

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44529  
Docket No. MW-43859  
22-3-NRAB-00003-210214**

**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**

**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 Machine Operator J. Peterson by eight (8) hours on October 17, 2014 for time spent participating in a disciplinary investigation during his regularly scheduled work day and failed to compensate him therefor (System File B-M-2805-E/11-15-0177 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Peterson shall be compensated for eight (8) hours' pay for October 17, 2014 at his respective 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.**

**Factual Background:**

Leading up to the instant dispute, the Claimant J. Peterson established and maintained seniority in the Carrier's Maintenance of Way and Structures Department and was assigned as a machine operator. In October of 2014, the Carrier directed the Claimant to report for a formal investigation into allegations that he had violated Company rules and regulations. He was not removed from service pending investigation. Following mutual postponements, the Carrier convened the investigation on October 17, 2014 and by letter dated November 6, 2014, the Claimant was notified he had been found guilty and was assessed a thirty (30) day suspension with a one (1) year review period. The Carrier refused to compensate the Claimant for attending his investigation.

Pertinent provisions of the parties' Agreement state:

**RULE 25. BASIC DAY**

- A. Except as otherwise provided in this Agreement, eight (8) hours exclusive of the meal period shall constitute a day.
- B. For work requiring continuous service, eight (8) consecutive hours without meal period will constitute a day, in which case twenty (20) minutes shall be allowed in which to eat without deduction in pay.
- 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.
- E. When inclement weather conditions prevent employes from performing work on a regular scheduled workday, they will be allowed a minimum of three (3) hours at pro rata rate. If held on duty over three (3) hours, actual time so held will be paid for. Except in an emergency and when required to patrol track during heavy rains,

employees reporting will not be required to work in the rain for the sole purpose of receiving payment under this Section. [11/15/96 Agreement, Paragraph 6]

- F. Positions not requiring continuous work, such as track tunnel, bridge and highway crossing watchmen, signalmen at non-interlocking crossings, drawbridge operators, and pumpers, and whose work is such that they can be relieved from duty, may be worked eight (8) hours within a spread of twelve (12) hours. Not more than one release from duty shall be made in any one (1) day, meal period not to be considered a release. In no case shall employees in these classifications be assigned to less than eight (8) hours per working day month.

NOTE: Application of this Section F will be confined to positions assigned as such as of date this Agreement becomes effective. \* \* \*

#### **RULE 40. INVESTIGATIONS AND APPEALS**

- 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.
- B. In the case of an employee 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 date withheld from service. He will be notified at the time removed from service of the reason therefor.
- 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 employe involved.**

- 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.**
- E. The employe and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.**
- F. The investigation provided for herein may be waived by the employe provided that any discipline assessed is confirmed in writing in the presence of his duly authorized representative and agreed to by the proper officer of the Carrier.**
- 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.**
- H. The provisions of Rule 42 shall be applicable to the filing of claims and to appeals in discipline cases. [See Appendix JJ for alternative expedited arbitration procedures]**
- I. The date for holding an investigation may be postponed if mutually agreed to by the Company and the employe or his duly authorized representative. If there is a change in the location of the investigation, the employe and his duly authorized representative will be notified.**
- I. 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.

- J. If an employee who has been discharged for cause is later reinstated, without having been found blameless, and his former position has been bid in by another employee on regular bulletin, the reinstated employee will displace the youngest assigned man in his own rank, unless otherwise agreed between the General Chairman and the Company.

**Position of Organization:**

In the view of the Organization, the Claimant was entitled to certain rights under the Agreement, including compensation for time spent attending his investigation. The Organization maintained there is a long-standing, forty-plus year practice and understanding between the parties to compensate charged employees like the Claimant for attending hearings. In its view, the Carrier's newfound position on compensation meant that employees who were not removed suffered discipline not provided for under Rule 40 when the Carrier denied them wages for attending an investigation.

The Organization maintains it is significant that the Carrier did not remove the Claimant from service or impose any discipline prior to his investigation. Rule 40A prohibits the imposition of discipline until after an investigation is conducted. It views the suspension of the charged employee's pay as discipline taken before a fair and impartial hearing is held. It notes that Rule 40G only contemplates wage loss from the imposition of discipline; the parties did not recognize any other type of wage loss.

Nothing in Rule 25 gives the Carrier the right to deny an employee pay for attending an investigation. Certainly, reducing the basic day when there is an investigation was not for the 'convenience of the employee' as provided in Rule 25 D. If an employee lays off or is absent part of the work day for personal reasons, that is where the reduction of basic day's pay for 'convenience of the employee' provision is applied. In this case, the Carrier unilaterally reduced the employee's basic day and pay. The Agreement obligates such investigation to be both fair and impartial. That mandate cannot be met when the Carrier unilaterally denies the principal compensation for attending such investigations.

The Organization cites Carrier and the Brotherhood of Railroad Signalmen in Award 42148 which held:

Finally, basic principles of contract interpretation require that a contract be interpreted so as to give meaning to all the terms of the contract and to avoid harsh and unjust results. The Carrier initiates disciplinary action when it decides to file charges alleging that an employee has violated some Carrier Rule or policy. When it does so, it must conduct an investigation pursuant to Rule 54 - Investigations and Appeals. The purpose of the investigation is to garner evidence and develop facts relative to the charges against the accused employee. Presumably the individual is innocent until proven guilty, and it is important for the employee to have an opportunity to respond to the charges and to be heard as part of the investigation. The employee who wants to defend him- or herself should not be penalized a day's pay (or overtime, if called in on his or her rest day) for doing so. Under the Carrier's interpretation of Rule 20, even an employee who is ultimately found innocent of any charges would be forced to choose between attending the investigation to answer the charges against him and his paycheck. That is an interpretation of Rule 20 that is inconsistent with the obligation under Rule 54 that investigations be 'fair and impartial.' That inconsistency can be avoided if Rule 20 is interpreted to cover compensation for employees who attend an investigation into charges against them.

**Position of Carrier:**

The Carrier contends it did not order the Claimant to attend his investigation. In its view, investigation compensation is a well-settled matter and the Agreement does not provide for it. The Carrier alludes to a long-standing practice of not compensating charged employees unless they are fully exonerated of all charges.

**Analysis**

The record shows that the Claimant arbitrated the allegations and discipline taken against him which were the subject of his investigation. As a result of the arbitration, he was awarded back pay. The case is therefore moot.

**AWARD**

Claim dismissed.

**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 8th day of October 2021.