PUBLIC LAW BOARD NO. 6228

AWARD NO. 1
CASE NO. 1

PARTIES TO
THE DISPUTE: American Train Dispatchers Department/
International Brotherhood of Locomotive Engineers

vs.

Soo Line Railroad Company

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained in accordance with the Findings.

DATE: January 3, 2000

STATEMENT OF CLAIM:

"On September 22, 1998, Mr. R. K. Balthazar, Assistant Director - Minneapolis NMC assessed discipline of dismissal effective September 22, 1998 against Train Dispatcher C. A. Deters as a result of charges filed by Mr. M. F. McNamara, Manager, Minneapolis NMC on September 3, 1998 and subsequent investigation/hearing held on September 14, 1998 wherein Ms. Deters was charged with failure to notify IMRL 367 West of a change in signal aspect and authorizing a conflicting movement between the IMRL 367 West and the Winona Switch Engine SOO 4401 and failing to report this infraction to her supervisor which occurred on September 1, 1998 while Ms. Deters was working 3rd trick River Dispatcher. She was charged to be in violation of GCOR 1.1, 1.1.1, 1.1.2, 1.4, 9.5.1, Train Dispatchers Manual Rule 1 (paragraph 1) and Rule 4 Lap of Authority. At this time, I would like to appeal Mr. Balthazar's decision to you, and he is so notified by copy of this letter."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute; and that the parties were given due notice of the hearing.

The Organization challenged Carrier's disciplinary action on both procedural and substantive grounds. Objection was raised to Carrier's failure to provide a complete transcript of the hearing per Rule 40(f) as well as Carrier's failure to hold a timely conference on appeal per Rule 40(c). On the merits, the sufficiency of the evidence was questioned along with the propriety of considering alleged "informal counseling" incidents when determining Claimant's disciplinary penalty. The Organization also noted that Claimant made every effort to notify a supervisor as required by Rule 1.4. Finally, under all of the relevant circumstances, the penalty of dismissal is excessive.

Carrier, on the other hand, maintains that Claimant's dismissal was warranted by the evidence

and no procedural error justifies reversal.

The impact of an incomplete or missing transcript is determined by the terms of the labor agreement. Careful examination of the prior awards cited by the parties on this point reflect consistent adherence to this approach. In this dispute, the parties' Agreement provides as follows in Rule 40(f):

> (f) Transcript:
>
> If stenographic record of hearing is taken, copy will be furnished the employee or his representative on request.

As the Board found in Second Division Award 9686, when faced with construing essentially identical rule language, the provision "... does not even require that a verbatim transcript be taken.." It merely mandated that *if* a record was taken, the local committee must be furnished a copy. In addition to the optional nature of its terminology, nothing in Rule 40(f) mandates a default decision in favor of the affected employee if a complete transcript copy is not provided. In this case, a taping error led to the erasure of a portion of the testimony of one witness and a disruption of the sequence of the testimony. In this regard, it must be remembered that Carrier offered the Organization the opportunity to reconvene the hearing to recreate the missing testimony as soon as the errors were noted and before Carrier made its disciplinary decision. It is clear from the on-property record that the Organization did not avail itself of this opportunity to obtain a complete transcript. Rather, it took the position that reconvening the hearing violated Claimant's due process rights as well as the concept of double jeopardy. Neither of these reasons is well-founded.

Double jeopardy is a constitutional restriction on the ability of *government* to twice try a person on the same *criminal charges.* By its very nature, it does not apply to an investigation into employment misconduct in the private sector. To the extent that vestiges of the double jeopardy doctrine might be applied in the labor relations context, it would only bar the employer from disciplining an employee twice for the same instance of misconduct. That is not the case here. Carrier has not sought to discipline Claimant twice for the events of September 1, 1998. Rather, it has sought only to produce one complete investigation of those events.

