

PUBLIC LAW BOARD NO. 6538

**BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES)**

and)

BNSF RAILWAY COMPANY)

AWARD NO. 12

CASE NO. 12

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when, following its August 18, 2004 action of removing and withholding Mr. D. Carter from service, it arbitrarily postponed the September 23, 2004 investigation (System File S-P-1119-G/11-05-0004 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Carter shall receive the remedy prescribed by the parties in Rule 40(G) and (J).”**

FINDINGS:

Public Law Board No. 6538, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

On August 18, 2005, Carrier removed the Claimant from service pending investigation in connection with an alleged violation of Carrier’s Policy on the Use of Alcohol and Drugs. The Organization requested a postponement of the investigation until September 9, 2004. Carrier granted the request and issued a letter dated August 25, 2004, notifying the Claimant of this postponement. Another postponement of the investigation was requested by the Organization, this time until September 23, 2004. Carrier agreed to a second postponement and sent a letter dated September 8, 2004 notifying the Claimant.

On September 22, 2004, the day before the scheduled investigation, there was a communication between the parties that is the subject of the dispute now before the Board. A letter postponing the investigation until October 1, 2004 was sent to the Claimant on September 23, 2004. The investigation was held and, as a result, Claimant was dismissed from Carrier’s service on October 11, 2004 for violating the Policy on Drug and Alcohol Use due to his second positive drug test for a controlled substance.

A claim by the Organization dated September 30, 2004 contends that Carrier violated various rules, but most particularly Rule 40, by unilaterally postponing the investigation. Rule 40 provides in relevant part as follows:

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 therefore.
- * * *
- I. The date for holding an investigation may be postponed if mutually agreed to by the Company and the employee or his duly authorized representative. If there is a change in the location of the investigation, the employee and his duly authorized representative will be notified.
 - 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 argues that the foregoing rule clearly requires mutual agreement by the parties to postpone an investigation. In the absence of such agreement in the instant case, the Organization submits that the investigation, which was held on October 1, 2004, was well beyond the contractual time limits. Since the investigation was not held and the decision was not rendered within the specified time limits, the charges against the Claimant must be considered as having been dismissed.

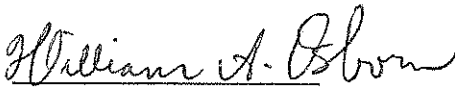
The Organization further insists that this is a rules case, and we are inclined to agree. Although Rule 40 objections typically arise in the context of discipline claims, the Organization filed the instant claim before the investigation took place and before discipline was issued. That being the case, our focus is narrowly framed and does not extend to an examination of the merits of the Claimant's discharge.

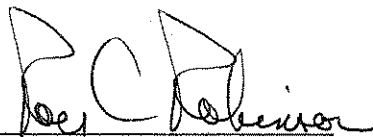
The crux of this matter centers on whether the parties agreed to postpone the investigation until October 1, 2004. The Organization maintained that it did not agree to a postponement, while the Carrier insisted that there was concurrence. As an appellate body, the Board is unable to resolve the factual conflict. The Organization carried the burden of demonstrating a violation of the Agreement and it had to prevail on this factual predicate as an essential element of proof. Since we are faced with an irreconcilable dispute as to what occurred, the Board is forced to dismiss the claim.

AWARD

Claim dismissed.


ANN S. KENIS, Neutral Member


Carrier Member
William A. Osborn


Organization Member
Roy C. Robinson

Dated this 28th day of June 2007.