

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45329
Docket No. MW-48079
25-3-NRAB-00003-230450**

The Third Division consisted of the regular members and in addition Referee Bradley Areheart 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. J. Hulen, by letter dated December 22, 2021, for alleged violation of Maintenance of Way Operating Rule (MWOR) 1.6 Conduct and Corporate Rule Travel and Entertainment Expense III. Corporate Rule requirements C. Corporate Travel Card 3. Personal Purchases for use of his Carrier Corporate Travel Card for personal travel expenses between July 29, 2021 and November 11, 2021 and again after September 13, 2021 for expenses associated with his relocation to Kansas City, Kansas, attempting to have the Carrier pay for renting a cargo trailer and rental vehicle for personal use from approximately July 29, 2021 through August 13, 2021, purchasing personal items using Carrier resources between July 29 and 31, 2021 and his dishonesty when interviewed on November 11, 2021 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-3633-S/11-22-0211 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Hulen:

‘... must be immediately be (sic) reinstated and paid for his lost time and day to attend investigation, including any and all overtime paid to the position he would have worked, any expenses lost, difference in pay, and we also request that Mr. Hulen be made whole for any and all benefits, and his record cleared of any reference to any of the

discipline set forth in the letter by the carrier dated December 22, 2021 from Terminal Manager Cole McCord.

The claimants (sic) shall be made whole for all financial losses as a result of the violation, including compensation for:

- 1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service);
- 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service;
- 3) overtime pay for lost overtime opportunities based on overtime for any position claimants could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service;
- 4) health, dental and vision care insurance premiums, deductibles and co-pays than (sic) he would not have paid had he not been unjustly removed from service.
- 5) Any 401K he had to use and the payment for match and match that he would have been making during this time.

All notations of the dismissal should be removed from all Carrier records. ***”

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

Claimant J. Hulen has worked for the Maintenance of Way Department for six years in the Carrier's service. On November 11, 2021, the Carrier removed the Claimant from service pending completion of an investigation into an alleged violation of the Carrier's Code of Conduct. The Carrier notified the Claimant by a letter dated November 23, 2021 that it had scheduled an investigation for December 1, 2021. The purpose of the investigation was to ascertain the facts connected to the Claimant's alleged use of his BNSF Corporate Travel Card for personal travel expenses. The concerns related to personal expenses between July 29, 2021 and November 11, 2021 and again after September 13, 2021, for expenses associated with his relocation to Kansas City, Kansas.

On December 22, 2021, the Carrier informed the Claimant that he was dismissed immediately pursuant to findings uncovered during the investigation. The Organization appealed the decision on January 24, 2022. A claims conference was held on August 16, 2022, but the parties could not reconcile their position. The claim is thus now before the Panel.

Position of Organization

The Organization argues the investigation was not held within the timeframe specified by Rule 40 of the agreement. Rule 40 says an investigation shall be held promptly, but no later than 15 days from the date of the occurrence of the incident, or in personal conduct cases from the date when the information is obtained by an officer of the company. Here, the Organization contends the Carrier's first knowledge of the incident is either November 1, 2021 when Mr. Parker received the hotline call or November 11, 2021 when the Claimant was removed from service. The Organization notes they objected on exactly this basis during the December 1, 2021 investigation. Their objection was noted and the Conducting Officer stated, without explaining, that BNSF's first knowledge was November 22, 2021. As the Organization contends, "there is nothing in the record, other than the Conducting Officer's testimony, that alluded to the date of November 22, 2021."

The Organization also makes an argument about double jeopardy. In particular, that he was an exempt employee on the dates of the alleged violations. When he was dismissed from his exempt position that was one consequence. Later, when he was issued discipline while a scheduled employee, that was a second measure of discipline for the same violation. The Organization also argues that the Carrier failed to meet its burden of proof. They explain in the May 23, 2022 letter how sloppy record keeping accounts for the inconsistencies.

Finally, the Organization argues that the quantum of discipline was too great. It was arbitrary, excessive, and in violation of the Agreement. The Claimant was a 6-year veteran with an unblemished record. The Organization argues that the ultimate goal of any discipline policy should generally be rehabilitation—not to punish. The discipline was thus too great to satisfy ordinary principles of just cause.

Carrier's Position

The Carrier's position is that the discipline was appropriate given all of the circumstances. He violated the rules as charged: MWOR 1.6—Conduct and BNSF's Corporate Rule Travel and Entertainment Expense III.C. Corporate Travel Card 3. The Carrier's arguments are focused on facts that suggest the Claimant misused his corporate travel card. They argue there is a pattern of the Claimant categorizing various personal expenses as related to business dealings. There are many detailed arguments for improper use of company funds (and the Organization does not dispute any of these). The Carrier also cites to evidence of dishonesty when the Claimant was confronted about these improper charges.