In the labor relations context, due process is essentially the right of an employee to be informed of the charges in advance of an investigatory hearing, to be heard in response to the charges in a fair and impartial hearing, to call witnesses in defense of the charges, to be represented, and to confront, or cross-examine, accusers. Carrier's offer to reconvene the hearing did not jeopardize any of these rights. Quite to the contrary, Carrier's offer actually would have advanced Claimant's due process rights by providing her with a complete transcript of the testimony. Most importantly,

nothing in Rule 40 explicitly prohibits reconvening a hearing to reconstruct evidence inadvertently lost. Accordingly, we find no proper basis for concluding that Claimant's due process rights would have been diminished in any respect by reconvening the hearing.

Under the unique circumstances of this record, we find the Organization's failure to avail itself of the opportunity to reconvene the hearing constituted a waiver of any rights it had to a complete transcript. In so doing, it accepted the transcript as is.

The parties also differ sharply over the Organization's second procedural challenge. The Organization says Rule 40(c) imposes a 15-day time limit for conferencing an appeal. Carrier's failure to respond within the time limit constitutes a procedural defect that is fatal to Claimant's dismissal. Carrier, to the contrary, made two opposing contentions in its December 14, 1998 response on the property. First, Carrier asserted that Rule 40 did not impose response time limits. In this regard, Carrier also cited examples of past practice in support of this assertion. Second, Carrier contended that Rule 41, which was modified in bargaining for the parties' 1997 Agreement, superseded Rule 40. Rule 41 established 60-day time limits for handling claims, which Carrier met.

After careful consideration of the competing contentions, we find problems with both parties' positions. Carrier provided evidence in the form of a July 10, 1995 letter demonstrating the past practice of applying Rule 40(c). That evidence was unrefuted by the Organization. The fact established thereby is that the parties have had a practice that essentially ignored conferencing time limits. Given that practice, it is incumbent upon the Organization to provide advance notice of its desire to return the contractual time limit before it would again be effective. It may not be asserted by surprise given the contrary practice. Moreover, nothing in Rule 40(c) explicitly provides for a default decision in favor of the employee in the event of an untimely conference. Given that arbitration abhors a default or forfeiture unless the parties have explicitly so provided in their Agreement, the better view is to treat an untimely response as a constructive denial and allow the appealing party to advance the claim to the next step of the resolution process. Accordingly, that is the view we adopt. We also note that the parties did eventually conference the matter on the property before bringing it to this Board.

Carrier's contention that Rule 41 superseded Rule 40 is in the nature of an affirmative defense. As such, Carrier has the burden of proving the validity of its contention. Given the evidence of record, we note the following observations about the two sets of Agreement provisions. Most importantly, nothing in Rule 41 explicitly says it supersedes all or any portion of Rule 40. Secondly, if Rule 40 were superseded as the Carrier contends, then Rule 41 would effectively wipe out the rights of employees to a proper hearing before discipline is imposed. It would also wipe out the employee's right to advance notice of charges, a speedy hearing within 10 days, representation by an employee of his/her choice, the opportunity to secure witnesses, the right to confront accusers, and the right to a timely decision upon close of the hearing. Since none of these basic due process rights

are replicated in Rule 41, they would cease to exist if, indeed, Rule 41 superseded Rule 40 as the Carrier contends. The relative importance of these due process rights demands that Carrier be held to the highest burden of proof to show the parties intended to extinguish these rights. Given the actual text of the two rules, we find no substantial evidence in support of Carrier's contention. Rather, it appears that the two minor references to discipline found in Rule 41(e) and (f) are directed only toward the monetary aspects of claims and not also to the merits of disciplinary action. In the overall, we find that Carrier has not sustained its burden to prove that Rule 41 was intended to supersede Rule 40. On this record, therefore, we find that Rule 40 still controls the review of the merits of disciplinary actions.

