SPECIAL BOARD OF ADJUSTMENT NO. 1112
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Vs.
BURLINGTON NORTHERN &
SANTE FE RAILWAY CO.

CASE # 77 – AWARD #78 – Maurice L. Sherlock
[Termination – Drugs – Failure to Comply with Medical Instructions]

Dennis J. Campagna, Esq., Referee
William A. Osborn, Carrier Member
Roy C. Robinson, Organization Member

BACKGROUND

A. Special Board of Adjustment #1112

This Special Board of Adjustment was created pursuant to the provisions outlined in a Memorandum of Agreement ("MOA") between the Carrier and the Organization dated September 1, 1982. Appeals reviewed under this MOA are expedited, and the Award resulting from any appeal, bearing only the Referee's signature, is considered "final and binding" subject to the provisions of the Railway Labor Act.

B. The Appellant

Maurice L. Sherlock, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on June 27, 1990. At all relevant times, the Appellant was employed as a Gang Trackman in Wenatchee, WA. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about September 23, 2004, following an Investigation conducted on July 21, 2004, recessed, and reconvened on August 27, 2004, by Wayne G. Lonngren, Roadmaster and Conducting Officer, the Appellant was dismissed from employment, having been charged with a violation of the BNSF Policy for Employee Performance Accountability, effective July 1, 2000, Appendix C, Item 4, for the Appellant's alleged "[f]ailure to abide by the instructions of the Medical & Environmental Department." As a direct result, the Carrier currently seeks, by way of this process, an affirmation of the Appellant's termination from employment.

D. Facts Gathered from the July 27, 2004 Investigation

On July 21, 2004, a formal investigation was begun by Mr. Wayne G. Lonngren, Roadmaster for the BNSF located in Tacoma, Washington, who served as the conducting officer. During the investigation, the Appellant was represented by Mike Garisto, Vice General Chairman, BMWE. Also present at said investigation was Jeff Strop, Roadmaster, who presented Mr. Lonngren with an e-mail from Jim Kennedy, Employee Assistance Manager, Medical & Environmental Health Department (BNSF Account), indicating that he (Kennedy) would "[b]e on vacation and unlocatable until August 5." (TR 5, Exhibit D)[1] The hearing was then recessed. Mr. Garisto raised a Rule 40 objection to the recess, noting on the record that the Carrier should have advised Mr. Kennedy of the investigation together with his obligation to be present for questioning.

The Hearing was reconvened on August 27, 2004. The record created at this formal investigation established that:

[1] References to the official transcript shall be referred to as "TR" followed by the applicable page number. References to Exhibits appended to this Official Transcript shall be referred to as "Exhibit" followed by the appropriate Exhibit Number.

- Jeff Strop was again called by the Carrier as a witness. A careful reading of the transcript makes it painfully clear that Mr. Strop was called strictly for the purpose of introducing Exhibit 1B, a letter dated June 16, 2004 from Martin Crespin, Manager, Medical Support Services, to Douglas Perry, Division Engineer. In his letter, Mr. Crespin noted: "Maurice Sherlock may be in violation [sic] the Burlington Northern Santa Fe Policy on the Use of Alcohol & Drugs, dated September 1, 2003. for failure to abide by the instructions of the Medical & Environmental Department and/or Employee Assistance Program regarding treatment, education and follow-up testing." It was this letter that gave rise to the instant matter. Mr. Strop admittedly lacked first hand knowledge about the alleged violation noted in Mr. Crespin's letter.[2] (TR 6-9)

