

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44749
Docket No. MW-46530
22-3-NRAB-00003-210304**

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 [Level S thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. J. Glendy, by letter dated December 18, 2019, for violation MWOR 1.15 Duty-Reporting or Absence and EI G.4 BNSF Employee Absenteeism Notification and Layoff Policy was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-20-D040-12/10-20-0112 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Glendy’s discipline must be removed from his personal record in accordance with Rule 40 of the Agreement.”

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 October 18, 2019, the Claimant overslept. He would have been approximately forty-five minutes late had he gone in to work. He contacted his foreman, J. Owens, as soon as he realized this and was instructed to stay home instead of coming in. There is no dispute this is the Claimant's first offense.

Following postponements, the investigation was held on November 26, 2019. By letter dated December 18, 2019, the Claimant was assessed a Level S 30 Day Record Suspension and a three (3) year review period. Thereafter, the Organization notified the Carrier by letter dated February 10, 2020 that it had not sent a decision in connection with the investigation to the Organization within the time limit prescribed by Rule 40 of the Agreement.

Rule 40J of the Agreement, in pertinent part, reads: "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:

While the Carrier argued that it rendered a decision on December 18, 2019 and sent it to the Claimant, it was undisputed that written notice of the Carrier's decision was never sent to the Organization. While the Carrier alleged it sent written notice of its decision to General Chairwoman Staci Moody Gilbert on December 18, 2019, the record establishes that two separate delivery attempts of the Carrier's written decision notice were unsuccessful.

As the Organization sees it, Rule 40D allows the Carrier thirty days to provide both the Claimant and local Organization's representative with written notice of its decision to uphold or rescind the charges leveled.

Another significant due process violation occurred when the Carrier failed to provide the Organization with a copy of the transcript of investigation, including all statements, reports, and information made a matter of record as required by Rule

40E. The Organization did not receive a copy of the investigation transcript until well past thirty days after the Investigation. While the Carrier argues that no provision of the Agreement compels it to turn over such documents in a specific timeframe, the Organization insists this is entirely beside the point due to the fact the Carrier concurs that it must furnish a copy of the transcript of investigation, including all statements, reports and information made a matter of record to the duly authorized representative, in this case, Vice General Chairman Jim Varner. The Carrier failed to satisfy the basic requirements of Rule 40E.

On the merits, the Organization contends that the Claimant was never given the RSG Expectation Book on policies and expectations when he reported to TP03 as an assistant foreman (Tr.P.19). The policies involved herein were never given to or discussed with the Claimant. However, the Claimant still complied with the policy and expectations as laid out in the Production Gang Absenteeism Policy. Although the Carrier alleges that the Claimant violated this policy, the aforementioned policy clearly states that if an employee is going to be absent "... it will be 'necessary that you personally contact your Assistant Roadmaster or Foreman to discuss the matter with that person.'" This is exactly what the Claimant did when he contacted his foreman, J. Owens, on the morning of October 18, 2019. The Claimant was never AWOL and communicated with his foreman as prescribed by the Production Gang Absenteeism Policy.

The Production Gang Absenteeism Policy specifically lays out that a first-time violation will result in the Roadmaster or foreman counseling the employee on the rules involved. This was never done and the Carrier instead hastily issued the Claimant a Level S Thirty (30) Day Record Suspension and three (3) year review period in direct contrast to the terms of its own policy.

Position of Carrier:

The Carrier argues that the Claimant did not follow proper procedures for calling in absent. When he got up, he noticed a text from his foreman asking where he was. He texted back saying he overslept and could not report at starting time. His foreman told him to stay at the hotel. He did not contact anyone else as required by the G.4 Engineering Instruction. In the Claimant's case, the proper contact was the assistant roadmaster.

ANALYSIS:

The Carrier met its obligations under Rule 40D when it sent a copy to the Organization on the date the discipline issued, December 18, 2019; delivery was attempted on December 23 and 28, without success. This is not the fault of the Carrier.

The Carrier's obligations under Rule 40E are subject to an implied obligation of reasonableness. The Investigation took place on November 26, 2019. The decision resulting from that investigation issued on December 18, 2019. Yet the Organization remained empty-handed on February 10, 2020, almost three months after the Investigation. In the assessment of this Board, the requirements under Rule 40E become meaningless if compliance is overly tardy. In this case, we do not find compliance with Rule 40E. This result must be deemed prejudicial to the Organization's representation obligations. The failure to provide the Organization with the statements, reports and information from the Investigation is an obvious impairment to the ability to represent; these lapses are simply too egregious to be overlooked. In finding a serious breach of due process in this case, the Board need not reach the merits.

Claim sustained. The Claimant's discipline shall be expunged from his record, and any compensation or benefits lost as a result of the discipline at issue in this case. 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.