The transcript available to us has been carefully reviewed. It is noted that none of the hearing exhibits were provided to us along with the transcript. Pertinent portions of the exhibits were, however, read into the record and, thus, were adequately available for our review. Moreover, Claimant's testimony appears entirely intact along with the summation of her representative. Her testimony acknowledges all of her actions that constitute the mishandling of track authority as well as the sudden change of signal aspect for IMRL 367 West without discussing the change with the crew beforehand. Her actions did, indeed, create a lap of track authority without properly coordinating the situation with the two crews involved. This created an extremely dangerous situation with the potential of great harm to life and limb as well as considerable property damage. The record also reflects that Claimant made a large number of unwarranted assumptions about the propriety of her conduct. Carrier was correct, therefore, in concluding that Claimant did not appreciate the significance of her actions despite her training.

Regarding Claimant's failure to report her actions per Rule 1.4, however, we do not find the charge to be supported by substantial evidence in the record. According to her unrefuted testimony, she made contact as soon as possible after the events. Rule 1.4 only requires *promptly* reporting the matter to supervision. It does not require that report to be made on the property.

Finally, it is undisputed that Carrier considered several instances of past "informal counseling" in arriving at its disciplinary decision. While it is normally proper to consider an employee's past disciplinary record in determining the quantum of discipline appropriate in a given case, nothing in the record shows that these counseling sessions met all of the due process requirements of Rule 40. Section (a) 1. prohibits disciplining a train dispatcher except in accordance with the rule. On this record, therefore, the Board must regard these sessions as being non-disciplinary. As such, they are improper considerations for determining an appropriate penalty. The extent of their influence on the dismissal penalty, which cannot be accurately determined from the available record, must be rejected.

Given that Claimant's violation of Rule 1.4 stands insufficiently proven and that Carrier's dismissal decision was influenced to some unknown extent by improper considerations, the Board finds that Carrier's decision must be modified. The Board finds that Claimant should be reinstated

to her former employment, with seniority rights unimpaired, but without back pay. Her employment record should reflect her time off payroll as a disciplinary suspension for just cause.

AWARD:

Claim sustained in accordance with the Findings.

Gerald E. Wallin, Chairman
and Neutral Member

I dissent:
David W. Volz
D. W. Volz,
Organization Member 2/21/2000

C. D. Kujawa
C. D. Kujawa,
Carrier Member 3/2/00

I dissent

Organization Member's Dissent
To Public Law Board No. 6228
Case 1 / Award 1

In addressing the Organization's procedural challenge concerning the incomplete transcript, the Majority found:

> "Under the unique circumstances of this record, we find the Organization's failure to avail itself of the opportunity to reconvene the hearing constituted a waiver of any rights it had to a complete transcript. In doing so, it accepted the transcript as is."

In making this finding, the Majority overlooks certain facts in the on-property handling.

First, the so-called offer by the carrier to reconvene the hearing was made on September 21, 1998 (Carrier Exhibit B). The discipline was assessed on September 22, 1998, the very next day (Carrier Exhibit C). The Organization's "opportunity" to avail itself for a reconvening of the hearing was obviously short-lived. There was no reason to reconvene the hearing once the carrier had issued the discipline. The Claimant's fate was already sealed.

Second, the hearing process is under the direct control of the Carrier. Had the Carrier been concerned about developing a full and complete record, it should have taken the appropriate action prior to issuing a decision and not try to shift its responsibility to the Organization with a meaningless offer to reconvene.

To say that the Organization waived its right to a complete transcript under these circumstances is incorrect.

Given the charge against the Claimant, a more than 16-month suspension is excessive.

I dissent.

Respectfully submitted,

David W. Volz

David W. Volz
Organization Member

CARRIER MEMBER'S DISSENT
TO
PLB 6228, AWARD NO. 1

In its decision the Majority found that Claimant is entitled to reinstatement because the Carrier treated several instances of "informal counseling" and coaching as "discipline." The Majority further found that such counseling did not meet the requirements of Rule 40 and completely disregarded two prior incidents involving cardinal rule infractions where discipline was assessed in accordance with Rule 40. This finding by the Majority is seriously flawed, inconsistent with incontrovertible evidence presented by the Carrier of progressive discipline of this employee in literal compliance with Rule 40 and represents unacceptable error by the majority. In addition, by reinstating this employee in the face of flagrant rule violations, the Majority is endangering the health and safety of railroad employees throughout the Carrier's system.

