Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39382
Docket No. MW-40280
08-3-NRAB-00003-080033

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. S. S. Salsman on August 21, 2006 for alleged violation of Maintenance of Way Operating Rules 1.6, Conduct, 1.9, Respect of Company Property and Engineering Instructions and 21.2, Showing Proper Conduct for your alleged inappropriate behavior and conduct at the BNSF provided lodging facility - Days Inn, Kirksville, MO was exceedingly harsh and in violation of the Agreement [System File C-06-D070-7/10-06-0320 (MW) BNR].

(2) As a consequence of the violation referred to in Part (1) above, all reference to this matter shall be removed from Mr. S. S. Salsman's record and he shall be restored to service and compensated for all lost time."

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.

The Claimant was hired in June 1996 and prior to his dismissal, he was assigned as a Machine Operator in the Maintenance of Way Department on Rail Production Gang 10. On March 17, 2006, the Claimant was notified to attend an Investigation into his alleged inappropriate behavior and conduct on March 11, 2006, at a BNSF provided lodging facility when he allegedly "exposed [himself], displayed pornographic materials, [was] intoxicated in a public area, and disruptive to various motel guests" from approximately 8:30 P.M. to approximately 11:30 P.M. After an Investigation held on July 27, 2006, the Carrier determined that he was guilty of the inappropriate behavior and conduct charged and dismissed him from employment for violation of Maintenance of Way Operating Rules 1.6, Conduct, 1.9, Respect of Company Property, and Engineering Instructions, 21.2, Showing Proper Conduct."

The Organization objects that the Claimant was denied a fair and impartial Hearing, that the Carrier failed to meet its burden of proof, and that the decision to dismiss the Claimant was arbitrary, capricious, excessive and in violation of the Agreement.

The Organization cites several aspects of the Hearing that were not fair and impartial. First, it contends that the Carrier violated the time limits of Rule 40 A, because the Assistant Roadmaster, and therefore the Carrier, became aware of the Claimant's misconduct on March 11 when he checked into the same motel. However, the Assistant Roadmaster testified that while he encountered the Claimant that evening, and knew that he was drunk, the Claimant's behavior in his presence was not objectionable, and no one made him aware of any objectionable conduct at that time. Instead, the record indicates that the Assistant Roadmaster became aware of the March 11 events on March 13, 2006 at about 8:30 P.M., when he received complaints about the Claimant's conduct. After interviewing employees and the Claimant, the

Assistant Roadmaster removed the Claimant from the property on March 14. The Carrier advised the Claimant on March 14 of the Hearing scheduled for March 27, 14 days after the Assistant Roadmaster first became aware of the problem. In this way the Carrier satisfied the Rule 40A requirement that the Investigation be scheduled to be held not later than 15 days from the date the information is obtained by a Carrier officer.

As for the requirement of Rule 40B that a Hearing be held within ten days after an employee is held out of service pending investigation, the Board is inclined to the view that the Claimant was removed from service by the Carrier on March 14, rather than removing himself to participate in the EAP as the Carrier suggests. Under Rule 40B, the Hearing should have been scheduled to be held on or before March 24, and the March 27 date was outside that time limit. However, the Board cannot say in this case that the Carrier's failure to schedule a Hearing within the time set by Rule 40B warrants that the charges be dismissed. The Board recognizes that the time limits and other mutually-agreed procedural safeguards in Rule 40 are essential elements of the Agreement due process to which employees are entitled. Rule 40B in particular serves to limit the financial risk borne by an employee who is rightly or wrongly held out of service pending Investigation. Where an employee is prevented from earning a livelihood, it is of paramount importance that the parties adhere to their contractual time limits. However, in this case, the Organization failed to prove that the failure to schedule the Hearing within the ten-day limit deprived the Claimant of Agreement due process or increased his financial risk. The Investigation was postponed repeatedly by mutual agreement of the parties, and for much of that time, the Claimant would have been unavailable for a Hearing due to his participation in in-patient and residential EAP treatment. The Organization failed to prove that this procedural irregularity prejudiced the Claimant or deprived him of a fair and impartial Investigation. Under these circumstances, the technical violation of Rule 40B does not require dismissal of the charges or sustaining the claim.

