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

Award No. 42439
Docket No. SG-42547
16-3-NRAB-00003-140177

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 D. Shew, for ten hours at his respective rate of pay, account Carrier violated the current Signalmen's Agreement, particularly Rules 8, 20, 44, and 54, when it refused to compensate the Claimant for the time he attended an Investigation at its direction on October 1 and 11, 2012. Carrier's File No. 35-13-0009. General Chairman's File No. 12-054-BNSF-119-D. BRS File Case No. 14976-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.

The Claimant asserts Rule 8-Basic Day and Starting Time, Rule 20-Attending Court or Inquest, Rule 44-Basis of Pay and Rule 54-Investigations and Appeals were

violated. He alleges these violations occurred when, despite his requests, the Carrier refused to schedule this investigation hearing during his working hours. The cited rules state as follows:

> **"Rule 8. A. Where one (1) shift is worked, eight (8) hours exclusive of the meal period shall constitute a day's work. The starting time shall not be earlier than 5:00 A.M., or later than 8:00 A.M.**
>
> **Rule 20. 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.**
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> **Rule 44. The regular established daily working hours will not be reduced below eight (8) hours per day nor will the regularly established number of working days be reduced below five (5) per week except in weeks in which positions are established or abolished, unless agreed to in writing by a majority of the employees affected through their General Chairman . . . .**
>
> **Rule 54. An employee in service sixty (60) calendar days or more will not be disciplined or dismissed until after fair and impartial investigation has been held . . . ."**

The Organization protested the denial of compensation, which the Carrier rejected on appeal. The claim was fully processed, without resolution. As a result, the Organization presented the dispute to the Board for hearing and decision.

The Carrier contends an investigation is not a court proceeding or inquest taking place under the authority of the state, hence Rule 20 does not apply. It argues the benefit the Organization seeks was not bargained for and is not provided for in the parties' Agreement. Had the parties intended compensation for investigations, the Carrier maintains they would have said so. It references Referee Dorsey in Award 21320, who said it is not the accepted practice in the industry to pay the charged employee for time spent in investigation. In its view, errors made by supervision in recording time cannot be used to demonstrate an intentional practice. Rather, past practice only applies where there is ambiguous language and a demonstration of mutuality. It notes that years have gone by without the Organization objecting to non-payment, and concludes that no cited rule compels

payment. Further, the Carrier argues that the principle of laches requires dismissal of the claim.

In the Carrier's assessment, the Organization's calculations of percentage payment for investigations suffer from faulty math and unsubstantiated data. The Carrier provided a list of 35 employees who were not paid for attending an investigation during a period ranging from 1997 to 2011 and a second list of 51 instances of nonpayment from 2004 to 2011. It did not provide information about instances where employees were paid. It claims the Organization made unsubstantiated assertions and provided no evidence of how they got their numbers.

The Carrier cites a prior rule which held that language providing pay for attendance at an investigation was not carried forward into the BNSF agreement. The Carrier contends this is evidence that the alleged benefit was excluded from the parties' Agreement by intent. It also contends that the Notice only invites employees to attend; they are not required to do so and have the right to decline attendance and rely on Union representation.

The Organization describes a well-established and mutually accepted past practice of paying employees who appear at investigations. It reasons that the reduction in pay Claimant experienced is in actuality a penalty prior to the completion of the investigation in violation of Rule 54.

In its review of past practices, the Organization found only five employees out of 242 who were denied paid time for investigations since 1997. It maintains this clearly shows an accepted practice of pay.

It argues the meaning of the contractual term "inquest" is not limited to formal judicial proceedings. As the Organization sees it, there can be no fair and impartial hearing unless the Claimant is in attendance. It maintains the Carrier's reference to the 1955 agreement is an attempt to muddy the water and irrelevant. It refers to Referee Knapp's Award 42148 as the controlling precedent. Stare Decisis applies here, states the Organization, insisting that we should not deviate from this precedent because it would create chaos.

The Board first observes that the doctrine of laches does not apply here. Each time an employee attends an investigation at which he or she is the principal and does so without pay, a new allegation of contract violation can be made.

Under the applicable rules, only if an employee is exonerated does he or she receive reimbursement for time lost due to attending an investigation. This means that the employee who is not exonerated not only receives a disciplinary penalty but also must absorb any expense of attempting to defend against the Carrier's accusations. The added loss of compensation in this scenario smacks of double jeopardy.

Rule 20 states: "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." The crux of the parties' dispute requires interpretation of the term "inquest." It is well established in contract interpretation that the terms used by the parties to express their intent should be given their ordinary and every day meanings.

Synonyms for "inquest" include investigation, inquiry, examination, probe, review and inquisition. The meaning of "inquest" therefore plainly refers to an investigation, that is, a proceeding designed to reveal information and find facts. Indeed, "inquest" and "investigation hearing" are synonymous. The Carrier's argument that an "inquest" must be held by the state is not supported by the parties' negotiated language. The term "inquest" is separated from the term "court" using the word "or." This establishes the two forums as equal alternatives. Nothing in the wording of Rule 20 restricts its terms to judicial or government-sponsored proceedings. Rather, the only restrictions are that the proceeding be an "inquest" and that the Carrier "instruct" the employee to attend.

The Carrier denies that it instructs employees to attend their investigations. In that regard, it is noted that the wording of a standard Notice of Investigation is contested between the parties and does not appear to be consistent. The Organization has provided a sample notice which states as follows in pertinent part:

> **"Arrange to attend investigation at 1300 hours, Thursday) December 15, 2011, at the Bob Downing Conference Room, 4510 East Wisconsin Ave) Spokane, WA, 99212, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged responsibility . . . ."**

This version of the notice carries the import of a command. The Carrier points to language in a different example, as follows:

> **"An investigation has been scheduled at 0900 hours, Tuesday, February 28, 2012s at the Lincoln Nebraska Depot Mail Room Conference Room, 3rd Floor, 201 North 7th Street, Lincoln, NE7 68508, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged . . . ."**

The evidence indicates that the Carrier has altered the language of the standard Notice of Investigation to create the impression of employee choice in whether or not to attend. The reality of this "choice" was evaluated by Arbitrator Knapp: "the employee accused of misconduct is the centerpiece of the investigation, its focus. Treating him as if he had not been 'called by the Company' to testify is a fallacy."

This Board agrees with Knapp's analysis. In the vast majority of disciplinary cases, a full and fair investigation cannot be attempted without testimony from the Claimant to explain his or her view of the facts. The concept that such testimony is optional stands in contravention of the most fundamental aspects of any hearing that could be described as full or impartial. How can attendance at an investigation be truly optional where the employee's disciplinary record, pay or even job hangs in the balance? Fullness of evidence cannot be achieved without input from the accused, and it is the Carrier's responsibility to guarantee this fullness. The Carrier simply cannot place the employee at risk of penalty if adequate defense is lacking, yet simultaneously label attendance a matter of choice.

The Carrier expects employees to attend investigations and historically worded Notice of Investigation accordingly. Its recent attempt to fog this expectation by rewording the Notice cannot and does not alter reality. When an investigation is scheduled, Claimants are so advised because they are expected to attend and are subject to penalty if they fail to do so.

This interpretation is based on the plain language of Rule 20. Because the language is not deemed ambiguous, evidence regarding past practice is not reached.

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 31st day of October 2016.