

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 229

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed in all capacities from the services of Norfolk Southern Railway Company) of Mr. E. Huntley issued by letter dated May 2, 20 12 in connection with his alleged conduct unbecoming an employee when he used the Carrier's MSI Lodging System without authorization to purchase motel rooms at the Holiday Inn Express in Greensboro, North Carolina for his personal use on the nights of January 20 and 27, and February 3, 2012 and when on April 5, 2012 he allegedly made false statements to Carrier supervision in stating that he used the MSI Lodging System to purchase the room on the night of January 20, 2012 because he was flagging for a contractor was arbitrary, capricious, unjust, unwarranted, unreasonable and in violation of the Agreement (Carrier's File MW-GNVL-12-07-LM-123).
2. As a consequence of the violation referred to in Part 1 above, Mr. Huntley shall receive the remedy prescribed under Rule 40(d) of the Agreement."

Upon the whole record and all the evidence, after hearing, the Board finds the parties herein are 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 in this case entered service for the Carrier on September, 1989 as a Laborer and was working in that capacity on the dates of the events which led to this case. The Claimant was working on a travelling gang Monday through Friday. As the location of travelling gangs can change weekly and can involve working in locations across a large geographic area, travelling gang employees are provided lodging during

the work week. Generally speaking, travelling gang members are expected to check out of their Carrier provided lodging at the end of the work week. In January and February 2012, the Claimant was working at a location approximately 15 miles from his home but opted to use carrier provided lodging during the work week.

On March 27, 2012 a Carrier official was conducting a routine examination of a MSI lodging report (the Carrier's motel reservation system). That examination showed the Claimant had obtained lodging at Carrier expense on three Friday nights between January 15, 2012 and February 4, 2012. The Claimant's explanations for the use of Carrier provided lodging were as follows: (1) on January 20, 2012 he was flagging for a contractor, (2) on January 27, 2012 the Claimant's car broke down and he forgot to check out, and (3) on February 3, 2012 the Claimant could not recall what occurred that would have resulted in a motel charge. A Carrier official examined the Claimant's payroll for these dates and concluded that he performed no work after the end of his scheduled Friday shift on January 20, 2012 or over the weekend rest days. As a result of these events the Claimant was charged with using the MSI lodging system without authorization and with making false statements on April 13, 2012. The Carrier conducted a formal investigation including a hearing on April 25, 2012. The Carrier found the Claimant guilty and dismissed him from service via letter on May 2, 2012.

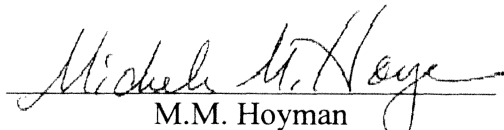
The Carrier's position is that there is no dispute related to the facts in this case: the Claimant used Carrier provided lodging on dates that he would have normally been expected to return home at his own expense (see Carrier Brief, page 5). The Carrier notes the use of company provided lodging in this case seems particularly egregious as the Claimant admitted to living nearby. The Carrier refutes the Organization's argument that the Claimant was entitled to carrier provided lodging for all days of the week by noting Assistant Division Engineer Boone's testimony that such arrangements are not typical for travelling employees (see Transcript, page 11). Specifically, while the Carrier allows employees to remain in camp cars during rest days, employees must get authorization from a supervisor to stay in a hotel on rest days. The Carrier also argues that the Claimant made false and conflicting statements to a supervisor when questioned about the lodging charges. This is supported by testimony from Track Supervisor Willis – despite stating he was flagging for a contractor on January 20, 2012, the Claimant's payroll indicates he did not work that day. Finally, the Carrier objects to the Organization's allegation of procedural errors in the investigation. The Carrier acknowledges that it is required to hold the investigation within 30 days of becoming aware of an incident, but states that although the lodging reports were generated on March 22, 2012 they were not reviewed by the Claimant's supervisor until March 27, 2012 (see Carrier Brief, page 12).

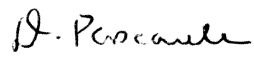
The Organization's position is that dismissal in this case is not appropriate because the Carrier failed to hold the investigation in a timely manner as required by the Agreement. The Organization alleges that the fact that the Carrier took more than two months after it initially became aware of the events to hold the hearing was a factor in the Claimant's inability to recollect the incidents. The Organization asserts that this meant that the Claimant was unable to appropriately defend himself against the charges (see Organization Brief, page 7). The Organization also argues that the Case fails on its merits

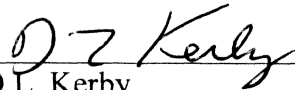
because the Carrier failed to meet its heightened burden of proof. As the instant case involves allegations of moral turpitude, the Carrier's standard of evidence increased from "substantial" to "clear and convincing" evidence (see Organization Brief, page 12). The Organization notes that there was no written Carrier policy on carrier-provided lodging during weekends (see Transcript, page 16) and that the Claimant never received proper instruction on this matter. The Organization refutes the Carrier's contention that the Claimant made false and conflicting statements by arguing that the written statement on the record was made after being compelled. As such, any appearance of false statements was not intentional and is exemplified by the fact that the Claimant could not recall what happened as he testified at the hearing.

There is no dispute in this case that the Claimant inappropriately used Carrier-provided lodging on rest days. As such, the Board finds that the Claimant is guilty of some level of negligence. Concurrently, the Board finds there is insufficient evidence in the record to support the claim that the Claimant's actions constitute intentional dishonesty. In coming to its decision, the Board has given significant weight to the Claimant's long record of service with the Carrier. Overall, we find that dismissal is not appropriate in this case. The claimant is to be reinstated, but without back pay. Additionally, the Board would like to take the opportunity to strongly caution the Claimant to be more cognizant of Carrier practices in this area in the future.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member


D. Pascarella
Employee Member


D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on June 20, 2013.