

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44312  
Docket No. MW-45789  
20-3-NRAB-00003-200002**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 [thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. M. Flores, by letter dated June 20, 2018, for violation of MWOR 1.6 Conduct and HR Corp Equal Employment Opportunity, Anti-Discrimination and Harassment Policy was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-18-D040-29/10-18-0329 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Flores shall have his record cleared of the charges leveled against him and be compensated for all wage loss suffered.”**

**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 had established and held seniority within the Maintenance of Way Department over the course of twenty-four years as an employee in the Carrier's service. On the date giving rise to this dispute, the Claimant was working as a grapple truck driver.**

**According to Roadmaster Mulhern's testimony, employees approached BNSF leadership regarding a situation involving MP 3.5 to MP 6.7 of the Valley Subdivision that warranted an internal investigation by Human Resources. According to these employees, another employee allegedly marked track defects that were unprotected in order to lay blame on Track Inspector Hancock-Lee. The Carrier's Human Resources department was requested to investigate the incident on April 6, 2018.**

**During the investigation, the Claimant denied painting or marking any defects. The Claimant also denied telling anyone that he did so to get Track Inspector Christie Hancock-Lee in trouble. On April 27, 2018, the Claimant was given notice of an investigation in connection with the following charge:**

**"An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged conduct, alleged violation of the BNSF EEO Anti-Discrimination and Harassment Policy at/or near Scottsbluff, NE, and alleged failure to protect track defects with appropriate speed restriction at/or near MP 2.7-MP 6.7, main I on the Valley Subdivision while assigned as a Grapple Truck on Headquartered gang TTDX0529. The date BNSF received first knowledge of this alleged violation is April 26, 2018."**

**After a formal investigation on May 24, 2018, the Claimant was found in violation of MWOR 1.6-Conduct and HR Corp Policy EEO, Anti-Discrimination and Harassment, and was assessed a Level S 30 Day Record Suspension, with a three-year review period.**

The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Carrier contends that it has presented substantial evidence demonstrating that the Claimant told two co-workers that he marked false track defects in advance of the FRA visit in order to get Track Inspector Hancock-Lee in trouble. The Carrier contends that while the Claimant denied the allegations, his testimony was less credible than that of the HR Manager. The Carrier contends that the level of discipline meted was appropriate for the Claimant's violation.

The Carrier contends that its first knowledge of the incident occurred on April 26, 2018, the date that HR notified the division of its findings from its internal investigation. The Carrier contends that it was not made aware of the allegations on April 6, when HR began its investigation to determine whether the complaint could be substantiated. The Carrier contends that it would be premature to issue an investigation notice prior to the confirmation by HR that there was cause to do so.

The Organization contends that the Carrier's first knowledge of the incident occurred on April 6, 2018, when Hancock-Lee made her complaint to the Carrier's HR department, and an investigation began. Therefore, pursuant to Rule 40J of the parties' agreement, the investigation, which was not held within 15 days of April 6, 2018, was untimely. Therefore, the Organization contends, the claim must be sustained.

The Organization contends that the Carrier failed to meet its burden of proving that the Claimant showed a marked disregard for the Carrier's rules or policies, and thus, the discipline imposed, a thirty day record suspension with a three year review period is excessive, harsh, and unwarranted.

The Organization has raised both procedural and substantive objections in its claim. With respect to the procedural objection, the Organization contends that the Carrier failed to hold a timely investigation. Thus, the Organization contends the charges must be dismissed, pursuant to Rule 40 of the parties' agreement, Investigations and Appeals, which states, in 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.**

**\*\*\***

**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 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.

There is no dispute that on April 6, 2018, the Carrier’s HR department was notified of Hancock-Lee’s complaint and made contact with her a short time later. This notice to the Carrier’s HR department constitutes first knowledge and the parties’ contractual timeline began running at that notification. Therefore, in order to be timely, the investigation had to be set within fifteen days from April 6, or April 21. Clearly, the timeline was not complied with, as Notice of Investigation did not issue until April 27.

The Carrier argues that the notice to its HR department should fall under the exception to the rule. As noted, the parties agreed that the timeline would not start to run upon notice to the Security Department. The Carrier has not presented any evidence that employees of the Human Resources department are actually employees of the Security Department. Therefore, this exception does not apply to these circumstances.

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.

**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 23rd day of October 2020.