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

Award No. 42149
Docket No. SG-42043
15-3-NRAB-00003-120411

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(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 R. C. Rupp, for eight hours pay, account Carrier violated the current Signalmen's Agreement, particularly Rule 20 and past practice, when it directed him to attend an Investigation on his regularly assigned duty day of March 31, 2011, and then refused to compensate him accordingly. Carrier's File No. 35-11-0030. General Chairman's File No. 11-022-BNSF-20-C. BRS File Case No. 14678-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.

At the time of the events giving rise to this dispute, the Claimant had a position as a CTC Maintainer (S4036), based in Ottumwa, Iowa. By letter dated February 9,

2011, the Carrier sent him a Notice of Investigation regarding allegations that he had violated MOWOR 1.2.7 - Furnishing information; MOWOR 1.6 - Conduct; MOWOR 1.9 - Respect of Railroad Company; MOWOR 1.19 - Care of Property; MOWOR 1.25 - Credit or Property, and MOWOR 1.27 - Divulging Information. The original Hearing date was mutually postponed, and the Investigation was held on March 31, 2011. The Claimant was withheld from duty at the time. This claim arose when he sought compensation for attending the Investigation and the Carrier refused to pay him. The Organization filed a timely claim on his behalf. The Parties having been unable to resolve the dispute through the on-property grievance procedure, the matter was submitted to the Board for a final and binding decision.

This is one of three cases that were simultaneously submitted to the Board for decision involving the same issue of contract interpretation - whether employees are entitled to compensation pursuant to Rule 20 of the parties' Agreement for attending an investigatory hearing into charges against them. (See also, Third Division Awards 42148 and 42150.) While the three cases involve different Claimants and different facts, the principles of contract interpretation are the same in all three cases, and the reader is referred to Award 42148 for the Board's basic analysis of the issue.

In Award 42148, the Board held that Rule 20 applies to employees who attend investigations into charges against them. The facts of this case differ from those in that case, however, in that the Claimant in the instant case had been withheld from service pending the Investigation. The language of Rule 20 states, in relevant part, "Employees attending court or inquest under instructions from the Carrier and who lose time as a result thereof, will be paid the equivalent of their regular assigned hours for each day so held . . . ." Employees who are being withheld from service arguably do not "lose time as a result" of attending their investigations.

It is at this point that the record becomes unclear. It does not indicate whether employees who are withheld from service are held off with pay or without pay. If they are held off with pay, they would presumably be entitled to compensation so that they do not "lose time as a result" of attending the investigation. If they are withheld from service without pay, that may not be true, depending on the outcome of the investigation. An employee who is exonerated of any charges is presumably compensated for the time he or she was withheld from service, which would include compensation for attending the investigation. For an employee who is given discipline

less than discharge, they might be compensated depending on how long they were withheld from service and the level of discipline imposed. From the record, it not clear that employees who are withheld from service at the time of the investigation and are subsequently dismissed have historically been compensated for attending the investigation into their alleged misconduct. The Organization submitted a chart of investigations in 2009 and 2010 that showed local union, the employee's name, location, date of investigation, whether paid, whether the employee was out of service, and the outcome of the investigation. Of the 50 investigations on the chart, six involved employees who were out of service.[1] Of those six, all were dismissed following the investigation. Regarding payment for attending the investigation, two did not attend their investigations; two were paid; and two were marked "?" In the final analysis, the record does not include enough information for the Board to draw any conclusions about compensation for employees who were withheld from service, like the Claimant here, and, accordingly, the claim must be denied on the basis the Organization failed to satisfy its burden of proof.

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 26th day of August 2015.

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[1] One employee is listed with four dates within a single month, with dismissal after the last investigation. Although he was withheld from service, he is listed as having been paid. It is not clear from the chart whether the employee had four separate investigations or whether the dates were for the alleged misconduct, with a single investigation into all of the charges at once. The Board is counting him as a single example, not four.

CARRIER MEMBERS' CONCURRING & DISSENTING OPINION

TO

THIRD DIVISION AWARD 42149; DOCKET SG-42043

(Referee Andria S. Knapp)

Although this Award ultimately rendered a decision in the Carrier's favor, it is still palpably erroneous because the Board ignored the basic principles of contract construction and prior arbitral precedent concerning pay for Principals attending an Investigation when it relied upon its erroneous analysis in Third Division Award 42148. Rule 20 clearly and unequivocally states that it only applies to "Court" or "Inquest" proceedings. Neither of those constitutes a disciplinary Hearing or "Investigation" as defined in the Agreement between the Parties. "Investigation" is a term of art in this industry identifying a very specific type of proceeding.