- Next, Jim Kennedy was called by Mr. Lonngren as a Carrier witness. Mr. Kennedy's testimony via a teleconference prompted a Rule 40 objection by Mr. Garisto who noted: "[A]nd I would further object at this time to anybody testifying via teleconference or any other mechanical means or, communication device. That anybody testifying should be done in person so that the principal has the ability to observe the testimony and to scrutinize it in a full and complete manner. It's a part of due process that Mr. Sherlock is entitled to." (TR 12) Mr. Kennedy rendered the following testimony, notwithstanding Mr. Garisto's noted objection: (1) that a previous "reasonable cause" test revealed the presence of "an illegal drug" in the Appellant's system. (2) pursuant to BNSF policy, Rule 1.5, the Appellant was then referred to a Substance Abuse Professional, (hereinafter referred to as "SAP"), who conducted an assessment, and made recommendations for the Appellant to follow. Pursuant to BNSF Policy, once all recommendations are satisfactorily completed, an employee is returned to work with a one-year probationary period. (3) Robert Lyle was the SAP assigned to the Appellant's case. (TR 21) (4) On or about May 28, Mr. Lyle made a determination that the

[2] Mr. Garisto raised his second objection, noting that the lack of any specificity, particularly with respect to references to BNSF Rules or Policies in either Mr. Crespin's letter or the Investigation Notice represented a per se violation of Rule 40. (See TR 9)

Appellant "[w]as either unwilling or unable to follow through with recommendations." A letter to this effect was sent to Mr. Kennedy, Certified Employee Assistance Abuse Professional, ("CEAP"), as well as to Art Freeman, the Director of Medical Support Services (TR 19)[3] (5) Following receipt of the letter from Mr. Lyle, by letter dated June 16, 2004, Martin Crispin informed the Carrier that the Appellant "[h]as failed to actively comply with proper instructions from the Medical & Environmental Health Department regarding treatment as required by Jim Kennedy, Employee Assistance Manager." (TR 20, Exhibit 1B) During his testimony on August 27th, Mr. Kennedy explained: "Based on, on the multiple violations of, of program recommendations, treatment program recommendations, it was determined that Mr. Sherlock was either incapable or not interested in doing what he needs to do to get himself into a, mental health situation where he could return to work. . . . I think these programs went beyond what they normally do to try to help him. And then finally they had to discharge him from the last program he was in." (TR 21)

- Two letters relating to the Appellant's discharge from the EAP (Employee Assistance Program) were introduced into the record. Those letters are as follows: (1) A letter from Mr. Kennedy, as the CEAP, to Art Freeman, dated June 15, 2004, advising Mr. Freeman of the Appellant's failure to follow the requirements set forth in the "Revised/Third Evaluation and Recommendation dated 4/3/04. Mr. Sherlock has also not complied with the requirements of the Waiver of Investigation set forth in the BNSF Policy on the Use of Alcohol and Drugs as it pertains to the EAP. (Exhibit 1E); (2) A second letter from Mr. Kennedy, CEAP, to Art Freeman, dated June 15, 2004, setting forth a "[c]hronological accounting of events in this case in which SAP sent letter of non-compliance." Mr Kennedy noted an error on page 2 of the letter in that an entry for May 28, 2004 was made twice. (Exhibit 1F, TR 28) Mr. Kennedy explained

[3] The May 28th letter is not part of the record in this matter, and Mr. Lyle was not called by the Carrier to testify.

that the delay of time between the last entry of May 28th and his letter of June 15th was calculated in order to give the Appellant as much time to comply as possible, and that the letter of June 15th was sent only after Mr. Kennedy was certain of the Appellant's continued non-compliance with the EAP. (See TR 29)[4]

- In response by a question from Mr. Garisto to Mr. Kennedy inquiring about the specific events that occurred between May 28th, the date Mr. Kennedy determined that the Appellant was in a state of hopeless non-compliance to June 16th, the date Mr. Kennedy informed Mr. Freeman of such determination, as to what, if any assistance the treatment provider was doing to aid the Appellant, Mr. Kennedy responded as follows: "He was given information at the treatment center as to what he could do. And he apparently chose not to do it. *I, I don't know.* He's never talked to me, he's never called." (TR 34, emphasis added)

