

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44747
Docket No. MW-46528
22-3-NRAB-00003-210302**

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 discipline [Standard Formal Reprimand and a one (1) year review period] imposed upon Mr. R. Taylor, by letter dated November 13, 2019, for violation of MWOR 6.3.2 Protection on Other Than Main Track was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-20-D040-7/10-20-0069 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. Taylor’s discipline shall be ‘... overturned, he be compensated for any time lost, made whole for any losses associated with the outcome of this investigation, any future losses that may arise as a result of this investigation being used for progressive discipline and that this discipline be removed from and no mention of this be placed on his personnel record.’ ”

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:

On August 28, 2019, the Claimant Taylor was working as assistant foreman performing switch replacements in the Ark City Yard on the Red Rock Subdivision. He was working with his foreman, R. Richardson, setting up numerous derails for track protection. After setting up the derails, the Claimant was instructed to leave the area to attend to other duties. The Carrier's operations testing team subsequently arrived at the work site and found one derail was missing the required tag. They determined the Claimant had failed to place the proper tag on the derail.

Rule 40 states as follows, in pertinent part:

- D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employee, with copy to local organization's representative. * * *
- E. The employee 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. * * *
- 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.

Position of Organization:

Though Carrier rendered a decision on November 13, 2019 and sent it to the Claimant, it remains undisputed that the decision was never sent to the Organization. The language of Rule 40D is clear on the conditions of issuing a disciplinary decision, stating "... written notice thereof will be given to the employee, with copy to local Organization's representative. ***" Likewise, Rule 40E requires

that information of record including the transcript, be provided to both the employee and his/her representative. The Organization additionally refers to Rule 40(J) which states in pertinent part: “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 concludes that the claim must be granted under Rule 40(J).” It interprets this provision as requiring dismissal of the charges when the Organization does not receive the required materials.

On the merits, the Organization maintains the Claimant was not the Employee in Charge (EIC), and was away from the job site for hours before the missing tag was found. Moving derails to accommodate a cone zone or a change in protection is not an uncommon practice. The Organization concludes that the cone zone was moved while the Claimant was away. The Organization argues he cannot be held responsible for conditions that did not exist when he left.

Position of Carrier:

When the Division Ops Testing Team found the untagged derail, it gathered the workers together and determined that the Claimant was responsible for the problem. The Carrier asserts it has been lenient in that the only discipline imposed was a Formal Reprimand. It contends there was no prejudice to the Claimant from any procedural defects in the case. As it reads Rule 40, the 30-day requirement for rendering the decision imposes no requirement on the timing of its receipt.

ANALYSIS

The Board is not in agreement with the Organization’s reading of Rule 40. The provision is very specific in setting time limits for holding the hearing and rendering a decision. The language used to express the parties’ intent does not apply the deadlines for either the transmittal of the transcript or the mailing of the decision to the Claimant and/or his representative. Plainly, when the parties agreed to a deadline with consequences, they said so. The Organization would transpose these deadlines where the contract does not provide for dismissal of the charges against the employee except in two situations: the investigation is tardy or the resulting decision is not made on time.

Rule 40E plainly requires that the employee and the representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.” Rule 40 D requires a decision to be rendered within thirty days following investigation, “and,” the Rule subsequently requires that written notice be given to the employee and to the local organization’s representative.

When the Organization contends it has not received the materials required under Rule 40D & E, the Carrier has an opportunity to rebut the allegations by providing proof of transmission. In this case however, the Carrier offered no tracking data to establish that it met the requirements of Rule 40E. The Board is utterly without evidentiary basis to find compliance with Rule 40D or E. Given this record, this Board finds noncompliance with Rule 40D & E. Under these circumstances, prejudice is a given, for the Organization cannot be expected to process a claim without either the Carrier’s articulation of its disciplinary penalty or the record of the Investigation of the claim.

Claim sustained. The Claimant shall be offered reinstatement subject to the Carrier’s return to service policies. The Carrier shall remove the discipline from the Claimant’s record, with seniority, vacation and all other rights restored. The Carrier shall make him whole for all time lost as a result of this incident, less any interim earnings from replacement employment. Lost overtime shall be compensated at the overtime rate. The Claimant’s medical insurance shall be retroactively restored, with deduction from the backpay herein granted of any premiums which would have been withdrawn had his employment remained uninterrupted. To the extent the Claimant purchased replacement insurance during his time of separation, he shall be reimbursed for the premiums. His backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records as well as proof of replacement insurance premiums and any claims paid under that insurance. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. Any other claims not expressly granted by this Award are hereby denied.

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 6th day of May 2022.