The record in this proceeding is clear and uncontroverted by the Organization, or the Claimant. Progressive discipline referenced in these proceedings consisted of two prior assessments of discipline in connection with established responsibility for cardinal rule infractions following formal due process and formal investigations in accordance with Rule 40. The Majority improperly disregarded claimants previous discipline record in its decision.

Claimant's established responsibility in each of the two prior incidents were sufficient to warrant dismissal. These are not the type of rule infractions that are conducive to "progressive" discipline. In the railroad industry, Rule infractions such as these place the lives of our employees in jeopardy along with public safety.

The Claimant in this case has been found guilty of cardinal rule infractions that include two "laps of authority" and a track warrant repetition error. A "lap of authority" establishes the potential for a head on collision and places at risk the safety of our employees and the public. One such incident is normally sufficient to warrant termination. Employees are not typically given the opportunity to learn from "cardinal" rule infractions. One mistake, such as this, is one too many.

The record establishes that the supervisors as well as co-workers made every effort to develop this individual as a capable train dispatcher, in addition to providing Claimant with additional training, assistance and counseling, in connection with the more minor rule infractions. The Claimant has been provided with more than sufficient opportunity to demonstrate that she is capable of

performing the job as a Train Dispatcher. She has failed under circumstances for which other employees have long since been terminated. The Carrier cannot allow this employee, with established responsibility for a third "cardinal" rule infraction, to return to work as a dispatcher.

The effect of a mistake by a train dispatcher can be catastrophic to the operation, safety of employees and the public, similar to that of a locomotive engineer. In order to function as a locomotive engineer, an individual must maintain a valid license, certified by the FRA. The issue of whether train dispatchers should be licensed and certified by the FRA is currently being considered by the FRA. It should be noted that if a locomotive engineer is found to be responsible for a "cardinal" rule infraction, he/she loses his/her certification and is not allowed to return to service, as mandated by the FRA. This action is separate and apart from any discipline which may be assessed by the Company. Ms. Deter's demonstrated poor performance and inability to safely dispatch trains, threatens the safety of the employees, the public, and the operating plan which has been filed with and approved by the FRA. The decision of the Majority to allow Ms. Deter's to return to service as a train dispatcher in spite of her previous record and the fact that extensive training and counseling was to no avail, presents a safety risk that we believe is simply inconsistent with the Company's operating plan that has been filed with the FRA.

Another concern with respect to the Majority's reinstatement of the Claimant stems from Claimant's attitude and failure to acknowledge any responsibility for the rule violation. It is disturbing to think train movements are being directed by a train dispatcher who has been given the benefit of the doubt in several instances and has had as much, or more, training than any other dispatcher, but still is unable or unwilling to safely perform the job.

By disregarding prior assessments of discipline, as well as Company efforts to educate and develop claimant, the Majority has seriously erred and exceeded jurisdiction by placing the safety of the public as well as our employees in jeopardy.

For these reasons, I dissent, and hold this Award to be without precedent.

Charles D. Kujawa

Charles D. Kujawa

9-00087/0-0037-040

PUBLIC LAW BOARD NO. 6228

Supplement to Award No. 1

The following supplement is provided in response to the remand order of the United States District Court, District of Minnesota, in Civil Action No. 00-926(DWF/AJB). The Organization, as Petitioner, sought to enforce Award No. 1 of this Board. The Carrier, as Respondent, sought to block that enforcement. Award No. 1 provided for reinstatement of the Claimant.

Carrier's position in the court action relied on the final sentence of Rule 40(d) of the applicable collective bargaining agreement. The sentence reads as follows:

> Train dispatchers who have been dismissed will not be reinstated after one (1) year from date of dismissal, except by mutual agreement between Management and General Chairman.

Although Award No. 1 was issued more than one year after the effective date of Claimant's dismissal, it is silent regarding the operation of Rule 40(d). Because of this silence, the Court remanded the matter to us for consideration of the application and effect of Rule 40(d).

