

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 203

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

“Claim of the System Committee of the Brotherhood that:

1. The dismissal of Flagging Foreman David E. Dunaway for conduct unbecoming an employee in connection with 1) for your unauthorized use of the Carrier's Lodging Voucher System to purchase motel rooms for April 4, 10, 11, 12, 17, 18, 25, May 2, 9, 16, 22, 23, 24, June 6, 13, 14, 15, 16, 17, 18, 19, 20, 2009. 2) for fraudulently submitting for Travel Allowance for the round trips between your assigned work site location and home, while at the same time obtaining Company provided lodging in the vicinity of his assigned worksite location is based on unproven charges, unjust, unwarranted, and excessive (Carrier's File MW-GNVL-09-22-LM-298).

2. As a consequence of the violations referenced in Part I above, Mr. Dunaway shall be granted the remedy prescribed by Rule 40 of the Agreement.”

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are the carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant had been working between February 15, 2009 and March 28, 2009 while staying at the Holiday Inn at Salisbury, North Carolina and the County Hearth Inn

at Lexington, North Carolina. From March 30, 2009 to June 20, 2009 the Claimant was also out on an out of town assignment and was staying at the Holiday Inn at Charlotte, North Carolina. During the February 15, 2009 to March 28, 2009 period, the Carrier paid for multiple days that the Claimant was not working while the Claimant concurrently applied for and received travel allowance reimbursements for travel home. During the period between March 30, 2009 and June 20, 2009, the Claimant made multiple stays again at the motel during days he was not scheduled to work (usually Saturdays) while also receiving travel reimbursements. However, the Claimant subsequently paid for these days and testified that he previously made private arrangements with the motel to pay for the authorized days at the Holiday Inn in Charlotte (Carrier Exhibit A, page 59). In this case, the usual work pattern for the lodging bills was that the Claimant would work Monday through Friday on a weekly basis and was approved for travel vouchers to cover expenses to leave Friday evenings and return to the worksite on Sunday evenings.

The system for “charging” things to the Carrier involves an I.D. card and a voucher. An employee turns in both at the beginning of the hotel stay and then at the end of the stay, the vendor, such as Charlotte Holiday Inn, submits the total bill to Norfolk Southern. However, the Holiday Inn in Charlotte contacted Norfolk Southern investigators before the Claimant checked out about an unpaid amount by the Claimant totaling \$5,477.27. This prompted an investigation of the Claimant, which resulted in his dismissal for the unauthorized Holiday Inn stays and previous unauthorized days that took place between February 15, 2009 and March 28, 2009. In the case of the Salisbury Holiday Inn and Lexington Country Hearth Inn stays, the Carrier paid for multiple unauthorized stays that were revealed by a subsequent audit. After he was charged for dishonesty and dismissed, the Claimant paid \$1,207.42 of the Charlotte Holiday Inn charges – an amount that constituted the costs of the unapproved stays.

During his extended motel stays, the Claimant applied for and received travel allowance reimbursements designed to cover the travel costs to and from the work site on a weekly basis (Carrier Exhibit A, pages 89-112 and 116-126). Both the Carrier’s brief and the testimony state that travel allowance reimbursements are only to be used for travel expenses (Carrier Brief, page 7 and Carrier Exhibit A, pages 32-33). Although the Claimant’s advocate engaged in a line of questioning to demonstrate that nothing in the Collective Bargaining Agreement prohibits the Claimant from both receiving a travel allowance and staying in the hotel at the work site, the testimony establishes that employees cannot do both (Carrier Exhibit A, pages 33-34). The record suggests the Claimant applied for travel allowance reimbursements in some cases to cover travel that never occurred. The record is also clear that, as of the date of the Claimant’s dismissal, the Carrier had not yet paid out for the Charlotte Holiday Inn bill (which the Organization argues is grounds for lenience) and that the Carrier never paid out the \$1,207.42 in unauthorized personal expenses incurred by the Claimant. It is also clear that, until the hotel flagged Norfolk Southern investigators, the Claimant had not attempted to pay the hotel by either billing Norfolk Southern or by paying himself. Therefore, the record supports two opposite inferences: (1) the Claimant was dishonest by subsuming the Saturday unapproved motel charges within the bigger bill that was approved by the

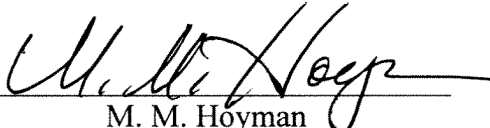
Norfolk Southern voucher; and (2) the Claimant was not dishonest and might have very well intended to pay for his portion, and had not done so because he had not checked out.

