

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44751  
Docket No. MW-46534  
22-3-NRAB-00003-210492**

**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 (dismissal) imposed upon Mr. T. Little, by letter dated March 18, 2020, for violation of MWOR 1.6 Conduct and EI 2.4 Inspecting Turnouts, Railroad Crossings, Moveable Bridge Joints and Rail Expansion was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-20-D070-5/10-20-0158 BNR).**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant T. Little shall have this discipline ‘... removed as it is excessive, and it is in violation of the CBA. I ask this discipline to be removed from his records in accordance with Rule 40 of the current agreement. I request Mr. Little be reinstated to service with all seniority rights restored and all entitlement to, credit for benefits restored, including vacation and health benefits I request that Mr. Little be made whole for all straight time and overtime lost during this violation, not to be reduced by outside earnings obtained while he was removed from service. He is to be made whole for all health, dental, and vision care paid out during this dismissal. He is to get any general lump sum payments or retroactive general wage increases provided in any agreement that become affective (sic) while he was out of service.”**

**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:**

The Carrier alleges the Claimant reported FRA Switch Inspections that he allegedly did not complete. The parties disagree about whether there are fatal failures of due process in the case. They also disagree about the sufficiency of the Carrier's evidence.

**Position of Organization:**

The Organization maintains the Carrier failed to hold the investigation within the requisite timelines. The Carrier contends that the first date of knowledge of the incident was December 27, 2019. However, the Organization asserts the Carrier's first knowledge of this event was as early as October 16, 2019.

Testimony during the hearing clearly shows that Carrier Officers G. Mukai and D. Powers had a conversation as early as October 16, 2019 concerning Mukai's suspicions regarding the Claimant. Powers clearly advised Mukai to 'make your Track Inspectors accountable, you should write them up.' The Organization argues that since the Investigation did not meet the timelines, Rule 40J governs and mandates that the charges against the employee be dismissed.

The Claimant contends he did not receive the Carrier's December 30, 2019 Notice of Investigation. In fact, Transcript Exhibit # 5 clearly shows that the first attempt by the United States Postal Service to deliver the Claimant's investigation notice was on January 9, 2020. The investigation was set to be held on January 8,

2020. The Carrier does not refute the fact that the Claimant did not receive five days advance written notice of this investigation as required by Rule 40C.

It is unrefuted that Mukai was terminated by the Carrier due to his own inadequacies as a Roadmaster. One of the most basic and fundamental principles of due process is the right to face ones accusers. Here, as in First Division Awards 5197, 20439, 23911, Second Division Award 10409, Third Division Awards 1989, 12090, 14443, Fourth Division Award 2270, Award 31 of PLB No. 2035 and Award 9 of PLB No. 2409, the Carrier's failure denied the Claimant his contractual right to face and cross-examine his accuser. Roadmaster Mukai did not come to the Investigation; he had been terminated. The Organization concludes the Claimant was denied a fair and impartial investigation as called for in Rule 40A.

In the Organization's view, the Carrier violated Rule 40D when it failed to render its decision and provide written notice thereof to the local Organization's representative within thirty days following the investigation. The investigation was held on February 19, 2020; the Carrier's discipline letter was not received until March 23, 2020, thirty-three days after the investigation was held.

On the merits, the Organization argues that the Carrier failed to pull the vehicle data reports and only pulled track authorities for the dates in question. It concludes that there is no accurate proof that the Claimant failed to perform his inspections as reported. Further, the Carrier did not offer any evidence of a Rule or Engineering Instruction supporting the alleged violation and subsequent discipline assessed.