Certain background information is necessary to properly set the context of our silence. Dispute resolution in the railroad industry is administered by the National Mediation Board ("NMB"), a federal agency. In addition to resolve major disputes in the industry, the NMB also regulates the resolution of minor disputes. A primary way of performing this regulatory function is by controlling the compensation paid to arbitrators who serve as neutral referees to the National Railroad Adjustment Board or as chairpersons to public law boards and special boards of adjustment.

As a federal agency, the NMB must operate within the budgetary constraints of the federal fiscal year, which runs from October 1st of one calendar year through September 30th of the following year. Although the NMB receives a lump sum authorization of the funds Congress appropriates for arbitrator compensation, it must ration the distribution of those funds to achieve two objectives: First, it must be able to fund arbitrator compensation throughout all twelve months of the funding cycle; second, it must ensure that the total amount of compensation paid during the fiscal year does not exceed the level authorized by Congress.

The NMB accomplishes the necessary rationing process by requiring, each month, that arbitrators request permission to work in any given calendar month. The timing of the request is this: The arbitrator must submit his or her request on NMB Form 14 not later than the end of Month #1; the request must state the number of full work days the arbitration wishes to use in Month #3; the Form 14 must also identify the estimated number of railroad cases the arbitrator will have remaining undecided as of the end of Month #2. After performing an internal analysis of all arbitrator requests for workdays to be used in Month #3, the NMB will notify the individual arbitrators, usually by the middle of Month #2, how many of their requested days have been granted.

Despite the appearance of complexity and uncertainty surrounding the rationing of workdays, the system works reasonably well most of the time. A breakdown of sorts, however, occurs during the late summer and early fall months of every calendar year due to the combined influence of the federal fiscal year and politics at the federal level.

Arbitrators wishing to be granted work days for the month of October (Month #3) must submit their Form 14 requests for those days by the end of August (Month #1). But the month of October is the first month of each new federal fiscal year and the NMB is not able to authorize workdays until it knows what its funding authorization will be for the new fiscal year.

The last several years of the Clinton Administration saw political differences between the Congress and the White House produce significant delays in the passage of bills that fund NMB activities as well as those of other federal agencies. As a result, the NMB was unable to timely grant arbitrators authority to work in the month of October each year. The same dilemma sometimes carried over into the months of November and December. Sometimes the Congress and the White House would agree upon month-to-month continuing resolutions to fund federal agencies. However, because of the lead times involved, this only prolonged the uncertainties. By the time the NMB could notify the arbitrators of the number of days they might be authorized to use in a given month, it was often too late in the month to do so.

Over time, it became commonplace for railroad arbitrators to plan their schedules to do no railroad work in October and November and very little, if any, in December of each year. Recognizing the reality of this situation, the NMB also began applying a "6-month rule." The 6-month rule meant that a railroad arbitration award would not be considered overdue until after the end of the 6th month following the month in which the arbitration hearing was held. For example, the award on a case heard in July would not be considered late until after the following January 31st.

Attached to this Supplement is an August 2, 2001 Memorandum from the NMB regarding several administrative matters. The second full paragraph confirms that the previously described funding problem is again a factor for October of 2001.

The foregoing background information now permits us to respond to the Court's Remand Order.

On April 6, 1999, the Carrier and the Organization entered into a written agreement to establish a public law board to have their Cases 1, 2, and 3 heard. They had not, as of that date, agreed upon the selection of an arbitrator to serve as chairperson of the board. Shortly thereafter, I was contacted by the Organization member, D. W. Volz, to ask if I would serve as neutral chair. Mr. Volz expressed a desire for a hearing date in the month of July. This brought into play the uncertainties surrounding federal funding in the October-December time frame. Accordingly, I agreed to serve as Chair but only on the condition that I would have the full six calendar months after July in which to issue the initial drafts of the awards and the further condition that any time limitation provisions in their agreements that operated to the contrary would be waived. Mr. Volz agreed. When I asked if he would obtain the Carrier's concurrence with the conditions imposed by me, he said he would. We set July 15, 1999 as the planned hearing date. My appointment as neutral Chair of Public Law Board No. 6228 was confirmed by NMB certificate dated May 14, 1999. The NMB cover letter enclosing the certificate contained the standard language reminding me of the 6-month rule.

