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File: AMWB 82-12-15C
B-RM-238C

Public Law Board No. 4161

Parties to Dispute

Brotherhood of Maintenance of	)	
Way Employee	)	
	)	Case No. 20
vs	)	
	)	Award No. 32
Burlington Northern Railroad	)	

STATEMENT OF CLAIM

1. The dismissal of Laborer D. R. Reister for alleged violation of Rule 702(B) was unwarranted and in violation of the Agreement.
2. That the Claimant be compensated for all wages lost as a result of the discipline assessed by the Carrier and that his record be cleared of the charge levelled against him..

FINDINGS

By notice dated June 16, 1982 Roadmaster G. Frank informed the Claimant and seventeen (17) co-workers that they were to attend an investigation on June 22, 1982 to determine facts and place responsibility, if any, in connection with their alleged insubordination at approximately 6:30 AM on the morning of June 8, 1982 at Trident, Montana. The Claimant and the seventeen (17) co-workers in question were members of the Carrier's Billings Region Tie Gang No. 964. After the investigation was held as scheduled, the Claimant and his co-workers were informed that they had been found guilty as charged and they were dismissed from service as of July 19, 1982. It was the position of the

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Carrier that the employees in question had violated Rule 702(B) of the Burlington Northern Maintenance of Way Rules. On September 12, 1982 an appeal was filed by the Organization for the Claimant and fellow worker K. G. Porter on the grounds that the Carrier had been in procedural error under Rule 40(C) of the Agreement since the Claimants had only "...received their notice of investigation on the day before the investigation (which was) held" on June 22, 1982. In this appeal the Organization also claimed that the discipline assessed by letter dated July 17, 1982 was unwarranted on merits. After the appeal was denied by the Carrier on September 23, 1982 the General Chairman of the Organization informed the Carrier by correspondence dated October 4, 1982 that Mr. K. G. Porter had withdrawn his claim but that the Claimant to the instant case, Mr. D. R. Reister, was pursuing his claim "as presented". In its denial of the appeal by letter dated November 8, 1982 the Carrier noted that Mr. Reister was one "...of the 18 employees dismissed for the same offense" and that as of that date six (6) had returned to service "on a leniency basis solely and no claims were to be progressed on their behalf".* On December 15, 1982 the General Chairman of the Organization again appealed the claim on behalf of Laborer Reister on both procedural grounds and on merits. Absent resolution of the claim on property it was ultimately docketed

* According to the Carrier's submission all but three (3) of those dismissed from service ultimately accepted reinstatement on leniency basis

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before this Public Law Board for final adjudication.

The procedural issue argued by the Organization references current Agreement Rule 40(C) which states the following:

(A)t 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 charge for which the investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved.

On page 4 of the transcript of investigation the Claimant testified that he had not received the notice of investigation until the day before the date of the investigation itself. This was noted by the Vice General Chairman of the Organization at the investigation and his allegation of the Carrier's violation of Rule 40 of the Agreement was entered into the record. The fact that Mr. Reister received the notification on June 21, 1982, and that the investigation itself took place on June 22, 1982 is not in dispute.

The role of a Board such as this is limited to the interpretation of the language of contracts in the railroad industry (Third Division Awards 6695, 21697 inter alia). In its denial of the claim on property Carrier officers argue two points. First of all, the Carrier argues in correspondence sent to the General Chairman of the Organization which is dated February 8, 1983 that the proper interpretation of the language of Rule 40(C) hinges on when the notice of investigation is dated

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and not when the notice is received. In the language of that letter, the Carrier officer states: "... (w)hen the Claimants actually received the notice is not dispositive of the matter". The Board must underline that the language of Rule 40(C) does not address the issue of when notices are dated, but that the Rule states, in what the Board concludes is unequivocal language, that at least five (5) days advance written notice of the investigation "...shall be given the employee..." in order that the employee may arrange for representation, the calling of witnesses and so on. Clearly the parties who wrote this provision had a time-frame in mind to permit the accused to prepare a defense in the case of assessment of discipline. And this time-frame is clearly spelled out in the Agreement at five (5) days. It is contrary to clear language construction to interpret the Rule in the manner which the Carrier officer is suggesting. It is also contrary to any possible application, by the Claimant, of due process procedures which is presumably what the parties had in mind when Rule 40(C) was written by them. The second argument proposed by the Carrier effectively places responsibility on the Claimant for the Agreement violation committed by the Carrier. This second argument suggests a potential solution to the Claimant's problems with regard to time-lines, if the Claimant felt that the Carrier had been in violation of Rule 40(C) prior to the investigation, which is operationally impossible to implement in view of the combined

