly wrong in his reasoning. Earlier in his testimony he admitted that he knew the rules regarding the use of the CLC card and that one was not entitled to company-paid lodging while assigned to a headquartered job.

Nevertheless the Board is persuaded that the Claimant did rationalize his use of the card and did not intend to defraud the Carrier. On both occasions that he used the card, in April and in June, it was in close proximity to the time that he had been awarded a bid for a floating job that included payment for expenses and lodging. On both occasions employees performing duties identical or similar to his were working in the same location as he and receiving expenses and lodging. (Tr. 22, 80). In June the very same gang onto which he had bid was working near him.

In both instances the Claimant was clearly wrong in his thinking and deserving of discipline. It is not far-fetched, however, that he rationalized his use of the lodging card on the basis that he had been awarded a job that entitled him to lodging and that other employees working nearby performing work similar to his were getting lodging. The Roadmaster testified that he had never had a problem with the Claimant in the past. Under all of the circumstances the Board is persuaded that the Claimant should be given the benefit of the doubt that no fraudulent intent was present in this case. In Award No. 3 of this Public Law Board, cited by the Carrier in its submission, where dismissal was upheld, fraudulent content was clearly present.

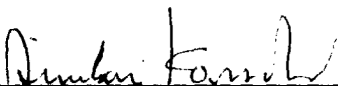
The Board finds that because of the absence of fraudulent intent in this case dismissal was an excessive penalty for the Claimant's misconduct. The Claimant shall be promptly reinstated to his former position but without back pay.

A W A R D

Claim sustained in accordance with the findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

A handwritten signature in cursive script, appearing to read "Sinclair Kossoff", is written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
May 6, 2009