

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 36197  
Docket No. MW-35415  
02-3-99-3-304

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(Burlington Northern Santa Fe Railway)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to provide Mr. J. A. Lawrence, Jr., and his representative a copy of the transcript following Mr. Lawrence’s March 3, 1997 investigation held in Minneapolis, Minnesota (System File T-D-1321-B/MWB 97-06-16AB BNR).
- (2) As a consequence of the aforesaid violation, the Carrier shall now provide Mr. J. A. Lawrence, Jr. and his representative with a copy of the decision and the transcript of the March 3, 1997 investigation.”

**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.

This case involves the Carrier’s alleged “failure and refusal” to furnish J. Lawrence, Jr. and his representative with a copy of the transcript of his disciplinary Investigation held on March 3, 1997 at Minneapolis, Minnesota. Of note, it is not disputed that the Claimant was exonerated of any wrong-doing in connection with the charges.

The Organization asserts that Rule 40E of the September 1, 1982 BN-BMWE Schedule Agreement mandates that in all instances of disciplinary Investigation, “the employee 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.” The Organization asserts that this case is “just that simple and straightforward” and should be sustained on the clear and unambiguous language of Rule 40E.

For its part, the Carrier maintains that the historical application of Rule 40E is that transcripts of Investigations are not provided unless there has been an assessment of discipline. The Carrier further maintains that the Organization has no need for the transcript unless there is disciplinary action on which to base an appeal. Specifically, the Carrier contends that Rule 40E applies only to matters “made a matter of record,” and there is no record unless a transcript is prepared. Finally, the Carrier contends that in the circumstances, the Organization has shown no prejudice to the Claimant’s rights.

Rule 40, as a whole, is dedicated to disciplinary trials and appeals, in text as well as in title. Specifically, Rule 40E states that:

“The employee 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.” (Emphasis added)

The language of Rule 40E, noted supra, is clear and unambiguous. It does not stipulate that the transcript “shall be furnished” only in cases where discipline is assessed, but rather simply states that a transcript “shall be furnished.” Based upon the clear and unambiguous language of Rule 40E, this claim must be sustained.

### AWARD

Claim sustained.

### 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 24th day of September 2002.

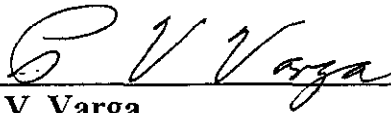
Carrier Members' Dissent to  
Award 36197 (Docket MW-35415)  
Referee N. F. Eischen

This decision was an exercise in futility.

The on-property record established that the Claimant had not been found guilty of any violation at the March 3, 1997 Investigation hearing. As such, since no discipline was issued and no notation was made on the Claimant's record there was nothing "made a matter of record." Further, it was noted in the on-property record, that, because of the outcome and because no record was made on Claimant's record, no copy of the investigative record was retained.

While the Majority has focused on one word in Rule 40E in rationalizing its decision, it has ignored all that follows the word "shall" in the Rule. Yes, a copy "...of the transcript... including all statements, reports and information made a matter of record" shall be provided to an individual. Based upon the unambiguous language of the rule, a copy of this decision, since it is the only remaining record of the March 3, 1997 hearing, is all that is necessary and factually is all that can be provided the Claimant in this matter.

We Dissent.



P. V. Varga



M. W. Fingerhut



M. C. Lesnik

LABOR MEMBER'S RESPONSE  
TO  
CARRIER MEMBERS' DISSENT  
TO  
AWARD 36197, DOCKET MW-35415  
(Referee N. F. Eischen)

If one would take the Carrier Members' Dissent at face value, then one would have to conclude that no transcript of the hearing was retained. Indeed, the Carrier asserted on the property that no record of the hearing was kept because no discipline was assessed. Despite the assertions raised on the property, miraculously under date of October 4, 2002, the General Chairman received a complete copy of the hearing transcript with exhibits attached. Hence, all of the assertions raised by the Carrier Members and the Carrier have shown to be untrue. Of course, this writer is hesitant to assert that the Carrier and its representatives were speaking untruths; however, its position can be described as disingenuous.

Finally, as the Carrier consistently does, it manages to attack the clear and unambiguous language of the Agreement. Rule 40E clearly states that:

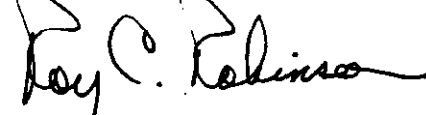
“E. The employe and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.”

The matter of record that the Carrier Members continue to bleat about is the record of the hearing itself, whether discipline is rendered or not.

Labor Member's Response  
to Carrier Members' Dissent  
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The Majority's findings in this case are correct and sound. The Dissent is nothing more than a thinly veiled attempt to shroud the Carrier's blatant violation of the Agreement. The award is correct in every respect and I concur with the findings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Roy C. Robinson  
Labor Member