Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32786
Docket No. MW-32532
98-3-95-3-440

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to supply Vice General Chairman A. R. Hohbein and the charged employe, Sectionman K. D. Smith, with a copy of the investigation transcript compiled following the disciplinary investigation held on December 14, 1993 (System File T-D-735-H/MWB 94-05-06AM).

(2) The Carrier shall provide a copy of the December 14, 1993 investigation transcript to Claimant K. D. Smith and to Vice General Chairman A. R. Hohbein in accordance with Rule 40."

FINDINGS:

The Third Division of the Adjustment Board, 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

Following the Investigation conducted on December 14, 1993, Carrier did not impose discipline upon Claimant. When no disciplinary decision and no copy of the transcript was provided to the Organization, the instant claim was initiated.

The Organization contends the clear and unambiguous language of Rule 40 E. requires Carrier to provide a copy of the investigative transcript whether or not discipline is imposed. Carrier, on the other hand, sees the purpose of Rule 40 E. differently. In its view, the Rule requires it to provide a transcript only when discipline is assessed. No logical purpose is served by requiring a transcript where no appeal process will be activated. In addition to these contentions, Carrier also asserted that its view is supported by a long-standing system-wide past practice.

Rule 40 E. reads as follows:

> "The employe and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record."

Well settled principles of language interpretation apply to this dispute. If the Board finds the meaning of a disputed agreement provision to be clear and unambiguous, the provision must be given effect as written. If the provision is ambiguous, however, then the objective is to ascertain the mutual intent of the parties and apply the provision as they intended. In ascertaining intent, the Board is limited to considering only the evidence in the record developed by the parties in their handling of the matter on the property. The analysis of the evidence must focus on determining what the language meant to the original negotiating parties when the provision was adopted. It is this meaning that drives the interpretation and not other, unintended meanings, that may possibly be read into the provision. Probative evidence of the parties' past practice in applying the provision is often of substantial weight in determining the original intent. Finally, an agreement provision is ambiguous if the conflicting interpretations of the parties are plausible.

Rule 40 E. does not explicitly state that transcripts are required whether or not discipline is taken, which is the Organization's position. Nor does the Rule explicitly state that transcripts need only be provided when discipline is actually imposed, as the Carrier urges. Given this lack of clear terminology, both parties' interpretations are

found to be plausible. As a result, the provision is not found to be clear and unambiguous.

On the property, the parties engaged in the exchange of a number of conflicting assertions in support of their respective positions. Both parties also cited prior Awards from the various divisions of the National Railroad Adjustment Board as well as certain Public Law Boards. None of these prior decisions is found to be on point. The two decisions cited by the Carrier, which involve these same parties, dealt with the question of delayed transcripts. The other decisions deal with other parties or other provisions. On the whole, they are not determinative.

In addition to the assertions it made in support of its position, the Organization also provided probative evidence to contradict the past practice contention raised by the Carrier. *In all, the Organization produced evidence of some 15 prior instances where* an Investigation was held and discipline was not taken but Carrier, nonetheless, did provide a transcript. This evidence directly contradicted Carrier's assertion of a past practice to the contrary.

The Carrier did not provide any actual evidence to support its past practice assertion prior to Notice of Intention to File an Ex-Parte Submission ("Notice") being filed on August 29, 1995. According to Carrier's Submission, however, it did provide past practice evidence by letter dated September 5, 1995. All of that information was also supplied, along with other new matters, with its Submission. In addition to including the new information, the Carrier essentially raised the contention that the Organization's August 29, 1995 filing unfairly deprived it of the opportunity to provide its past practice evidence.

It is well settled that we may properly consider any document presented on the property prior to the filing of Notice with this Board. It is also well settled that, absent extraordinary circumstances warranting a different result, evidence not exchanged prior to that Notice may not be considered. Thus, we are faced squarely with the issue of whether we may properly consider the Carrier's past practice evidence.

Careful examination of the record reveals that the Organization first provided one piece of past practice evidence supporting its interpretation of Rule 40 E. in its appeal to the Carrier dated May 6, 1994. The record shows that Carrier did not acknowledge that evidence in its reply dated June 30, 1994. Rather, Carrier only raised

an assertion of the long-standing practice underlying its position. Thereafter, the Organization asked for and received three extensions of time limitations to assess its position on the instant claim as well as several others. The record also reveals that the parties conferenced the instant dispute on March 2, 1995, at which time the Organization again raised its piece of past practice evidence. Finally, on July 7, 1995, the Organization furnished the Carrier with some 14 more evidentiary examples contradicting the Carrier's assertion of past practice. During this period of more than one year, the Carrier did not furnish any evidence to support its asserted past practice.

On July 28, 1995, the Carrier acknowledged receipt of the Organization's additional evidence. It said that it was investigating the Organization's evidence. It went on to state that it expected to provide the Organization with a response concerning the Organization's evidence soon. Other than the use of the word "soon," the Carrier did not suggest when it would respond. Nor did the Carrier ask for any period of time in which to develop its response. After hearing nothing more in the weeks that followed, the Organization filed the Notice on August 29, 1995.

Given the foregoing circumstances, we find that Carrier's past practice evidence must be rejected as being new material. From the record, it is clear that the issue over Carrier's purported past practice was joined on the property not later than June 30, 1994. Being in the nature of an affirmative defense to the claim, Carrier had the burden of proof to establish this purported past practice by more than mere assertion. Yet for more than one year it did not provide any such evidence. It also had several months between the conference on the property and the Notice filing date. Nevertheless, the Carrier did not produce any past practice evidence during this period. Finally, in the nearly two months after the Organization provided 14 more evidentiary examples conflicting with the Carrier's position, the Carrier did not produce evidence. We cannot find, therefore, that the Carrier was unfairly deprived of the opportunity to respond. We are, accordingly, confining our decision in the instant matter to the record developed on the property prior to August 29, 1995.

The Organization supported its position with probative evidence. The Carrier did not. The claim, accordingly, must be sustained. We note, however, that the record strongly suggests that it is not possible, at this point, to produce the missing transcript. It is likely that the recording tape has long since been erased and reused. Our decision, therefore, is limited to the finding that, on the instant record, the Organization's interpretation of Rule 40 E. was correct.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of September 1998.