Public Law Board No. 6228 convened as planned on July 15, 1999. The Carrier member was Mr. C. D. Kujawa. Because I had not previously spoken directly with Mr. Kujawa about the conditions on my willingness to serve as Chair, I addressed them at the outset of the hearing. I

explained the uncertainties I anticipated surrounding federal funding for the fall of 1999. I specifically informed Mr. Kujawa and Mr. Volz that the draft awards would likely be issued *no sooner than* November or December of 1999. Accordingly, I stated the conditions upon my willingness to serve as Chair: One, that I would have a full six months after July in which to issue the initial draft of the awards and, two, that any time limitation provisions in their agreements that operated to the contrary would be waived as necessary to accommodate that time frame. Both Mr. Kujawa and Mr. Volz agreed to the conditions as stated without any reservations. Significantly, the Carrier member did not mention, in any manner whatsoever, that Rule 40(d) was to be excluded from the waiver agreement.

During the hearing for Case No. 1, the Carrier member did not verbally assert any defense to the possible reinstatement of the Claimant's employment based on Rule 40(d). The same was true of its written submission. Indeed, the Carrier's position in Case No. 1, both verbally and in its submission, was that Rule 40 had been superseded in its entirety by Rule 41 and, therefore, was no longer effective. Further, the Carrier did not reserve any ability to assert Rule 40(d) as a defense, in the alternative, in the event the Board rejected its contention about Rule 41 superseding Rule 40. In short, Carrier's entire presentation in Case No. 1 was absolutely silent on the subject of Rule 40(d).

The Board's initial draft of Award No. 1 was issued in January of 2000, within the six month time period allowed by the parties' waiver agreement. The Board's final award made no substantive changes to the initial draft. The final Award No. 1 is silent on the subject of Rule 40(d) because executive session discussions, via conference call with the Carrier and Organization members, confirmed that Rule 40(d) was never raised as an issue by the Carrier at any time prior to the issuance of the Board's initial draft of Award No. 1. Thus, no reference to Rule 40(d) was necessary in the Award. Moreover, since it was never submitted to the Board as an issue requiring analysis and disposition, the Board may have exceeded the scope of its jurisdiction by attempting to decide any questions about its operation.

We speak to the application and effect of Rule 40(d) now only because the United States District Court has asked us to do so. If the issue were ours to decide, we would find that Rule 40(d) has no application to or effect upon the award of a public law board, regardless of the timing of its award issuance, and that, in any event, the Carrier waived all rights to assert Rule 40(d) as a defense at any stage of the dispute resolution process.

Concerning the application of Rule 40(d), it is well settled that the terms of a collective bargaining agreement should be construed in context with the other provisions of the agreement. When the seven subsections of Rule 40 are examined in context with one another, it is readily apparent that they pertain only to the handling of the dispute on the property by the Carrier and the Organization before it is advanced to a public law board. Examining subsections (c) and (d) together is particularly supportive of this conclusion. They read as follows:

(c) Appeals:

If decision is against the train dispatcher, written appeal may be made up to

and including the highest officer designated to handle such matters; copy of such appeal to be furnished to the officer whose decision is appealed. Such appeal shall be made within fifteen (15) days after date of decision. Conference on appeal shall be granted within fifteen (15) days thereafter, unless otherwise agreed to, and decision rendered within ten (10) days after close of conference.

(d) Reinstatement:

If the decision decrees that the charges against the train dispatcher were not sustained, his record will be cleared of such charges; if suspended or dismissed, he will be reinstated and compensated the amount he would have earned if he had continued in service, less compensation earned in other service with the Carrier. Additional expenses will be reimbursed only as mutually agreed to by the Carrier and the General Chairman. Train dispatchers who have been dismissed will not be reinstated after one (1) year from date of dismissal, except by mutual agreement between Management and General Chairman.

