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

**Award No. 42150**
**Docket No. SG-42258**
**15-3-NRAB-00003-130157**

**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. E. Evans, for eight hours pay at the straight-time rate account Carrier violated the current Signalmen's Agreement, particularly Rules 8, 20, 44, 54, and past practice, when it directed him to attend an Investigation on August 25, 2011, and then refused to compensate him accordingly. Carrier's File No. 35-12-0016. General Chairman's File No. 11-046-BNSF-188-SP. BRS File Case No. 14738-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 this case arose, the Claimant was working as Signalman assigned to crew SSCX0105 and was operating a boom truck. By letter dated July 25, 2011, he was sent a Notice of Investigation that stated, in part:**

> **"Arrange to attend investigation at 0900 hours, Tuesday, August 2, 2011, [location omitted] for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with alleged violations that occurred at approximately 0818 hours, July 25, 2011, at or near Ward Rugh, Inc. parking lot, 710 W. 8th Avenue, Ellengsburg, WA, 98926, resulting in boom striking overhead power lines, while you were working as a Signalman assigned to gang SSCX0105."**

**The original Hearing date was mutually postponed and the Investigation was ultimately held on August 25, 2011. The Claimant attended. When he sought compensation under Rule 20 for time lost to attend the Investigation, the Carrier refused to pay, and the Organization filed this claim on his behalf. The Parties having been unable to resolve the matter through the on-property grievance process, it 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 42149.) 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 dispute fit squarely into the analysis in that case. From the record, it appears that the Investigation occurred on one of the Claimant's regularly scheduled workdays. Rule 20 states, in 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."**

**Accordingly, the Claimant is entitled by the express language of Rule 20 to "be paid the equivalent of [his] regular assigned hours" for the day that the Investigation into the charges against him was held.**

## 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 26th day of August 2015.**

**Carrier Members' Dissent**
**To**
**Third Division Award 42148; Docket SG-42041**
**And**
**Third Division Award 42150; Docket SG-42258**

**(Referee Andria S. Knapp)**

**These Awards are palpably erroneous because the Board ignored the basic principles of contract construction and prior arbitral precedent concerning pay for Principals attending an "Investigation." Rule 20 clearly and unequivocally states that it only applies to "Court" or "Inquest" proceedings. Neither of these constitute an industrial 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 spelled out 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 past 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 is 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 satisfy 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. The Board states that the language "Arrange to attend" is not permissive; 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 such instructions if they elect not to attend. Nor have they been charged with a failure to comply with such 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 Principles or witnesses called by the Claimant under Rule 20. For one thing, the Organization never argued that Rule 20 applied to witnesses who the Principal or the Organization ask 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? Furthermore, 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 for Principals to be compensated, 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 vigorously dissent.**

*Michelle McBride*
**Michelle McBride**
**Carrier Member**

*Michael C. Lesnik*
**Michael C. Lesnik**
**Carrier Member**

**April 21, 2016**