Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 45160
Docket No. MW-47580
24-3-NRAB-00003-220598

The Third Division consisted of the regular members and in addition Referee Jeanne M. Vonhof when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed upon Mr. L. Ihde by letter dated December 15, 2020 for violation of MWOR 1.6 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-21-D070-9/10-21-0106 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant L. Ihde shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated in accordance with Rule 40G 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.

Claimant L. Ihde has established and holds seniority within the Carrier's Maintenance of Way Department. During the period leading up to the Claimant's dismissal, the Claimant was assigned to a Regional System Gang foreman position. He had approximately twenty-four (24) years of service with the Carrier at that time.

During the months of June, July and August 2020, the Claimant worked in various locations across the Carrier's system. On August 5, 2020, the Carrier received an anonymous call to its compliance department alleging that the Claimant had been working overtime without authorization and was taking a Company vehicle home without authorization and improperly compensating himself under Pay Code 55 Travel Allowance. A Compliance Specialist and Project Manager began investigating the report. On October 5, 2020, they interviewed the Claimant over the telephone, along with a Manager of Human Resources.

On November 13, 2020, Compliance Specialist B. Heller and Project Manager K. Schram notified Roadmaster N. Martin of their determination following the Claimant's interview. By letter dated November 17, 2020 the Carrier charged the Claimant with falsely reporting time in order to receive pay for hours not worked on various dates in June, July and August 2020. The investigation was held on November 23, 2020.

By letter dated December 15, 2020 the Carrier found the Claimant in violation of MWOR 1.6 Conduct and assessed the penalty of dismissal. The Organization filed a claim on behalf of the Claimant dated January 31, 2021, and the Carrier denied the claim. The parties were unable to resolve this matter and the dispute now comes before this Board for final adjudication.

The Organization argues that the Claimant did not receive a fair and impartial hearing because two of the major witnesses, the manager from the Compliance Department and the project manager, testified by telephone. This Board has ruled in other cases that permitting witnesses to testify by telephone does not necessarily constitute a violation of a Claimant's rights to a fair and impartial hearing. NRAB 3d Division, Award 42463. In this case the Organization and the Claimant himself were given the opportunity to fully question the witnesses about the details of their findings. They conducted in-depth questioning, including thoroughly discussing the documents supporting their testimony, and details concerning specific dates. Under these circumstances, the Board cannot conclude that the hearing was not conducted fairly by permitting these witnesses to testify by telephone.

The Organization argues that the Carrier committed a serious procedural violation by failing to hold the investigation within 15 days of the occurrence leading to the discipline, or within 15 days of a Carrier official becoming aware of the occurrence. According to the Organization, Carrier officials had knowledge of the charges they intended to pursue against the Claimant by October 5, but failed to hold a formal investigation until November 23, 49 days later, and 34 days after the 15-day deadline. The Organization contends that Carrier officials confronted the Claimant on October 5 with their findings of his alleged misconduct regarding certain dates and payroll claims and argues that there is no evidence in the record that any new evidence was acquired by the Carrier after that date. Therefore, the Organization contends that the investigation was clearly untimely and the charges against the Claimant must be dismissed under Rule 40 (J).

The Carrier relies upon the testimony of Compliance Manager Heller that no conclusions were made at the time the Claimant was questioned on October 5. According to Heller, they were still gathering background information at that time and their Compliance report was not finalized until November 13, at which time it was provided to the Claimant's supervisor.

The Organization accepts that the Carrier was permitted under Rule 40 to take some period of time to investigate whether or not to bring charges against the Claimant after receiving a hotline call alleging that he made fraudulent pay claims and then discovering multiple pay claims over a period of three months that possibly supported those accusations. The Organization does not argue in this case that the clock began ticking for the 15-day time limit at the moment that the Carrier received the hotline call about the Claimant's conduct, or the moment that the Compliance Department began its investigation. The Organization contends, however, that by October 5 when the Claimant was questioned over the telephone about these dates and pay claims, Management had knowledge of the charges they intended to pursue against the Claimant. The Organization argues that the dates the Carrier asked the Claimant about on October 5 are the same dates relied upon during the formal investigation 49 days later. In addition, the Organization argues that the investigation clearly was concluded when the Claimant answered certain questions on October 5 in a way which the Carrier now argues demonstrate that he admitted guilt.