Regarding the delay in scheduling an investigation, the carrier cites to the Investigation transcript, in which Mr. Parker was asked about the date of first knowledge. He responded:

The first date of knowledge, let me get back to my little table here, would've been November 22nd when I finished my data analysis, and we were able to give that information to the field. I did not, all the information we give them, the um a report on it. That's when the field got their notices on November 22nd. November 1st, I got the allegation. If we're going to call that first day of notice, we're going to be investigating a whole lot of people because that don't need to have that. Tr. at 53.

The Carrier concludes that the date of first knowledge was November 22, 2021, well within the 15-day timeframe since the investigation was held on December 1, 2021.

The Carrier concludes its brief by contending that the Claimant was punished properly. They note the violations of the rules are clear and that there were sufficient grounds for dismissal. They also note that if the Panel were to accept the Organization's pleas for leniency, it would be inappropriately substituting its judgment for the Company's.

Analysis

The Board finds the Carrier should not have dismissed the Claimant.

There are many argumentative appeals advanced by the Organization (and they are outlined in broad form above), but the Panel finds that this case hinges on Rule 40:

“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 employee involved.

- 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. 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 employee. If not effected within five (5) calendar days, or if employee is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be canceled.
- 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.
- ***
- G. If it is found that an employee 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.
- ***
- 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."

The Organization has detailed by on-property awards the critical role that Rule 40 plays in ensuring procedural and substantive fairness. Because the Carrier maintains control over the investigation, it is critical that the Claimant is given a hearing that is thoroughly fair and impartial and affords a hefty measure of due process. However, the Panel is persuaded that the Claimant was not afforded due process, stemming from the delay – which exceeded contractually agreed-to timeframes – in holding the investigation.

Under Rule 40, the Investigation must be held promptly but no later than 15 days from the date when the information is obtained by an officer of the company. Here the Panel is persuaded that the date of notice was November 1. During the Investigation,

witness Parker, who is not an employee of the security department (Tr. at 41, 64-65), testified as follows:

So, I received the or we received an anonymous report um alleging that um Roadmaster Joshua Hulen um allegedly used his company resources for personal expenses. Um they had questioned um Mr. Hulen about an expense for a rental um for a small utility trailer form a company in Minot. Mr. Hulen had said um he did not know anything about the charge or the trailer. Tr. at 15.

The language of this testimony is clear. A report was received regarding the Claimant's alleged conduct. And that report seems to indicate that someone (presumably a Carrier employee) or more than one person had already questioned the Claimant about an expense. The Panel finds this is sufficient notice to trigger an investigation.

The absolute latest the panel could find notice to exist is November 11, when the Claimant was removed from service. Removing someone from service is clear enough notice to start any clock for when an Investigation will be held. Separately, Rule 40 requires an investigation to be held within 10 days of the date someone is pulled from service.

Mr. Parker's claim is that November 22 was the date of notice because that's when he "finished [his] data analysis." It defies logic to say that the date information is obtained by an officer of the Company is when data analysis is finished. The Panel understands that the company wanted time to review the allegations before taking more serious actions, but presumably they did just that between November 1 and November 11, the date that the Claimant was removed from service.

During the hearing, the Organization argued that Rule 40 would be meaningless if the company could decide on its own when a matter is ripe for scheduling an investigation. The Organization contends that the company is not allowed to perfect its investigation prior to saying it received notice. The Carrier responds that this was a "big" case, and it required a lot of resources to vet the allegations. The Panel finds the Organization's arguments on this score persuasive. The agreement provides the Carrier with hard time limits for holding an investigation once it receives notice.

Whether notice existed on November 1 (and they had 15 days to hold an investigation) or November 11 (and they had 10 days to hold an investigation), the

subsequent investigation was untimely. Under Sub J, if an “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.” This delay thus requires the Panel to overturn the dismissal and put the Claimant back to work.

There are many more arguments and positions that were advanced by the parties. Some are outlined above; others were included in the lengthy submissions and discussed during oral arguments. The panel considered each of them, but it is not necessary to resolve all of them to reach the panel’s ultimate determination: that Mr. Hulen was wrongly dismissed.

Finally, there is a question of remedy. This Board is guided by the well accepted principle of rendering a “make whole” remedy in a labor contract dispute such as the one here. The goal of such a remedy is to place the parties in the position they would have been in had there been no violation. Under this analysis, the Claimant would have received medical benefits, regular compensation, overtime, and all the other benefits of an employee working under the parties’ collective bargaining agreement. The organization also seeks 401k benefits for the time that Mr. Hulen was held out of service. These benefits are also granted as this is consistent both with making the employee “whole,” as well as with replacing “wage loss” under Rule 40.

The Organization contends that any wages earned by the Claimant during his period away from BNSF are properly his and should not be deducted from his awarded compensation. This Board agrees in part. Lost wages must be offset or mitigated by true replacement wages received during the time the Claimant was separated from BNSF. However, any wages that were being received prior to dismissal shall not be used to offset. If they were being received prior to dismissal, that indicates those earnings are not in replacement of the lost wages associated with dismissal.

