

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44241
Docket No. MW-45410
20-3-NRAB-00003-190259**

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

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. C. Brasel, by letter dated November 17, 2017, for violation of Engineering Instructions (EI) 15.1 and 15.2 and Corporate Policy Company Vehicle IV.A and Corporate Rule Company Vehicle Operation and Maintenance IV.A.I in connection with his alleged unauthorized use of Company vehicle and fuel card was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D- 5419-M/11-18-0125 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Brasel shall be reinstated to service with seniority and all other rights and benefits unimpaired; 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 as described in the initial claim.”**

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 October 4, 2017, BNSF's anti-fraud team received a report identifying employes with higher-than-normal overtime; the Claimant was on the report. The auditor randomly selected September 2017 as a month to focus on and reviewed the Claimant's timekeeping records. During that month the Claimant was assigned as a foreman on Mobile Maintenance Gang TMGX2361, working in Minnesota, Iowa, North Dakota and South Dakota. The auditor noted that he drove the company truck he was assigned to, and used the truck's company fuel card for gas, for his weekend drives home on September 9-10, 16-17 and 23-24.

The auditor concluded her research on Friday October 20 and received approval from her leadership to present her findings to the Claimant's supervisor, which she did on October 23. This was the Claimant's supervisor's first knowledge of the auditor's findings. At the investigation, the Claimant's supervisor confirmed that the Claimant was not authorized to drive the company vehicle home over the weekends, nor was he authorized to use the company fuel card. During the investigation the Claimant admitted to driving the company vehicle and using the company fuel card without authorization over the cited weekends, and he admitted that he understood the rules requiring him to obtain authorization to do so. Because the Claimant had discipline on his record, he was dismissed.

The Organization maintains the Carrier both failed to hold a timely investigation and denied Grievant a fair and impartial hearing. It calculates that the Claimant admitted guilt to the auditor on October 13, starting the 15-day limitation for holding the Investigation hearing. However, the Investigation hearing was not held until November 2, 2017. Rule 40J is clear in its mandate that tardy Investigation requires the claim to be granted.

The Organization cites Award 32 of PLB No. 4161 and Third Division Award 30248 for the principle that the Carrier's offer of postponement or unilateral postponement does not cure a timeline violation, and that nothing in the Agreement

requires the Organization to request or agree to a postponement in the face of the Carrier's violation of the Agreement.

Rule 40 provides as follows in pertinent part:

"A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule.

*** * ***

C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved.

*** * ***

J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.

It is undisputed that the auditor in question stated on the record that she was an officer of the company. However, an organizational chart is not to be confused with negotiated contract terms. The Board is not persuaded that the auditor's perception is dispositive of the definition of "officer" within the meaning of Rule 40J. Rule 40J does not provide a definition of the term "officer." Dictionary definitions refer to positions of responsibility or authority, and are therefore too vague to be helpful. We therefore find the term "officer" to be ambiguous. Notably,

the record is devoid of any indication as to whether the auditor's anti-fraud team was part of the Security Department. There being no proof of inclusion, we will assume the anti-fraud team was not part of the Security Department.

Contract interpretation of ambiguous terms cannot be accomplished in a void, but springs from usage and searches for indicia of intended meaning. The Carrier maintains that the intent of Rule 40J was to restrict "officers" to those supervisors with the capacity to initiate an investigation. It further argues that when a third-party investigation is taking place, the Carrier cannot be deemed "on notice" of the results of that investigation until it is finished and received.