However, simply because no new dates were added after October 5, or because the Claimant provided certain answers the Carrier now argues are incriminating does not mean that the Carrier's Compliance Department had completed its internal investigation on October 5. This is a case where the Organization acknowledges that the Claimant made the pay claims but argues that the Claimant had no intent to

defraud the Carrier, for a variety of reasons. His intent must be determined based largely upon computerized data including his pay claims, scheduled hours and GPS records, some of which the Organization challenges, and his own claims of authority from Company policies or supervisors. The questioning by the Compliance Department was not to determine the "guilt" of the Claimant, at least for disciplinary purposes, as that is not within the scope of their authority, but rather to gather as much information as possible regarding a potential fraud situation.

Under these circumstances the Board concurs with Award 44241 which found the Carrier' argument "persuasive" that the intent of Rule 40J's sanction regarding the knowledge by the Carrier's officers is limited "to those supervisors with the capacity to initiate an investigation." That Award also stated that "when a third-party investigation is taking place, the Carrier cannot be deemed 'on notice' of the results of that investigation until it is finished and received." The Board went on to say,

> **"The problem with the Organization's interpretation is that it presumes the Carrier is on notice of the results of an ongoing independent investigation before they actually exist. We do not think this was the intent of Rule 40J. Both parties have an interest in the thoroughness and reliability of third-party investigations…We fear the Organization's interpretation would lead to a premature notice requirement, resulting in abortion of the independent investigation, when further investigation could lead to truth. We fear the Organization's interpretation could lead to precipitous investigation hearings based on preliminary, incomplete findings and unverified conclusions."**

A violation of Rule 1.6, especially proven claims of dishonesty on the part of an employee, is very serious and is generally a dismissible offense, even without previous progressive discipline. The interpretation of Rule 40J in Award 44241 ensures that any underlying investigation is thorough and sound before the Carrier initiates charges of fraud and sets into motion a formal investigation. The time it takes to complete such a preliminary investigation must be reasonable. However, on the basis of the evidence here the Board cannot conclude that Rule 40J was violated when the Carrier did not begin counting the 15-day time limit until the Claimant's supervisor received the report from the Compliance Department on November 13.

The Organization argues further, however, that the Claimant was not provided with proper notice of the charges against him. He was notified only that he was being investigated for falsely reporting time for hours he did not work. The Organization argues that he was not notified that he was being charged with taking a Company

vehicle home without proper authorization and falsely claiming a travel allowance under Pay Code 55. The Board concludes that neither the Claimant nor the Organization would reasonably understand, from the notice that the Claimant received, that these charges regarding compensation associated with a vehicle were included as part of the charge. The charges regarding the vehicle allowance do not involve extra hours claimed by the Claimant that were not worked, but rather a different type of compensation provided by the Carrier related to use of a vehicle or traveling to and from a worksite. There is evidence in the record that the lack of proper notice may have hindered the Organization's defense of the Claimant in regard to these charges, as the Organization representative argued a very different interpretation of the Agreement and Company policies than the Carrier's witnesses, with regard to when employes may collect Pay Code 55 allowances.