The Organization also objects that the Hearing Officer served a dual role as both the official who ordered his removal from service on March 14 and the one who conducted the Investigation on July 27, 2006. Recognizing that the dual role alone does not prevent the Hearing Officer from serving as a fair and impartial finder of fact, the Organization asserts that the Hearing Officer's pre-judgment of the Claimant is illustrated by his decisions to admit and give weight to hearsay and double hearsay

into the record over the Organization's objections. However, a careful review of the Hearing record does not disclose any errors prejudicial to the Claimant. Even though the Hearing Officer had ordered his removal from service after the March 11 incident, his conduct of the Hearing was even-handed. The Organization and the Claimant were given the opportunity to examine and respond to all documentary evidence, to present and fully question all witnesses, to make their objections and to present their defense in full. The Hearing Officer conducted a fair and impartial Investigation.

On the merits, the Organization contends that the Carrier failed to meet its burden of proof. It is true that the only witness at the Hearing was the Assistant Roadmaster whose first-hand knowledge was limited to the fact that the Claimant was intoxicated on the evening of March 11; he had observed none of the offensive conduct with which the Claimant was charged. The details of the Claimant's alleged conduct came from other employees, a motel guest, and the motel manager, statements often based on second and third hand information. None of those employees or the night clerk appeared at the Hearing.

However, the statements were sufficiently reliable to provide substantial evidence supporting the Carrier's decision. First, it is notable that when interviewed by the Assistant Roadmaster on the evening of March 13, the Claimant did not deny engaging in the conduct described – he simply could not remember. Even at the Hearing, the Claimant admitted that he had been intoxicated, that he had been carrying around (but not "humping") a hobby horse, and that "some people" might interpret his conduct as having been disruptive to the motel's guests. The Claimant even admitted positioning his laptop in his window so it could be seen from the pool, although he insisted that he did so on March 10, not March 11, and that the image displayed was his non-pornographic screensaver rather than "a babe." Most tellingly, the Claimant testified, "I'm not saying I wasn't intoxicated or wasn't drunk or wasn't partially blacked out some of the night, but I, I mean yeah, maybe I guess I could have done some of that stuff." He acknowledged that he might have blacked out part of the evening. Thus, the hearsay statements coincided significantly with the Claimant's own account. Second, while the employees' statements offered into evidence (other than the Assistant Roadmaster's) were signed by the Director of Human Resources who transcribed them, but not by the employees themselves, the Assistant Roadmaster witnessed those statements as they were given and attested to their accuracy.

Most important, the Hearing Officer offered the Organization the opportunity to request to have these witnesses and the Human Resources Director called to the Hearing for examination, but the Organization disavowed any interest in doing so. The Carrier was entitled to rely on the witness statements, and did not violate the Claimant's rights in so doing. The only conduct alleged that was never directly observed by any witness was the Claimant allegedly exposing himself. Although several employees reported having heard the allegation, no employee, motel guest, or staff reported having seen him do so. Thus, except on that one point, it was not an abuse of discretion for the Carrier to credit the witness statements it received in concluding that the Claimant committed the offense charged.

The Carrier demonstrated that there was substantial evidence to support all charges other than that the Claimant exposed himself. However, even without having proved that the Claimant engaged in that particular conduct, the Carrier amply demonstrated that the Claimant engaged in offensive conduct with the hobby horse, displayed pornographic pictures from his laptop to motel guests, was intoxicated in the motel lobby and disruptive of other motel guests, all in violation of Operating Rule 1.6, Conduct, which prohibits immoral and discourteous conduct; Operating Rule 1.9, Respect of Railroad Property, which requires employees to behave in such a way that the railroad will not be criticized for their actions; and Engineering Instruction 21.2, which requires employees using BNSF-provided lodging facilities to act professionally and courteously at the lodging facility, and to refrain from on or off-duty behavior that discredits the Carrier.

