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

Award No. 42967
Docket No. MW-42634
18-3-NRAB-00003-140332

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan 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 Agreement was violated when the Carrier reduced the basic day of Track Inspector N. Dumas by two and one-half (2.5) hours on January 10, 2013 for time spent participating in a disciplinary investigation during his regularly scheduled work day and failed to compensate him therefor (System File T-D-4216-M/11-13-0177 BNR)

(2) As a consequence of the violation referred to in Part (1) above, Claimant N. Dumas shall be allowed two and one-half (2.5) hours' pay at his applicable straight time rate."

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 instant case concerns whether employees should be compensated for attending their own disciplinary Investigations. The Claimant received notification by letter dated December 5, 2012, that there would be an Investigation concerning his alleged failure to properly protect a dangerous track condition that resulted in a train derailment. The Investigation was postponed, but eventually occurred on January 10, 2013. The Claimant reported to work that day, worked up until the time of the investigation and then attended the 2.5-hour Investigation. After the Investigation, the Claimant was issued a 10-day record suspension and one-year probation for violating Engineering Instruction 2.1. Subsequently, the Claimant learned that his pay was reduced for the 2.5 hours he spent in his disciplinary Investigation.

The Carrier argues that the Agreement does not require it to compensate employees for attending their own disciplinary investigations, and it cites to Rule 43 regarding payment for attending court, to argue that employees must be compensated when they appear in court only "at the request of the Company or to appear as a witness for the Company."

Rule 43 states:

RULE 43. ATTENDING COURT

> **"Employes taken away from their regular assigned duties at the request of the Company to attend court or to appear as witnesses for the Company, will be allowed eight (8) hours at pro rata rates for each work day, and eight hours at time and one-half for rest days and holidays, or actual amount they would have earned had they remained on their regular assigned positions, whichever is greater. Transportation will be furnished and actual expenses allowed while away from headquarters. Any fee or mileage accruing will be assigned to the Company.**

The Organization points to recent Third Division Awards in support of its position that a rule similar to Rule 43 has been held to require payment for employees attending their disciplinary Investigations. In Third Division Awards 42148 and 42150, the issue presented was whether the Claimant was entitled to compensation for attending an Investigation into charges against him. In those cases, the operative language under which the claimants sought compensation read, "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 hours for each day so held." In these awards, the Board concluded that the term "inquest" applied to investigations. In sustaining the claims, the Board also determined that the statement in the notification from the carrier that the employee should "[a]rrange to attend investigation" meant that the employee did not have a choice whether to attend.

In Third Division Award 42439, the Board interpreted the same language as in Awards 42148 and 42150, and similarly found that the term "inquest" included investigations. However, in that case, the carrier had argued that the language in its notification did not state that the employee should "arrange to attend"; it simply notified the employee of the date and time of the Investigation. Again, the Board sustained the claim, finding that regardless of the more nuanced notification, an employee's attendance at an investigation where that employee faces discipline or discharge is not truly optional.

In considering the effect of these prior Third Division Awards on the instant case, it is necessary to examine any differences in the rule interpreted in those cases and Rule 43. Unlike the rule interpreted in these prior awards, Rule 43 does not provide for compensation to attend inquests. It only applies when an employee has been requested by the Company "to attend court or to appear as witnesses for the Company." The Carrier argues – under the principle of contract interpretation that specific provisions exclude more general application (i.e., *inclusio unius est exclusio alterius)* – that the fact that Rule 43 does not specifically include investigations means that the parties did not intend for Rule 43 to apply to investigations. This argument is persuasive here, as the plain language of Rule 43 applies only to employees requested by the Company to appear in court or as witnesses for the Company.

The Organization argues that the claim must be sustained based on several rules, including Rules 25 and 40. First, the Organization claims that the Carrier

violated Rule 25 when the Carrier failed to pay the Claimant for the entire day, including the 2.5 hours he spent for the Investigation into his alleged misconduct.

Rule 25 states, in relevant part:

RULE 25. BASIC DAY

> **"A. Except as otherwise provided in this Agreement, eight (8) hours exclusive of the meal period shall constitute a day.**
>
> **…**
>
> **C. Except as provided in this rule, regular established working hours will not be reduced below eight (8) hours per day.**
>
> **D. When less than eight (8) hours are worked for convenience of employes, or when regularly assigned for service of less than eight (8) hours on rest days and holidays, or when, due to inclement weather, interruptions occur to regularly established work period preventing eight (8) hours work, only actual hours worked or held on duty will be paid for except as provided in Section E of this rule."**

The language of Rule 25 requires that work hours cannot be reduced below eight hours per day, "[e]xcept as provided by this rule." Thus, the language of this rule incorporates the contract interpretation principle discussed above – *inclusio unius est exclusio alterius* – such that an employee's established work hours may be reduced only for the reasons expressed in Rule 25.

