Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 41884
Docket No. MW-41995
14-3-NRAB-00003-120300

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline [Level S thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. G. Jordan by letter dated May 5, 2011 for alleged violation of EI 21.1 Lodging Procedures (General) and MOWOR 1.6 Conduct in connection with alleged misuse of company credit by booking and staying in company provided lodging at various locations on November 2, 3, 4, 9, 10, 14, 15, 16, 21, 23, 24, 2010 and December 1, 2010 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-27/10-11-0457 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. Jordan shall now receive the remedy prescribed by the parties in Rule 40G."

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 facts indicate that in March 2011, the Carrier conducted a remote audit of the district in which the Claimant worked as a Track Inspector, checking for employee compliance with the Carrier's Lodging Policies. It was alleged that the audit revealed various dates in November and December 2010, in which the Claimant allegedly stayed in Company-provided lodging without the proper authorization, and because of that, charges were brought against the Claimant.

On March 15, the Carrier directed the Claimant to report for a formal Investigation on March 22, which was mutually postponed until April 7, 2011, concerning, in pertinent part, the following charge:

> **". . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misuse of company credit, by booking and staying in company provided lodging at various locations on November 2, 3, 4, 9, 10, 14, 15, 16, 21, 23, 24, and December 1, 2010. The Carrier's first date of knowledge with this alleged violation was March 11, 2011."**

On May 5, 2011, the Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a three-year Review Period.

The Board notes that this is the first of two discipline cases involving the same Claimant before this tribunal.

It is the position of the Organization that the Claimant was denied a "fair and impartial" Investigation for multiple reasons:

(1) The Investigation was not held within 15 days of the Carrier's first constructive knowledge of the alleged incident in violation of Rule 40A because the charges were not brought against the Claimant until three months later.

(2) The Carrier failed to have a primary witness against the Claimant attend the Hearing so the Claimant could have confronted his accuser and instead allowed the witness to testify via telephone.

(3) The Hearing Officer had detailed information regarding the alleged incident prior to the Investigation and subsequently acted as a prosecutor rather than as an impartial trier of facts.

(4) The Hearing Officer did not render the disciplinary decision; instead, a Carrier Officer who did not attend the Hearing and who could not make reasonable credibility decisions issued the discipline.

The Organization reasoned that based upon the alleged aforementioned procedural errors, the Hearing was unfair, and because of that, it asks that the discipline be set aside without reviewing the merits.

Turning to the merits, the Organization argued that Roadmaster Bell testified that during an October 2010 meeting, he explained his expectations concerning motel stays to the employees who attended that meeting. It asserted that Bell testified that he explained that the employees were eligible for motel stays if they worked overtime, or if the weather conditions were hazardous, and that if the Claimant had worked overtime, he would be approved to stay in a motel. The Organization further argued that an examination of certain transcript exhibits shows that the Claimant worked overtime on each of the dates listed in the charge letter; therefore, he was in compliance with Roadmaster Bell's unwritten policy and instructions. The Organization further pointed out that the Claimant had similar motel stays in October and other dates in December and the Claimant was not charged with misuse of Company credit. The Organization explained that Bell testified that the Claimant was not charged with those dates because the Claimant had sent him an e-mail notifying him that he was staying in the motel. However, he was charged for the dates listed in the Notice of Investigation because the Claimant

did not send him an e-mail. According to the Organization, it presented various transcript exhibits that were e-mails from the Claimant to Roadmaster Bell showing notification of work performed and various motel stays. Additionally, it stated that during Bell's testimony he admitted that he may have missed those e-mails; it alleged that he further testified that he may have missed others. The Organization concluded that the Carrier did not meet its burden of proof and requested that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that the Hearing was held in a timely manner and the Organization is incorrect when it asserts that the Carrier had first knowledge of the Claimant's alleged violations on March 9, 2011. It argued that the record shows that a Carrier Official was told to make an audit on March 9 by the Corporate Audit Services and she reported her results to Roadmaster Bell on March 11, which constituted the Carrier's first knowledge the incident. It further argued that it did not err when it allowed a Carrier witness to testify by telephone because countless tribunals have recognized that telephonic testimony is permissible. The Carrier further noted that the Organization was permitted to ask any questions during cross-examination of the witness. Additionally, it stated that the Hearing Officer was impartial and did nothing that violated the Claimant's contractual rights. Lastly, it argued that the parties' Agreement does not require the Hearing Officer to render disciplinary decisions; it cited several on-property Awards in support of that proposition. Lastly, it requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted that the Claimant was not authorized to use Carrier lodging, but made a conscious decision to do so on the dates set forth in the Notice of Investigation. It argued that the Claimant's home station was Creston, Iowa. Creston is located 50.15 miles from Red Oak, Iowa, where the Claimant's position was headquartered. In order to qualify for lodging, the Claimant was required to work a position that was greater than 75 miles from his home station. Therefore, according to the Carrier, the Claimant was not entitled to lodging because he was working a position that was less than 75 miles from his home station. It further argued that the Claimant was also ineligible for lodging because he chose not to bump to an available position that had a higher rate of pay than the position he was working; and because he did not comply with the Agreement Rules, he was not eligible for lodging. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the record of evidence. We find that the Organization's procedural arguments do not rise to the level that the Claimant's defense was impaired; therefore, it is determined that the Claimant was not denied his "due process" Agreement rights. Accordingly, the claim will be resolved on its merits.