Finally, the Organization charges that the dismissal was arbitrary, capricious, and excessive because the Carrier proved only that the Claimant was intoxicated, and the impact of the unproven charges on the discipline decision cannot be eliminated. However, as we have indicated, the Carrier proved the vast majority of the charges. While the Board applauds the Claimant's efforts to overcome the disease of alcoholism, his illness does not excuse his repeated misconduct. Leniency in such a case is a matter for management's discretion, not ours. Given the nature of the offenses proved, and the fact that this was the Claimant's second similar offense in less than one year, we find that the dismissal decision was not arbitrary, capricious, or excessive.

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 8th day of December 2008.

LABOR MEMBER'S DISSENT
TO
AWARD 39382, DOCKET MW-40280
(Referee Kohn)

The Majority denied this docket in honoring the palpably erroneous presumption that Rule 40 is "directory" and not "mandatory" in nature. For ready reference, Rule 40 reads:

"RULE 40. INVESTIGATIONS AND APPEALS

A. An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rule.

B. In the case of an employe who may be held out of service pending investigation in cases involving serious infraction of rules **the investigation shall be held within ten (10) days after date withheld from service**. He will be notified at time removed from service of the reason therefor.

C. At least five (5) days advance written notice of the investigation shall be given the employe and the appropriate local organization representative, in order that the employe may arrange for representation by a duly authorized representative or an employe of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employe involved.

D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employe, with copy to local organization's representative. If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employe. If not effected within five (5) calendar days, or if employe is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be cancelled.

"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.

F. The investigation provided for herein may be waived by the employe provided that any discipline assessed is confirmed in writing in the presence of his duly authorized representative and agreed to by the proper officer of the Carrier.

G. If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from the record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension.

H. The provisions of Rule 42 shall be applicable to the filing of claims and to appeals in discipline cases.

I. The date for holding an investigation may be postponed if mutually agreed to by the Company and the employe or his duly authorized representative. If there is a change in the location of the investigation, the employe and his duly authorized representative will be notified.

J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employe shall be considered as having been dismissed.

K. If an employe who has been discharged for cause is later reinstated, without having been found blameless, and his former position has been bid in by another employe on regular bulletin, the reinstated employe will displace the youngest assigned man in his own rank, unless otherwise agreed between the General Chairman and the Company."

What is abundantly clear from an uncomplicated reading of the above-quoted rule is that an employe who has been in service sixty (60) calendar days or more will not be disciplined or dismissed without a proper hearing. What is equally clear from an uncomplicated reading of the above-quoted rule is that the words "*will*" and "*shall*" are *mandatory*, not directory. In support of our position in this regard are Third Division Awards 11225, 12092, 12397, 12632, 16799, 18352 and 23482 which are but a mere sampling of the plethora of decisions of this Board which held to the effect that "*will*" is **MANDATORY** vis-a-vis "directory". See also Third Division Awards 10852, 13097, 13721, 13959, 14204, 17947, 22258, 22898, 23459, 23496, 25465, 25888,

28133 and 28927 which held to the effect that "*shall*" is **MANDATORY** vis-a-vis "directory". See also awards concerning "*shall*" and "*will*" relative to the time limits for claims handling which also support our position and are so numerous as to preclude the necessity of citation herein. Moreover, it is abundantly clear that where the parties intended for the contractual provisions of Rule 40 to be permissive and/or directory, the word "**may**" appears. The salient point here is that the Majority's findings in Award 39382 are plainly grounded on an erroneous premise.