**Position of Carrier:**

The Carrier notes that the Investigation was held on February 19, 2020 and the decision was rendered on March 18, 2020, twenty-eight days afterwards, which is well within the guidelines of the CBA. The original Notice was mailed on December 30, 2019 which was eight days prior to the hearing date. The Investigation was postponed through mutual agreement until January 29, 2020. The Carrier references Public Law Board 6538, Award 3 which rejected a claim that Rule 40C was violated when a claimant received only three days advance notice of the Investigation. The Award noted that the rule requires at least five days advance written notice to both the employee and the local Organization representative. It found the evidence to demonstrate that that Carrier mailed the Notice of Investigation on December 15, 1999, notifying the Claimant and the Organization of

the December 23, 1999 hearing. Although it was not received by the Organization until December 18, 1999, and the claimant insisted he did not receive his Notice until December 20, 1999, the Board found that mailing the Notice eight days prior to the scheduled hearing fulfilled the Carrier's obligation under the Agreement. Absent any evidence of prejudice resulting from the delayed receipt of the Notice by the Claimant, it found no proper basis for invalidating the discipline.

Once Mr. Parker gathered all the data, including EAM inspection reports, TMDS track authority documentation, and HLCS Hy-Roil data, he completed his investigation and reported his findings to the Division on December 27, 2010. The Carrier denies that it had prior knowledge of the alleged infractions dating back to October 16, 2019. Company witness Parker testified that he was contacted on December 10, 2019 to perform an internal review of the allegations that the Claimant was not performing some of his track inspections. The internal review was completed on December 27, 2019 which the Carrier contends was the date of first knowledge.

Through his investigation, Parker identified ten switches that were shown as inspected by the Claimant on September 25, 2019, and four switches shown as inspected on September 30. The Claimant stopped for a total of 1 ½ minutes while hy-railing. Parker determined that the Claimant could not have performed walking inspections of the ten switches in the 1 ½ minutes that he was stopped while hy-railing. He noted that the Claimant did not have any track authority on the Pikes Peak subdivision on September 30, 2019, even though he submitted an EAM inspection report showing four switch inspections completed. The Carrier notes that El 2.4 is clear: when inspecting turnout switches, the inspector will make a walking inspection of all main line and yard turnouts. The Organization's witness T. Ray, a 15-year employee with over 12 years of Track Inspecting experience, testified that doing a switch inspection on foot takes at least five minutes. The Carrier insists it has more than enough evidence to meet its burden of proof.

### ANALYSIS

We do not find a denial of due process in the timing of the Notice of Investigation. It was timely sent, and there was no prejudice to the Claimant. Likewise, the timing of receipt of the decision following investigation was only three days after the deadline for rendering the decision. We are not persuaded that Rule 40 requires the decision be received on the same day as its issuance. There is no deadline for conveying the decision to the Claimant or his representative, hence the

Rule will not be deemed violated unless the receipt was unreasonably late. Three days after arriving at the decision was quite reasonable.

The parties are in conflict as to what date should be used as the date of the Carrier's first knowledge of the case. The Organization maintains the Carrier had knowledge as of October 16, 2019 when Mukai had suspicions, but no Carrier official had gathered relevant documentation which could prove or disprove any wrongdoing at that point. We do not credit suspicions as equivalent to knowledge. The Carrier's knowledge of wrongdoing was not established until it had a chance to review material documentation and records. Once these findings were reported, the Carrier was obliged to hold an Investigation within five days. The Investigation was not tardy in this case.

The Carrier's failure to call Mukai did not constitute a denial of a fair and impartial hearing. It was Parker who gathered the data and reported his findings to the Division on December 27, 2010. These are the findings the Carrier relied on in making its disciplinary decision. The Letter of Dismissal was signed by Project Manager Allan Breden. Though certainly Mukai may have approved the Dismissal decision at some point, he has not been shown to have had critical knowledge regarding a contested fact. The Carrier must meet its burden of proof with the evidence it provides of record. We do not find a violation of due process in its failure to include Mukai as a source of important evidence.

Insofar as we find no fatal procedural error in the case, we move to the merits. The Carrier had substantial evidence on which to base its decision that the Claimant had been dishonest in his reporting of inspections completed. We do not find it credible that an inspector can inspect ten different switches within one and one-half minutes, the amount of time he stopped while hy-railing on September 25, 2019. We find his lack of track authority on September 30, 2019 is not compatible with his assertion that he completed four switch inspections. The Carrier had a proper basis in fact for its conclusion that the Claimant's reporting was dishonest.

**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 6<sup>th</sup> day of May 2022.