It must first be noted that there is no listed exception that would permit reducing the working hours of employees attending their disciplinary Investigations. The only exception that could apply to these circumstances is the one "for convenience of employes." This presents an issue of whether the phrase "for convenience of employes" should be interpreted to include principals attending their disciplinary Investigations. The phrase at issue is ambiguous and must be interpreted using principles of contract interpretation.

To begin, there is no record evidence concerning the parties' bargaining proposals or negotiation history that would inform this issue. Another aid to

contract interpretation may be the past practices of the parties. Generally, to be binding on the parties, strong proof is required that the practice is (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. F. Elkouri & E. Elkouri, *How Arbitration Works* 607-08 (6th ed. 2003). As it concerns the first of these three elements, the extent of the parties' unequivocal acceptance of a purported practice is a factor to consider. Acceptance refers to "mutuality," which may be implied by inference from the circumstances. F. Elkouri & E. Elkouri, *How Arbitration Works* 608-09 (6th ed. 2003). Both parties presented conflicting past practice arguments concerning whether employees had been paid to attend their disciplinary Investigations. These conflicting accounts establish that there is no mutuality, and the conflicting accounts of the parties' practice are not helpful in determining the meaning of the phrase at issue.

Industry practice may be another aid in the interpretation of ambiguous language. The Carrier provided several cases supporting the proposition that the railroad industry traditionally does not pay principals to attend their disciplinary investigations. See Third Division Awards 21320, 23399, 23962, and 22506. Although these cases do provide support for the notion that it is the industry practice to not pay employees for attending their disciplinary Investigations, none of these cases discuss the effect of Rule 25 or similar rules, so they are not helpful in determining the meaning of the phrase "for convenience of employes."

Contracts may also be interpreted by giving the words used their ordinary meaning. The word "convenience" is defined as something that adds to one's ease of living. *Merriam-Webster.com* 2017 (15 December 2017). Related words that are useful in this context are "benefit, help, service." Id. There are some reasons that employees may proffer that would appear to fall within the "convenience of employes" exception, such as requests to arrive for work late or leave early to attend to personal matters. These types of reasons are clearly for the employees' benefit.

Whether principals attending their disciplinary investigation falls within this exception is not as clear. Certainly, principals stand to benefit by attending, as by doing so they have the opportunity to provide exculpatory testimony or offer assistance to their representatives. But, the Carrier is the moving party and stands to benefit by enforcement of its work rules for the sake of order and efficiency. Also, pursuant to Rule 40, the Carrier is contractually obligated to provide a "fair and impartial investigation" prior to taking disciplinary action. Having principals at

their disciplinary Investigations helps to ensure that they receive a fair and impartial investigation, and removes a potential challenge to whether that standard has been met. Under these circumstances, the attendance of principals at their disciplinary investigations is mutually beneficial and not solely "for convenience of employes." For these reasons, the phrase "for convenience of employes" does not include principals attending their disciplinary Investigations.

The Organization also argues that the Carrier's decision not to compensate Claimant for the time spent in his disciplinary Investigation did not comply with Rule 40. Specifically, the Organization submits that reducing pay for the investigation is inappropriate prejudgment or discipline that does not comply with Rule 40.

Regardless of the limitations on reducing employee work hours and compensation in Rule 25, Rule 40 separately authorizes such reductions either by holding an employee out of service for "serious infractions of rules" or through the issuance of suspensions or dismissal.

Rule 40 states, in relevant part:

> **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.**
>
> **….**
>
> **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 the date withheld from service.**
>
> **….**
>
> **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 canceled.**
> **….**
> **G. If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from 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."**

The Claimant here was not held out of service for "serious infraction of rules," yet the Carrier reduced his compensation for the time spent in the Investigation, which the Carrier asserts is its practice. During the on-property handling of this case, the Carrier also asserted that its practice is to reimburse principals who are exonerated for time spent in their Investigations. This practice is consistent with the language of Rule 40G, which requires that employees be compensated for wage loss if found to be unjustly disciplined. If exonerated principals are paid for the time they spend in their investigations, and those who are not exonerated are not paid, it logically follows that principals in the latter category have received disciplinary suspensions for the time they spend in their investigations, even if that discipline was not formally issued. In the instant case, the Claimant was formally issued a 10-day record suspension and one-year probation. In effect, however, he also received a *de facto* 2.5-hour disciplinary suspension that was not included in his formal discipline.

Based on a full review of the record and the analysis above, the Board concludes that the 2.5-hour reduction in the Claimant's work hours for time spent in his disciplinary Investigation was not issued under Rule 40 as a disciplinary suspension, and the 2.5-hour reduction in his work hours for attending this investigation was not authorized under Rule 25. Therefore, there was no basis in the Agreement to reduce his pay by 2.5 hours.

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 14th day of February 2018.