Rule 40 C is clear and requires that the notice must specify the charges for which the investigation is being held. Otherwise, the scope of the investigation falls outside of the notice. In Award 11222 this Board held,

> **"An examination of the Carrier's charge reveals a failure to appraise the Claimants of the charge against them. It is not our intention to restrict the Carrier's accusation to the requirements of formal legal pleadings, but their charge should be in such terms that would make known to the accused the nature of his misconduct or the violation of the rule involved."**

The Board concludes that the Carrier failed to provide specific notice in this case with regard to the charges related to vehicle use or a travel per diem, which are sufficiently different from a general charge of claiming pay for hours not worked. Therefore, the Board will not consider the evidence regarding the charges related to the Claimant's use of a Company vehicle or his claim to travel allowances under Pay Code 55.

The remaining charge is that the Claimant claimed pay for hours that he did not work, and for overtime that was not authorized. The Carrier has presented information based upon times recorded by the GPS associated with the Company vehicle which the Claimant drove from the hotel to the worksite on various days. The GPS records show that on multiple occasions the Claimant requested pay for a full day, or for overtime hours, for hours when he remained at the hotel and did not travel to the worksite. In some cases, the amount was a half hour or so, but on several days the hours amounted to 3, 4 or 5 hours that the GPS recorded that the Claimant was not at the worksite but still claimed pay for hours worked. There also was no evidence

that anything was defective with the GPS or data systems that routinely record the time and location of the vehicles assigned to the Claimant, when they left the hotel and when they arrived at the worksite.

The Organization argues that the Claimant was required to conduct COVID cleaning of the vehicle and other duties as a Foreman before the GPS indicated he left the hotel. In its calculations of excess time claimed by the Claimant, the Carrier gave him credit for a standard 15 minutes per day for COVID cleaning, and there was no evidence in the record that more time was needed or permitted for this function, before the vehicle was taken to the worksite. As for the other duties of a Foreman, there was no evidence that this work was authorized to be performed off the worksite on any of the dates in question. In addition, there was no evidence that the Claimant had authorization from a supervisor to perform any of this work on overtime.

Therefore, the Board concludes that the Carrier has presented substantial evidence that on multiple occasions the Claimant requested pay for hours he did not work. The evidence supports a conclusion that he violated the dishonesty portion of Rule 1.6 by this conduct and this is a very serious charge. Fraud committed by an employee is grounds for dismissal, standing alone, because it undermines the employment relationship and the Employer's trust. However, the Carrier also presented evidence that this is the Claimant's third serious violation within a short within about a year, and he was still under review for the earlier violations when this incident occurred. Therefore, the Board cannot conclude that the penalty of dismissal is unduly harsh or excessive.

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 22nd day of February 2024.

LABOR MEMBER'S DISSENT
TO
AWARD 45160, DOCKET MW-47580
(Referee Jeanne Vonhof)

I must dissent with the Majority's opinion. Specifically, the Majority erred when it failed to find a violation of Rule 40J in this case.

This finding is contrary to the clear language of Rule 40 and on-property precedent interpreting and applying its provisions. Rules 40A and J state:

> "A. An employe 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 employes of the Security Department) and except as provided in Section B of this rule.
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> 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 employe shall be considered as having been dismissed."

The clear language of the Agreement only gives the Carrier fifteen (15) days to hold an investigation from the date information is obtained by an officer of the Company. The Majority has essentially amended that language through its holding. Not only is the holding contrary to Rule 40, but it is contrary to the on-property precedent which holds:

AWARD 41708:

> "The Carrier's argument that the 'offense wasn't established until . . . [the Roadmaster] reviewed the timeroll entries, for that was when "information was obtained by an officer of the company" and that occurred two days later on July 1,' is without merit. To accept this approach is to modify Rule 40 (A) to mean that the time limit in Rule 40 (A) - which is, after all, a limit on management - may be unilaterally extended by the Carrier merely by having an Officer of the Company do nothing for several days after receiving an allegation of wrongdoing and then, at a time of that person's choosing, review official records."

While the Majority relied on Award 44241 for its reasoning, it failed to address a decision rendered simultaneously by this Board with another arbitrator, which reads:

AWARD 44312:

"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.

* * *

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." (Emphasis in original)

For these reasons, I must dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member