The claim is sustained. The Carrier shall immediately remove the discipline from the Claimant’s record and reinstate the Claimant, subject to its policies on return to work, with seniority, vacation, and all other rights unimpaired and make him whole for all time lost as a result of this incident. Lost overtime shall be compensated at the overtime rate. His compensation shall be reduced by any interim earnings from replacement employment. There shall be no offset from earnings that existed prior to the discipline. The Claimant shall be reimbursed for medical benefits to the extent that he provides the Carrier and the Organization with receipts of

medical expenditures that would have been covered but for the lapse in his Health and Welfare Benefits. The Parties shall then jointly determine what co-pays, premiums and other medical costs would otherwise have been covered by his insurance had he continued in the Carrier's employ uninterrupted by dismissal. Any other claims to compensation not specifically granted in 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 31st day of October 2024.

Carrier Members' Dissent
To
Third Division Award 45329; Docket 48079

(Referee Bradley Areheart)

In issuing this decision, the Board found that the Carrier violated Rule 40 by allegedly failing to initiate a timely investigation following its initial internal inquiry into allegations against Mr. J. Hulen. This ruling is not only palpably erroneous but also fundamentally misconstrues both the procedural and substantive principles established by Rule 40, compelling the Carrier to respond in dissent.

The Board has failed to appreciate the procedural distinction between an internal inquiry conducted by compliance departments and a formal investigation pursuant to Rule 40. As consistently articulated in on-property handling documents and confirmed by arbitral precedent, BNSF maintains a procedural practice of conducting preliminary inquiries to validate allegations received from hotlines or other reporting channels before initiating formal investigations. In the case at hand, BNSF conducted a responsible and measured internal review, gathering the necessary background information to determine whether a formal investigation was warranted. Contrary to the Board's interpretation, this inquiry does not trigger the 15-day timeline for a formal investigation as specified by Rule 40. Simply put, an internal inquiry into allegations and an investigation under Rule 40 are two separate procedures and should never be conjoined into one.

Precedent on Rule 40 Interpretation

Past arbitral awards affirm BNSF's interpretation of Rule 40 and the procedural framework for conducting internal inquiries. As upheld in Third Division Awards 45160 (Referee Vonhof) and 44241 (Referee Bittel), the Carrier is permitted to engage in preliminary compliance inquiries without initiating a formal investigation under Rule 40. Specifically, in Award 45160, the Board recognized that "no conclusions were made at the time the Claimant was questioned... as [the Compliance Department] was still gathering background information... [and] the questioning was not to determine 'guilt' for disciplinary purposes." Similarly, Award 44241 explicitly found that Rule 40J's timeline does not commence upon the Carrier's receipt of preliminary findings; rather, it is only triggered once the internal review is completed and presented to the appropriate officer.

This Board's decision misreads Rule 40 and effectively disregards these precedents, which establish that internal compliance reviews do not constitute formal investigations. By presuming that the initial inquiry initiated the 15-day timeline, the Board disregards the established standard that only completed findings by internal departments, reviewed by an authorized officer, can trigger formal investigative protocols. This ruling dangerously redefines Rule 40 by blurring the line between compliance reviews and formal investigations, setting a precedent that will hinder the Carrier's ability to conduct thorough and responsible inquiries.

Misuse of Corporate Resources and Evidence of Misconduct

Moreover, the evidence presented demonstrates Mr. Hulen's misuse of his corporate travel card for personal expenses, a violation of both MWOR 1.6 Conduct and Corporate Rule Travel and Entertainment Expense requirements. The Claimant's inconsistent explanations during

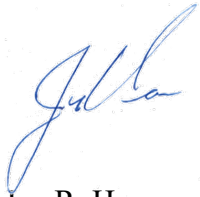
questioning further underscore his misuse of resources. Despite this, the Board's ruling ignores the gravity of these actions and diminishes the Carrier's authority to hold employees accountable. Allowing such infractions to go unpunished on the grounds of procedural misinterpretation weakens the integrity of workplace policies and Carrier authority.

Inadequacy of Remedy and Undermining Management Rights

The "make whole" remedy ordered here is excessive and unsupported, given the well-documented misconduct. By ordering reinstatement with back pay, the Board disregards the seriousness of the infraction, sending a message that well-documented breaches of trust may be excused by procedural misinterpretations. The ordered remedy not only impedes the Carrier's ability to discipline employees but also establishes an unsustainable standard for addressing misconduct.

In summary, the Board's ruling on this matter misconstrues Rule 40, disregards established arbitral precedent, and unduly penalizes the Carrier's procedural safeguards. This decision endangers the Carrier's ability to conduct fair and efficient inquiries into employee conduct while compromising essential managerial rights to enforce compliance with workplace policies.

For the foregoing reasons, we vigorously dissent.

A handwritten signature in blue ink, appearing to read "Joe R. Heenan".

Joe R. Heenan
General Director Labor Relations
Carrier Member

A handwritten signature in black ink, appearing to read "James C. Rhodes".

James C. Rhodes
Director Labor Relations
Carrier Member