We find this interpretation persuasive. The problem with the Organization's interpretation is that it presumes the Carrier is on notice of the results of an ongoing independent investigation before they actually exist. We do not think this was the intent of Rule 40J. Both parties have an interest in the thoroughness and reliability of third-party investigations. There is danger in the Organization's interpretation. For example, a confession to an investigator might be deemed to trigger the 15-day time limit, when it was actually a cover-up for another's guilt. Only further investigation could cure that. A document which might establish guilt can later be found to have been forged. Only further digging could ferret that out. A representation by a one or more witnesses can be found out as part of an attempt at collusion, but only after probing deeper. The list of possibilities is endless. In each of these examples, the Organization's interpretation would lead to a premature notice requirement, resulting in abortion of the independent investigation, when further investigation could lead to truth. We fear the Organization's interpretation could lead to precipitous investigation hearings based on preliminary, incomplete findings and unverified conclusions. The bottom line is that when a report of factual investigation is awaited, evidence accumulated during that investigation does not trigger the 15-day timeline for Formal Investigation. Rather, only the finished report can do that.

As to the failure to give fully five days' notice of the Investigation, we note that the Carrier had knowledge of the violation on October 23, and the Claimant received his Notice of Investigation on October 27, within the required period. However, the Claimant's representative did not receive delivery until October 30, though it was mailed at the same time as the Claimant's. Even so, it is documented that the representative had actual notice from the Claimant on October 27. Given these facts, we agree with the Board in PLB 6538 Award 3: "Absent any evidence of prejudice resulting from the delayed receipt of the notice by the Claimant, we find

no proper basis for invalidating the discipline.” There was no evidence of prejudice to the Claimant herein arising from the delivery delay to his representative.

The record in this case on the merits clearly establishes that the Claimant was in violation of the rules as charged and that the penalty was reasonable under the circumstances.

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 23rd day of October 2020.

LABOR MEMBER'S DISSENT
TO
AWARD 44241, DOCKET MW-45410
(Referee Patricia T. Bittel)

I must dissent with the Majority's opinion. Specifically, the Majority erred when it held:

“*** The bottom line is that when a report of factual investigation is awaited, evidence accumulated during that investigation does not trigger the 15-day timeline for Formal Investigation. Rather, only the finished report can do that.”

This finding is contrary to the clear language of Rule 40 and on-property precedent interpreting and applying its provisions. Rule 40A and J states:

“A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule.

* * *

J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.”

The clear language of the Agreement only gives the Carrier fifteen (15) days to hold an investigation from the date information is obtained by an officer of the Company. The Majority has essentially amended that language through its holding. Not only is the holding contrary to Rule 40, but it is contrary to the on-property precedent which holds:

AWARD 41708:

“The Carrier's argument that the ‘offense wasn't established until . . . [the Roadmaster] reviewed the timeroll entries, for that was when ‘information was obtained by an officer of the company’ and that occurred two days later on July 1,’ is without merit. To accept this approach is to modify Rule 40 (A) to mean that the time limit in Rule 40 (A) - which is, after all, a limit on management - may be unilaterally extended by the Carrier merely by having an Officer of the

“Company do nothing for several days after receiving an allegation of wrongdoing and then, at a time of that person’s choosing, review official records.”

This holding is also contrary to a decision rendered simultaneously by this Board involving another neutral member, which reads:

AWARD 44312:

“The Carrier responds that it received first knowledge of the claim not on April 6, 2018, but on April 26, 2018, when HR finished its internal investigation and notified Carrier officials of the results. Therefore, it argues, the Investigation Notice sent on April 27, 2018 for an investigation on May 9, was timely.

* * *

When the language of the parties’ agreement is clear and unambiguous, this Board need look no further than the negotiated language agreed to by the parties to resolve their dispute. The language of Rule 40 is clear and unambiguous. While an exception for the Security Department has been negotiated, there is no similar exception for the employees of the Human Resources Department. The parties have not agreed to extend the timelines while an internal investigation establishes the basis of the complaint. See, *e.g.*, Third Division Award 41708. The Carrier violated Rule 40A by failing to hold the initial hearing within 15 days from learning of the possible offense. Third Division Award 42381. Under the clear language of Rule 40J, the charges against the employee must be deemed dismissed.” (Emphasis in original)

For these reasons, I must dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Zach Voegel', with a stylized flourish at the end.

Zachary C. Voegel
Labor Member