

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated February 25, 2009, Mike McGowan, Engineer Program Construction, notified Robert L. Graves ("the Claimant") to attend a formal investigation on March 10, 2009, at the company offices in Cumberland, Maryland, "to determine the facts and place your responsibility, if any, in connection with information that I received on Tuesday, February 17, 2009, that on the evening of Monday, February 16, 2009, you individually occupied a motel room (single-stay) at the Quality Inn in Carmel Church, Virginia, after you were specifically instructed by Foreman John Porter on Thursday, February 12, 2009, that you were required to share a room (double-stay) with Adam Lilioc. Additionally," the letter continued, "when I confronted you with this fact on Tuesday, February 17, 2009, you advised me that you refused to comply with the requirements of the Engineering Department's Instructions for Corporate Lodging revised April 1, 2001, and my instruction that you were required to share lodging accommodations with a fellow employee."

The letter stated that the Claimant was "charged with conduct unbecoming an employee of CSX Transportation, failure to follow instructions, insubordination, and

possible violations of, but not limited to, CSX Transportation Operating Rules - General Rule A and General Regulation GR-2, and CSX Engineering Department's Instructions for Corporate Lodging revised April 1, 2001." The letter further confirmed that the Claimant was "being withheld from service pending the results of this investigation." After one postponement by mutual agreement, the Investigation was held on March 31, 2009.

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 Carrier's Corporate Lodging Policy provides, "Any time a double room is available, employees of the same gender, who are required to share a room, will share a room." A foreman, however, is permitted to be lodged in a single room "to conduct confidential company business and other administrative duties in the room." If a gang or team has an odd (as opposed to even) number of employees on it, the practice is to assign

the senior assistant foreman to a single room. The Policy also provides, "Employees will respect the privacy and personal property of their roommates and other motel guests."

A start-up meeting was held for the Claimant's team on February 3, 2009. One of the items discussed at the meeting was the Carrier's lodging policy that required two employees in a room. The Claimant objected to the requirement, but it was made clear that the policy had to be observed. For the week beginning Monday, February 9, 2009, the Claimant was told by the Foreman that he must stay two in a room. He again objected, complaining that he did not know the person that the Foreman had paired him with. To make peace the Assistant Foreman, who was entitled to a single room because there was an odd number of team members, said that he would share a room with the employee that the Claimant was objecting to room with.

The Claimant was told by the Foreman on Thursday, February 12, 2009, that beginning the following week on the evening of Monday, February 16, 2009, he was required to stay two in a room and that the employee he would be sharing a room with was Adam Lilirock, who was bumping onto that team beginning that week. The Claimant said that he was not going to. The Foreman said, "Well, we'll deal with that next week." The Foreman testified that his experience has been that when instructed to do something they don't like, employees out of anger will say that they won't do it, but that, on reconsideration, when the time comes to do it will comply.

The Claimant checked into the motel on Monday night, February 16, 2009, and

said nothing to the clerk about sharing a room with Mr. Liliock or anybody else. He was given a single room. The next morning, February 17, Mr. Liliock mentioned to the Foreman that he did not have a roommate. The Foreman asked him, "You're not with Mr. Graves?" He said, "No." The Foreman reported the situation to his supervisor, Engineer Program Construction Mike McGowan.

Manager McGowan met with the Claimant at the worksite the morning of February 17. He asked him why he was out of compliance with the Corporate Lodging Policy. The Claimant said that he did not want to share a room with another man. More discussion ensued, and finally Mr. McGowan asked the Claimant if he would comply two in a room that evening. He said that he would not. Mr. McGowan told him that if he did not, he would be charged with insubordination and failure to comply with the CSX Corporate Lodging Policy.

Mr. McGowan waited until after the job briefing and then met again with the Claimant, this time bringing the Foreman into the meeting as a witness. Mr. McGowan again asked the Claimant if he would comply with the lodging policy. He told him that all he had to do was to get his things and move into the other room when they got back to the hotel that evening and that would end the matter. The Claimant asked what would happen if he did not. Manager McGowan said that he would have to charge the Claimant with insubordination and remove him from service. The Claimant said, "In that case just take me out of service." Manager McGowan said, "Well, go get your things, and I'll take

you to the hotel.”

In his testimony the Claimant acknowledged that he said that he did not want to share a room with someone else but stated the he “didn’t look at it as being insubordinate.” He testified that he “took it as we all work together, we are all friends. I didn’t really look at it as a way to get me fired,” he continued, “I just thought we were just discussing it.” He also stated, “I didn’t take it as seriously as I should have.” He testified that he checked into the hotel before Mr. Liliock did on Monday night, February 16th, and that if Mr. Liliock had come to his room that night, he would have let him in.