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contractual requirements of both Rule 40(A) and Rule 40(C) of the Agreement. Rule 40(A) states that an investigation must be held no later than "...fifteen (15) days of the date of the occurrence". The alleged act(s) of insubordination occurred on June 8, 1982. Fifteen (15) days from this date was June 23, 1982. The Carrier officer writes to the Organization that "...if any of the Claimants believed they were not prepared to proceed with the investigation, they could have requested a postponement". Rule 40(A) required that this postponement not go beyond June 23, 1982. Yet Rule 40(C) required that the Carrier give this particular Claimant until June 25, 1982 to prepare his case for the investigation since there is no dispute of fact that the notice was not received by this Claimant until June 21, 1982. This second argument introduced by the Carrier, therefore, is contractually impossible to implement in view of the requirements of Rule 40(A) and Rule 40(C) taken together unless both parties mutually agree to implement Rule 40(I) of the Agreement. Nothing in the language of this latter provision requires the Claimant to request a postponement in the face of the Carrier's violation of any other provision of the Rule. An alternative which is open to the employee, which is the one which he followed, is to appeal the discipline under Rule 42 of the Agreement which, in turn, has its own time-frame requirements which must be followed. For the

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record, rule 40(I) of the Agreement states the following:

(T)he 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. (Emphasis added)

On procedural grounds the Carrier was in violation of contract. Arbitral forums in the railroad industry have ruled on numerous occasions that claims can be won or lost if one side or the other, as party to a dispute, does not properly follow the time-lines outlined in an Agreement (Third Division 11505, 14354, 16163). Such forums have also ruled that it is not sufficient on evidentiary grounds for Carrier officers to argue that because notices or letters have been dated or mailed that this fulfills time-line requirements of the type here at bar (Third Division 10173, 10742, 17291, 25100). More specifically, prior Awards of the National Railroad Adjustment Board have ruled that a Carrier must give proper notice, in accordance with the Agreement, prior to holding an investigation (Third Division 19566). Third Division Award 22748 was issued on this property in 1980 and it deals specifically with the issue here at bar between this Carrier and this same Organization. In that Award, relative to the violation of Rule 40(C) of the Agreement, the Board stated:

...we believe that the Awards of this Board which hold the parties to their Agreements with respect to time limits should be followed. The wording of the Rule is clear; 5 days written notice is required. This is a bargained for right of an employee subject to discipline...

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A search of the public record of the National Mediation Board shows that the Carrier never filed a dissent to the above decision. The conclusion reached by the Board in the instant case, therefore, is in line with the arbitral precedent established by the cited line of Awards. The claim must be sustained as presented. As moving party in this contract interpretation dispute the Organization has sufficiently met its burden of proof (Third Division 22180, 22292, 22760; Fourth Division 3379, 3482).

Given the Board's ruling on the procedural issue raised by the Organization the question of merits need not be addressed.

AWARD

The claim is sustained in accordance with the Findings. Part 2 of the Statement of Claim shall be implemented in a manner which is consistent with Rule 40(G) of the Agreement and with the principles outlined in Award No. 1 of Public Law Board 4161. The latter states that payment for time lost shall be made to the Claimant minus any earnings by the Claimant during the time-frame in question. Cumulative earnings during the time-frame shall be defined as pro rata rate which the Claimant would have earned.

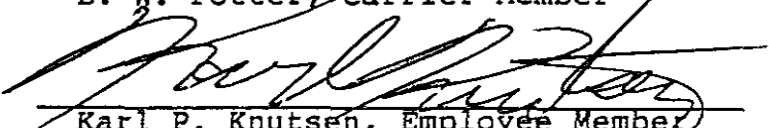
It is the responsibility of the Claimant to present documentary evidence to the Carrier on earnings prior to implementation of this Award by the Carrier. The Claimant's seniority shall be unimpaired during the time he lost work. The Claimant shall be

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notified of his rights by the Carrier within thirty (30) days of the date of this Award.


Edward L. Suntrup, Neutral Member


B. W. Potter, Carrier Member


Karl P. Knutsen, Employee Member

Date: July 28, 1987