Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41686
Docket No. SG-41863
13-3-NRAB-00003-120132

The Third Division consisted of the regular members and in addition Referee Roger K. MacDougall when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of J. Velasco, for his record to be cleared of any mention of the discipline issued in a letter dated August 9, 2010, account Carrier violated the current Signalmen's Agreement, particularly Rules 54 and 56 when it issued the harsh and excessive discipline of a Level S (serious) 30-day record suspension with a three-year probation period without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on July 13, 2010. Carrier's File No. 35-11-0004. General Chairman's File No. 10-038-BNSF-188-SP. BRS File Case No. 14591-BNSF."

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 may be broken into two parts. The first involves a series of procedural issues; the second addresses the merits of the case.

The procedural issues raised on the property, and arguably after the close of the record in the briefs, hinge on the interpretation of a newly negotiated Rule involving a limited form of pre-hearing discovery. Before turning to that issue, the key facts of the case are important.

On June 7, 2010, the Claimant, a Signal employee, asked for permission from the Dispatcher to occupy a block of track. The Dispatcher gave him authorization to occupy track, but not the full extent he had requested. The Claimant did not realize this. He put his hy-rail vehicle on the track and proceeded to perform his work. At some point, the Dispatcher got a warning that the Claimant had exceeded his track authority. When the Dispatcher contacted the Claimant, they both agreed on where he was – the Claimant thought he had authority to be there, but the Dispatcher pointed out he did not. The evidence in the case proves that the Dispatcher was correct.

The preliminary issue involves new language in the Collective Bargaining Agreement between the parties. Item 2d of the April 1, 2010 Rules Modification Agreement states:

> "d. Document Review, Formal Investigations – Rule 54 is modified as follows:
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> In the course of a formal investigation, should BNSF intend to enter into evidence a log or similar recording of specialized technical data which is solely in BNSF's possession and control (an example would be an HLCS log), then, in order for BNSF to rely on such data in the formal investigation, BNSF shall first have made available for review such specific data to the employee's BRS representative as soon as

practical, but not later than twenty-four hours prior to the formal investigation."

During the course of the preparation for the Hearing, the Organization requested a copy of the recording of the Dispatcher's conversation with the Claimant. The Carrier refused. The Organization says this is a violation of the above-quoted new Rule. Much was made, in the briefs and in oral argument, about the intent of the contract language. Arguments were also made that some of these debates were outside the allowable record before the Board, because they were only raised after the close of the record.

The Board finds that, regardless of when any such arguments were made, the Board need not deal with them. The doctrine of contract interpretation, including the parol evidence rule, says that if the language of the contract is unclear for the purpose of interpretation, extrinsic evidence (including, for example, bargaining history) may be allowable as evidence of the intent of the parties. However, the Board finds that this language is clear and unambiguous for facts of this case. Both parties are very sophisticated and experienced negotiators. They both have decades of contract negotiation experience, indeed with each other. For the purposes of this dispute, the Board finds that the language negotiated is extremely clear. The history of arbitration in the rail industry is unique. There is, as a rule, no prehearing discovery requirement, absent contract language to the contrary. This is a long-standing practice between the parties. The pre-requisite for discovery of this nature, in this new language, is:

1. An intent by the Carrier to introduce evidence; that
2. Is in the nature of specialized technical data; that
3. Is solely in the possession of the Carrier; and
4. The Carrier intends to rely upon.

There is even an example given to help clarify the language. This example includes relatively new technology (a GPS system which logs vehicle location on the track). It is hard to imagine that radio recordings, which date back nearly a century, can qualify as "specialized technical data" of the nature contemplated by the new agreement language. One might imagine other specialized technical data that might be involved

in a railway operation (on which the Board need not, and does not, opine) – but a .wav file of a radio conversation is not one.

As a result, the Board finds that the language is clear on its face, with respect to the issues at hand, and the Board need not go beyond such clear contract language. As a result, the preliminary issues are dismissed.

Turning to the merits of the case, the Claimant admitted that he was outside the limits granted by the Dispatcher. He thought he had authority to be there – but admitted that, upon review, he did not. As a result, the Carrier met its burden of proof.

Further, given the serious nature of and potential consequences of a violation of this sort, the Board sees no reason to interfere with the discipline assessed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 18th day of June 2013.