Neither the Carrier nor the Organization provided evidence to show that Rule 40(d) was to be applied more expansively than its terms suggest. It is, therefore, quite clear from the normal meaning of the words used that Rule 40(d) applies only to a reinstatement decision made by a Carrier official that exonerates the employee during the handling of the matter on the property. Without the final sentence of Rule 40(d), there is no effective limit on the amount of time a reinstated Claimant can take to return to work from other non-Carrier employment and still claim full back pay in addition to the earnings received from the outside employment.

In addition to the foregoing substantive finding about the application of Rule 40(d), we would also find, in any event, that Carrier waived all rights to assert the rule as a defense to Claimant's reinstatement by either or both of two well settled aspects of waiver doctrine. First, Carrier affirmatively agreed to waive any Rule 40(d) rights at the outset of the Board's hearing on July 15, 1999. This is confirmed by the Carrier's failure to thereafter assert rights under the rule in any manner whatsoever, either directly or as an alternative, during its presentation on Case No. 1; it did not assert such rights notwithstanding the Carrier's full knowledge that the draft award would not be issued until more than one year after the date of Claimant's dismissal.

The second aspect of waiver doctrine is closely related to the first and flows from railroad arbitration precedent. That precedent requires that procedural objections must be raised at the first opportunity to do so or they are deemed waived. At the Board's hearing on July 15, 1999, the Carrier's member had full knowledge that the Board's draft award would not be issued within one year from the date of Claimant's dismissal. Thus, the Carrier's first opportunity to raise Rule 40(d) as a direct or alternative defense was on that date. Carrier failed to do so. That failure operated to waive its right to assert the defense at any later time.

Our further finding would be that Carrier has wrongfully delayed Claimant's reinstatement

to her former employment. As a result, she should receive full back pay and other economic benefits of employment from February 1, 2000. Had Carrier not delayed her reinstatement, the evidentiary record shows no justification for why her employment should not have been restored by that date.

8/13/2001
Gerald E. Wallin, Chairman
and Neutral Member

David W. Volz 9/5/01
D. W. Volz,
Organization Member

C. D. Kujawa,
Carrier Member

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

Memorandum

TO: Railroad Neutrals

FROM: Roland Watkins, Esq.
Director, Arbitration Service

SUBJECT: Year-end Submission of Vouchers and Fiscal Year 2002 Update

DATE: August 2, 2001

This is to remind you that Fiscal Year 2001 ends on September 30, 2001. I have been informed by the Chief Financial Officer that all travel and pay vouchers received by 4:00 p.m., Thursday, September 27, 2001, will be processed before the financial records are closed, provided there is a previously approved travel and salary (Form 14) authorization on file at the National Mediation Board's office. Any vouchers received after September 27, 2001, will be held until the accounting records have been closed and the financial statements have been prepared. We are estimating that the year-end processing will be completed by October 15, 2001, at which time normal processing of vouchers will resume. Therefore, it is imperative that you submit all outstanding vouchers for salary and travel to the National Mediation Board (NMB) prior to the September 27, 2001, deadline. The Administration and Finance Office will only process the original voucher and not one forwarded by facsimile.

At the present time, Congress has not passed an appropriation for the NMB for Fiscal Year 2002. Because of the Anti-Deficiency Act, the NMB can not authorize or spend monies beyond September 30, 2001. It is suggested that if you have any hearings scheduled for the month of October to reschedule them for the latter part of the year. While the agency anticipates that we will be operating on continuing resolutions, no funds will be authorized for travel if the continuing resolutions are less than a month in duration. Assuming the continuing resolution is for more than two weeks, we will make every effort to authorized some portion of days for the month, but we will not be able to do this until the last minute. We will attempt to inform you of the funding as soon as information is available to Arbitration Services. The NMB will issue notices to you and post information on the web site: www.nmb.gov.

At the present time, the number of case closures is significantly lower than the number for last year. Any decisions that you can render will help NMB in its efforts to seek a significant increase in the daily rate for the neutrals.

If you have any questions, contact Arbitration Services at 202-692-5055.