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

Award No. 43693
Docket No. MW-45099
19-3-NRAB-00003-180606

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1) The discipline [thirty (30) day record suspension with a one (1) year review period] imposed upon Mr. M. Joseph by letter dated March 17, 2017 for alleged violation of MWOR 6.3 in connection with his alleged failure to stay within his track authority on December 12, 2016 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-17-D040-18/10-17-0191 BNR).

2) As a consequence of the violation referred to in Part (1) above, Claimant M. Joseph shall now have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits."

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.

On December 12, 2016, the Claimant, a Track Inspector, was hi-railing and performing track inspections. He stopped just east of the East Winona control point. When he went to release the authority he had just left, he released the wrong authority and got an exceeds warning from his HLCS. The Claimant immediately backed into the limits he still held and called the Dispatcher to report what had just occurred. He then set off the tracks, cleared his remaining authority and contacted Assistant Roadmaster Michael Holty to also let him know what had happened.

The Carrier maintains the Claimant released his authority while occupying it. In its view, the case is cut and dried. During the investigation, the Claimant admitted he broke the rule and exceeded his authority; he acknowledged his employes were not clear of 355-73 when he released it.

The Organization argues the Board cannot reach the merits of this case because the Carrier has violated Rule 42, a breach that requires the claim to be allowed as presented. It cites three on property awards in support of the interpretation that the cited deadline is for actual "notification" of the Organization, not just placement of something in the mail. On June 21, 2006, Neutral Referee P. R. Meyers sustained a claim based on procedural violations including timeliness breaches. On July 12, 2017, Referee B. Helburn sustained the claim regarding untimeliness, stating such an interpretation gives the parties "a greater degree of certainty and predictability in their claim handling process." On February 14, 2018, Referee M. G. Whelan followed the Helburn interpretation. The Organization points out that the Carrier has not cited any on property award in support of its contention that the deadline can be met by placing something in the mail.

The Carrier claims it complied with Rule 42 in that it placed the declination letter in the hands of the mail carrier within the time limits. It contends the letter was not received within the contractual time limits because it was unclaimed. In its view, the mailbox rule is rational, having been used for decades with several agreements still following it. It asserts the new rule shortens the Carrier's time to respond and requires expensive shipping. It finds the word "notification" to be ambiguous and

subject to a more reasonable interpretation. Mailing is an act of notification, it claims, noting it is not in charge of when folks open up their mail.

The rule at issue states as follows in pertinent part:

"RULE 42. TIME LIMIT ON CLAIMS

A. All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances."

The Claimant's Letter of Discipline was dated March 17, 2017. The Organization appealed by letter dated April 20, 2017, mailed April 21, 2017 and received by the Carrier on April 24, 2017. The declination letter dated June 20, 2017 was mailed June 22, 2017 and available for pickup by the Organization representative on June 24, 2017. If the date of receipt is the determining factor, it fell 61 days after the Organization's appeal and exceeded the 60-day negotiated time limit. The question raised then is whether the placement of the declination letter in the mail on June 22 met the contractual requirement to "notify" within the 60- day time limit. To decide this question, we will examine the rule closely.

In using the word "shall" the parties elected to use mandatory as opposed to discretionary language. They have articulated a firm and flat requirement. That requirement is to "notify whoever filed the claim or grievance … of the reasons for such disallowance." This can only be interpreted as a requirement of notification with explanation. "If not so notified, the claim or grievance shall be allowed as presented" is again mandatory language, reaffirming the notification requirement and mandating allowance of the claim if the requirement is not met. The last part of the provision allows the Company to argue otherwise, and it has done do.

Despite the Carrier's arguments, the Board must follow the express language of the Agreement. "Notify" means "to inform or give notice to someone."[1] A person can hardly be deemed to have been informed or given notice of something if the information being relayed has not arrived because it is still in the mail. Notification requires that the notice actually be available to the recipient. This is not confusing. It is the plain meaning of the words the parties used to express their agreement.

We easily reach this determination based on a well-accepted principle of contract interpretation: words are to be given their ordinary and everyday meaning unless the parties indicate a contrary intent.[2]

> **"§2.5 Ordinary and Popular Meaning of Words**
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> **When interpreting agreements, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. When an agreement uses technical terms, however, arbitrators give preference to the technical or trade usage, unless there is evidence that the parties intended a nontechnical meaning.**
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> **Comment:**
> **Although not usually dispositive, dictionaries may be consulted by arbitrators when determining the ordinary and popular meaning of words. Decisions of courts, administrative agencies, and arbitrators, as well as the totality of circumstances, may provide assistance in determining the meaning of terms in collective bargaining agreements. Context is crucial because, for example, a technical term such as 'deadheading' in the transportation industry would refer to empty trucks or buses returning to a terminal, but the term could have quite a different meaning in popular usage, such as being passed over for promotion. Arbitrators rely on a presumption that parties negotiated their agreement with a knowledge of arbitral jurisprudence and that they expect an arbitrator to apply commonly accepted arbitral principles when interpreting their agreement.[3]"**

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1 Webster's Dictionary of the Englisih Language, Random House Dictionary, Classic Edition, 1983.
2 Elkouri & Elkouri, How Arbitration Works, 5th Ed., (BNA Books 1997) 488-489.
3 National Academy of Arbitrators, *The Common Law of the Workplace*, (Theodore St. Antoine, BNA Books 1998).

In additional impetus toward the result found here, we wholeheartedly embrace the stability arbitral precedent contributes to the labor management relationship, and find on property precedent has repeatedly arrived at the same conclusion and should be followed.

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 18th day of June 2019.