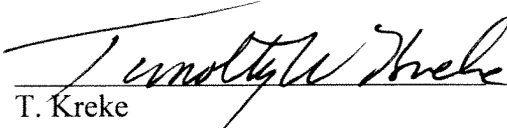
The Board finds that there are several mitigating factors in favor of the Claimant. Although the total hotel bill in the Charlotte Holiday Inn stay was over \$5,477.27, the portion that was unauthorized was \$1,207.42. This unauthorized portion was paid for by the Claimant shortly after he was notified of the investigation (Carrier Exhibit A, page 22). The Claimant has noted that he planned to pay the hotel for these personal days separately. Since he had not checked out yet, it was not unusual that these personal days were not paid for. Although the Claimant should have had more foresight and understood how this would have looked from the Carrier's perspective, that alone is not enough for dismissal. The Carrier's Special Agent testified that at no point was the Carrier billed for the personal stays and that he could not find any impropriety in the billing process for the Charlotte motel (Carrier Exhibit A, pages 13-14). Based on the record, there is insufficient evidence of purposeful intent to defraud the company based only on the Claimant's weekend stays at the Charlotte hotel. In addition to these factors, the Board notes that until this incident the Claimant had an otherwise good work record and is a very senior employee.

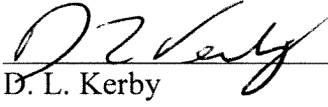
Concurrently, the Board also finds several factors against the Claimant. The Carrier claims several of the stays for the February 15, 2009 through March 28, 2009 period were unauthorized, which it uncovered after being alerted to the Claimant's unauthorized Saturday stays at the Charlotte Holiday Inn. Although the Organization disputes some of these days as being authorized, the majority of the days are not disputed. The Claimant at the hearing offered only that he thought all seven days were covered for that work assignment (Carrier Exhibit A, page 58). Insufficient corroborating evidence was offered to demonstrate that the unauthorized stays claimed by the Carrier at Salisbury Holiday Inn and Lexington Country Hearth Inn were actually allowed as the Claimant testified. The Claimant's Supervisor testified that the Claimant requested and received travel allowance reimbursements for dates that he actually stayed at the motel and provided payroll records to substantiate the claim (Carrier Exhibit A, page 18 and Carrier Exhibit C). After considering all the evidence, the Board concludes the Carrier did meet its burden of proof to demonstrate that the Claimant could not stay at the motel on private arrangements while receiving travel allowance reimbursements to go home once a week to check his mail and return the same day.

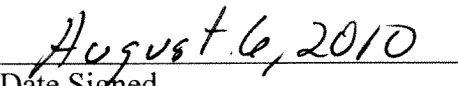
The case before the Board is extremely difficult due to the number of mitigating factors and the Claimant's otherwise excellent work record and high level of seniority. In arriving at its decision, the Board has carefully reviewed record and considered arguments brought forth by both the Organization and the Carrier. The case is complex with a variety of mitigating and aggravating factors that the Board has carefully considered. After balancing all of these factors, we conclude that there is enough evidence to demonstrate that the Claimant had the intention to defraud the Carrier. Given the circumstances of the case, the Carrier's dismissal of the Claimant was warranted.

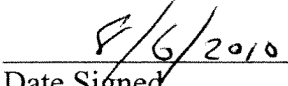
The claim is denied.


M. M. Hoyman
Chairperson and Neutral Member


T. Kreke
Employee Member


B. L. Kerby
Carrier Member


Date Signed


Date Signed

Issued at Chicago, Illinois on June 19, 2010.