In the dispute which precipitated the award in question, the Carrier *conceded* its nonfeasance, i.e., that the investigation was not held within the ten (10) day time limit agreed to by the Parties in Rule 40B. Therefore, from an uncomplicated reading of the record of this case, due process in accordance with the provisions of Rule 40B did **NOT** occur. However, instead of sustaining the claim based on the Organization's properly presented procedural argument, the Majority ignored the literal, common and ordinary meaning of the above-quoted Rule 40 and improperly considered the merits of the discipline. Moreover, as if to add insult to injury, the Majority's finding created out of whole cloth its own interpretation of Rule 40B. The point is, the Majority modified the agreed to language of Rule 40. A modification which finds no essence in the Agreement. Inasmuch as it is a fundamental axiom that the Board is without authority to amend or modify the Agreement, it is crystal clear that the Majority exceeded its jurisdiction by adding a condition to the Agreement in this instance and rendering Rule 40B ineffectual. The condition which the erroneous "directory" premise led the Majority to devise was that the Carrier's violation had not prejudiced the Claimant. While not altogether new, this conclusion runs contrary to the clearly predominant view of arbitral authority with regard to the identical contractual language, including substantial and recent precedent involving this Carrier and on this property. In this instance, the Majority displayed *naivete* in departing from both time honored and recent decisions of arbitrators well-versed in the railroad industry. The findings demonstrate conclusively that the Majority attempted to look behind the clear contractual language of Rule 40 to fashion its anomalous brand of industrial justice. Such maverick views of individualized industrial justice violated a hornbook principle of How Arbitration Works (Elkouri, et al.) and rendered the findings palpably erroneous and of no precedential value whatsoever.

To emphasize just how wrongheaded Award 39382 is, we invite attention to a sampling of the awards which considered the same issue, the same contractual language and which sustained the claim for the Employes. The below listed sampling of such awards represents the mainstream, predominant view of the Board on this issue:

First Division Award

16366 **(Daugherty)** Apache Railway

Second Division Award

2364 **(Carter)** NP

Third Division Awards

2590 **(Blake)** SPW
3502 **(Douglas)** Pullman
3697 **(Miller)** TRR
3736 **(Wenke)** TRR
5472 **(Carter)** ICG
8160 **(Bailer)** NYC
8714 **(Weston)** MP
10035 **(Daly)** MP
11019 **(Ray)** MP
14496 **(Rohman)** Valdosta Southern
14497 **(Rohman)** Valdosta Southern
19796 **(J. Sickles)** DTS
21040 **(J. Sickles)** CNW
21675 **(Blackwell)** BN
21873 **(Zumas)** BN
23553 **(Dennis)** Belt Railway

Public Law Boards

2960 **(Vernon)** CNW, Award 3
3397 **(J. Sickles)** ICG, Award 69
1844 **(Eischen)** CNW, Award 19
1844 **(Eischen)** CNW, Award 28
1844 **(Eischen)** CNW, Award 58
1844 **(Eischen)** CNW, Award 62
1844 **(Eischen)** CNW, Award 79
1844 **(Eischen)** CNW, Award 80

Finally, insofar as the language of Rule 40 is concerned, wherein the Majority had trouble interpreting the clear terms thereof, Referee Suntrup put the issue in the proper perspective in the August 29, 1999 Seniority District Consolidation Issue, between these very parties, wherein he held:

> "Whatever the parties' different intents may have been the arbitrator '...is constrained to give effect to the thought expressed by the words used...' as the company states in quoting from Phelps Dodge.[21] The principle enumerated in this latter Award originated in an arbitration conducted under a NLRA protected union-management relationship. More pertinent to this industry is the arbitral precedent which states that the function of the 'rights' arbitrator under Section 3 of the RLA is to '...interpret labor agreements,,,' as they are 'written'.[22] Arbitrators in this industry have always held that the '...terms of (a) written agreement must prevail...'.[23] Arbitration Awards issued in this industry tell us that we must '...give common or normal meaning to the language used in (an) agreement...' and that

"'...however onerous the terms of an agreement may be, they must be enforced if such is the meaning of the language used...'.[24]

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[22]First Division 21459. See also Third Division 21459, 21697, 23135 & Fourth Division 4645.

[23]Third Division 6856.

[24]Third Division 16489."

The Majority would have been well served to follow the above-cited findings rather than doing what it did. For all the foregoing reasons, I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member