The Carrier alleged in its Notice of Investigation that the Claimant was not authorized to stay in corporate lodging on November 2, 3, 4, 9, 10, 14, 15, 16, 21, 23, 24 and December 1, 2010. In its May 5, 2011 Discipline Letter it stated that the Claimant was guilty of having stayed at corporate lodging on all of the aforementioned dates without authorization. However, in its Submission to the Board it stated: "And while Roadmaster Bell did admit that he had overlooked two e-mails from [the] Claimant for November 4 and 14, [the] Claimant was still ineligible to stay in corporate lodging on the remainder of the dates." With that admission, the Board concludes that the two aforementioned days were authorized.

Roadmaster Bell testified that he held an October, 2010 meeting at which he told all the employees who were in attendance – including the Claimant - what he expected of them regarding motel stays. Bell further testified that employees were eligible for motel stays if they worked overtime, or if weather conditions were too hazardous to be driving. Importantly, they were instructed to send him an e-mail explaining why they were staying at a motel. The Carrier alleged that the Claimant failed to send the requisite e-mails. There is no dispute that the Claimant worked overtime on each of the listed dates. The question before the Board is did the Claimant send the required e-mails to Roadmaster Bell so as to inform him that he was going to stay at corporate lodging. During the course of the Investigation, RoadmasterBell was questioned as follows:

> **"Randy Anderson: To the original notice, investigation notice, Mr. Bell, there were 12 days on there, November 2nd, 3rd, 4th, 9th, 10th, 14th, 15th, 16th, 21st, 23rd, 24th, and December 1st. Now it was your testimony previously that you did not approve any of these days because you did not receive an email. <u>Yet exhibits now show that you did receive an email. So you went from 12 days of not receiving emails to half the days of not receiving emails</u>. Since Scott Jordan sent you emails for some of the days you did not receive or did not see them, what makes you, I guess since you missed a few of the days <u>I guess the probability of missing more is pretty apparent</u>.**

Allan Bell: I'll agree." (Emphasis added.)

Therefore, Roadmaster Bell confirmed above that the 12 days on which it was alleged that he had not received e-mails from the Claimant were reduced to six days. Bell also testified when shown two e-mails regarding November 4 and 16 that if he had seen those earlier, he would not have included either of those dates in the charges. The Board also concludes that he would not have included November 15 as well, because the Claimant stated in that e-mail: "just got a room."

The Claimant testified that he did not keep all of his e-mails and he might not have sent his Supervisor an e-mail for each date set forth in the charges. He admitted that he did not advise Roadmaster Bell that he was staying at a motel on November 2, but he emphasized that on each date listed in the Notice of Investigation he worked no less than the required amount of overtime so as to be eligible for the motel stay in accordance with Bell's expectations.

A fair reading of the record reveals that the Claimant sent the required e-mails to his immediate Supervisor at least 50% of the time, and perhaps more, which was not contested by Roadmaster Bell. During the Hearing the Claimant was asked if he felt like he acted in compliance with Roadmaster Bell's instructions and he responded as follows:

> **"I feel that I was in compliance as much as I possibly could be. I think everybody has a lapse of memory every now and then and as you can see by all of these exhibits, I sent emails, number one, we work a lot of overtime out there as you can tell by Exhibit 12, 13, and 14, and when [you] get in at 7:00, 8:00 at night sometimes you're pretty tired so you don't think about, oh, I forgot to put I'm staying in a hotel. Did I think it was an issue, no, because I worked the overtime and we were there."**

The record is clear that the Claimant failed to send an e-mail to cover all of the dates covered by the charges levied against him and it is equally clear that Roadmaster Bell overlooked several e-mails covering some of the days listed in the Notice of Investigation. Nonetheless, substantial evidence was adduced at the Hearing so as to warrant the conclusion that the Carrier met its burden of proof that the Claimant failed to send the required e-mails on a few dates.

Thus, the only issue remaining is whether the discipline was appropriate. At the time of the incident, the Claimant had approximately six years of service with one Level S 30-Day Record Suspension still under its review period. However, the Board is not persuaded that the Claimant's omissions were purposeful; nor has the Carrier shown that it was thereby harmed. On a non-precedential basis and because of the mitigating circumstances evidenced in the instant case, the Board finds and holds that the assessed discipline was excessive. Accordingly, the Claimant's discipline is hereby reduced to a 10-Day Record Suspension.

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 16th day of June 2014.