Loose use of vernacular does not overcome terms of art that are contractually defined; laymen's language or generic dictionary definitions do not trump contract terminology. Obviously, Rule 20 is intended to compensate employees who are required by the Carrier to attend actual Court or Inquest proceedings, neither of which is the same as an Investigation as defined in Rule 54 of the BNSF/BRS Agreement.

Additional evidence that Rule 20 does not apply to Principals attending their own Investigations is the fact that when the Parties intended to include Investigations, it was clearly stated so in the Rule. In a predecessor road Agreement, specifically the Joint Texas Divisions (JTD) Agreement effective January 1, 1955, the Rule specifically identified "investigations."

> **"ATTENDING COURT: Employes attending court, inquests, investigations or hearings, under instructions from the railroad company, will be paid compensation . . . ." (emphasis added)**

Obviously, if the intention of the Parties' skillful negotiators had been to include "Investigations" as that term is defined in the current Collective Bargaining Agreement, then such would have been clearly stated in the Rule, as it was in the predecessor-road Agreement. However, it was not.

Arbitral precedent has already ruled that unless an Agreement includes specific language requiring a Carrier to pay a Principal to attend their own Investigation, they are not entitled to wages, expenses, or travel time from the Carrier for doing so.

A few of these Third Division Awards are, again, 1032, 21320, 22506, 23399, and 23962. Also see Second Division Award 12673 and Fourth Division Award 1971.

Incredible as it sounds, the Board also erroneously asserts that past practice trumps clear language. To reach this conclusion, the Board had to ignore years of prior arbitral precedent that determined the opposite to be true. It also disregarded the Carrier's evidence that such a practice did not exist. To prove the existence of a binding past practice, the Organization was obligated to prove that the past practice was (a) unequivocal, (b) clearly enunciated and acted upon, and (c) ". . . readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." See, Second Division Award 13760, as well as Third Division Award 34207 cited therein.

The "evidence" presented by the Organization failed to meet its required burden of proof as the moving party because, for one thing, there was clearly no mutuality between BNSF and the Organization concerning this issue, as is evident by the numerous Principals who were not compensated for attending their own Investigations. For another, a negative inference can be drawn from the fact that for decades the Organization failed to file any claims citing a violation of Rule 20 for those employees who were not paid to attend their own Investigation.

The Board then tries to bolster its fallacious ruling by asserting that a Principle is "under instructions from the Carrier" to attend the Investigation and, therefore, is entitled to compensation. It states that the language "Arrange to attend" is not permissive, but rather it is an imperative form placing the employee under the direction of the Carrier as stated in Rule 20. Even if Rule 20 applied, which it does not, Principles have never been charged with failing to comply with instructions if they elect not to attend their own Investigations. Nor have they been charged with a failure to comply with instructions if they chose not to "Arrange for representation and any witnesses . . . ."

Nor is the Carrier's position inconsistent. Simply because the Carrier has a pay code to pay certain employees to attend an Investigation does not constitute entitlement to pay for the Principle or witnesses for the Claimant under Rule 20. For one thing, the Organization never argued that Rule 20 applied to witnesses that the Principle or the Organization "arrange" to attend an Investigation. Why then would the Carrier compensate the Principal, whose alleged misconduct put the Carrier to the trouble and inconvenience of holding the Investigation? Plus, the Organization's argument would result in employees who are guilty of violating the Carrier's Rules being rewarded for their misconduct. That would be absurd.

The fact that a Collective Bargaining Agreement does not address an issue that the Organization or the Board believes it should is not evidence that another Rule in that Agreement was "intended" to apply instead. What this actually means is the Parties failed to reach an agreement on the issue. Rule 54 includes language for the handling of employees ultimately found blameless and for those who are reinstated but without a finding of innocence. There is no reason to believe that if the Parties had intended Principals should be compensated for their attendance, they would not have said so in this Rule. There is no excuse for the Board's improper attempt to twist another Rule to "fix" its perceived inequity.

For the foregoing reasons, we concur and dissent.

Michelle McBride *Michael C. Lesnik*

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April 21, 2016