In the past, the Claimant testified, he always stayed in a room by himself. “They just dropped it like a bombshell right there,” he stated. When he checked in the night of February 16, 2009, according to the Claimant, the motel clerk did not say that he was supposed to be doubling up with someone else. The Claimant as of the date of the incident had a few months less than 30 years of service with the Carrier. He had no prior discipline on his record.

After the close of the hearing, by letter dated April 20, 2009, D. L. Moss Jr., Director of Program Construction, informed the Claimant of his determination that the charges against the Claimant “were valid and proven.” The evidence, Mr. Moss stated, demonstrated that the Claimant was “guilty as charged” and in violation of the cited rules and regulations and the corporate lodging policy. “Through this review, and because all charges assessed were properly proven,” Director Moss wrote, “it is my decision that the

discipline to be assessed is your immediate dismissal in all capacities from CSX Transportation.”

The Board believes that the evidence establishes that the Claimant was insubordinate and failed to comply with the Carrier’s lodging policy. He made no effort to comply with the lodging policy when he checked into the hotel the night of February 16th although he had been told that he was required to share a room with Mr. Liliock. In fact, he had been more than informed of the policy. The week previously he had resisted an instruction from his Foreman to room with another member of his team. A confrontation was avoided only because an Assistant Foreman, to avoid controversy, agreed to double up with the employee that the Claimant was supposed to stay with. The Claimant was well aware that he was not supposed to have a single room the night of February 16th, but made no attempt to comply with the lodging policy.

The Organization contends that it was premature to relieve the Claimant of duty on the morning of February 17th merely because he said that he would not share a room; that the Carrier should have waited until the evening to see what the Claimant would actually do. Normally there could be merit to the Union’s argument. For example, the Foreman testified that employees, when told to do something they do not want to do, often, out of anger, say that they won’t do it, but then, when the time comes to do the task, comply. Under that approach management should have waited until the evening to see what the Claimant would actually do, as opposed to what he said.

That argument would hold water if the Claimant had not yet disobeyed an instruction. In this case, however, the night before, on February 16th, the Claimant had already disobeyed an instruction when he made no effort to stay double instead of single, although clearly told on Thursday, February 12th, that he had to share a room. Manager McGowan informed the Claimant on the morning of February 17th that he would wipe the slate clean if he agreed to share a room that night. Mr. McGowan was referring to the fact that the Claimant had already crossed the line the night before by making no effort to comply with the instruction of the previous Thursday to share a room. When the Claimant did not take up the baton after twice being given the chance to make amends in his conversations with Mr. McGowan on February 17th (once without the Foreman being present; and the second time with the Foreman as a witness), Mr. McGowan was justified in proceeding with discipline.

The Board understands the Claimant's desire for privacy. Privacy is precious, and especially after a hard day's work, one does not want to share his personal space with a stranger. It is not unreasonable, however, for the Carrier to require employees to share a room to reduce company expenses. In almost 30 years of employment on the railroad, the Claimant had to be aware of the right of the Carrier to require employees on traveling jobs to stay two in a room. The fact that, according to his testimony, other managers did not enforce the travel policy did not give him any assurance that it would not be enforced by present management. So long as he accepted employment with the Carrier, he was

required to abide by its reasonable rules. To require employees in travel status on a railroad job to stay two in a room was neither unreasonable or unusual.

All that said, the Board believes that dismissal was too harsh a penalty under all of the circumstances. The Individual Development & Personal Accountability Policy (IDPAP) states, "This policy is designed to provide everyone an opportunity to improve and grow through a measured, open, and just process. . . ." It is true that the IDPAP permits dismissal for a first offense of insubordination, but it does not require it. The Claimant had almost 30 years of service with the Carrier and its predecessor without any prior discipline on his record. If anyone was entitled to an opportunity to improve, that would certainly include the Claimant.

Although the Claimant was insubordinate, it was not the most serious form of insubordination. He did not refuse to perform a work assignment. He was not disrespectful of any supervisor or manager. Manager McGowan testified that the Claimant "was very civil." Under all of the circumstances the Board is of the opinion that dismissal was an excessive penalty and that the appropriate penalty would have been something designed to correct the Claimant's conduct, such as a long suspension.

In his testimony at the hearing the Claimant indicated that he was prepared to change his behavior in the future and not violate the Carrier's lodging policy. Thus he stated (Tr. 80), "Had I had any idea that this was . . . as serious as it is turning out to be I would [have] stayed with eight people in the room. . . ." We are therefore not dealing

here with someone who is unlikely to conform to company norms should he be permitted to return to work. The Board finds that someone with the Claimant's long service and otherwise unblemished record should not have been dismissed on the facts of this case but should have been assessed discipline with the aim of correcting his shortcomings. The Board will order that he be reinstated but, in view of the seriousness of his misconduct, 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.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
July 2, 2009