- Mr. Strop was recalled in an attempt to ascertain what the Appellant failed to do such that the Carrier determined to remove him from service. Mr. Strop responded that the Appellant failed "[t]o comply with instructions of the Medical Director." (TR 37) No further specifics were given to explain the Appellant's alleged failure to comply. In this same regard, when the Appellant was asked by Mr. Lonngren to "[a]ccount for those instances in which [Mr. Kennedy] repeatedly enumerated instances of noncompliance", the Appellant responded as follows: "I'm sorry, but I'm unable to. Those were terribly vague, and I'm not a record keeper, and I have no way of determining exactly what possible offenses could have occurred at those, on those dates, if any." (TR 42)

- Appellant was requested on two occasions during the investigation to permit Mr. Kennedy to explain the specifics underlying the allegations of the Appellant's

[4] It should be noted that for all dated beginning with February 23, 2004 to and including May 28, 2004, no Carrier witness was called to testify regarding the specific details surrounding the notes of the Appellant's non-compliance.

non-compliance, a request that would have required the Appellant to waive his claim of confidentiality. Twice the Appellant to do so. (See TR 28 & 45) However, the Appellant gave the following response to the following question posed by Mr. Garisto:

Q. [D]uring the course of your treatment did the, were you privy to any information from any the treating counselors that you may be not in compliance with the program? Did they tell you those types of things, or were you kept in the dark regarding?

A. I was pretty much kept in the dark. I, I didn't receive a letter.

(TR 47)

- During his testimony, the Appellant testified that as part of his course of treatment, he was instructed by Mr. Kennedy to contact an SAP, who, in this case was Robert Lyle. (TR 50) Appellant was then referred to Dr. Terry Rogers for drug/alcohol abuse and treatment. (Id.) Dr. Rogers, a medical doctor, was identified as the facilitating coordinator in charge of the Lakeside Mylam Recovery Center in Kirkland, Washington. (TR 47) On April 15, 2004, following the Appellant's completion of an in-house stay, Dr. Rogers released the Appellant "[w]ith a recommended work status of return to full duty without restrictions, effective date 4/16/04." (Id.) A Medical Status Form to this effect was introduced into the record as Exhibit 1H. While this document lists Mr. Kennedy's fax number as having been sent to that number, Mr. Kennedy initially testified that he had no recollection of having received this document. (TR 57) Mr. Kennedy later recalled that he may have had a conversation with Mr. Garisto regarding Dr. Roger's recommended action, but noted that Dr. Rogers, "[t]he doctor made a mistake in saying he should return to work full duty. He must not have known the total situation, and it's not up to him to do that." (TR 58-59) In this regard, Mr. Kennedy testified that following receipt of Dr. Roger's

recommendation, Mr. Lyle, the SAP, made a determination that the Appellant would need to be observed for one month in order to determine if the Appellant could follow directions. (See TR 60)[5]

- Finally, the Appellant is a decorated Veteran, having received the Army Commendation Metal, the Army Achievement Metal, the Soldier's Metal and the Meritorious Service Metal. Tragically, at or near the time of the instant event giving rise to his termination, he lost his 20-year old daughter to cancer.

DISCUSSION

A. The Role of the Referee in the Instant Matter

Pursuant to the Memorandum of Agreement between the parties dated September 1, 1982, the role of the Referee in this matter is three-fold:

1. To determine whether there was compliance with the applicable provisions of Schedule Rule 40;
2. To determine whether *substantial evidence* was adduced at the investigation to prove the charge at issue, and
3. To determine whether the discipline was excessive.

B. Compliance With Rule 40

During the formal investigation, Mr. Garisto raised numerous objections maintaining that the Carrier, in carrying out its duty to conduct a timely, fair and impartial investigation, failed to comply with Rule 40. In this regard, Mr. Garisto maintained that Rule 40 was violated because:

[5] During his testimony, Mr. Kennedy established that he had no authority to override a determination of the SAP, and that neither he nor the SAP had the authority to override the determination of a medical doctor. (See TR 56) Mr. Kennedy later testified that the determination of Dr. Rogers was not overridden, but that Dr. Roger's written determination was "[a] fabrication." (TR 57)

- The Investigation was delayed from its originally scheduled date of July 21, 2004 to August 27, 2004 due to the unavailability of Mr. Kennedy, a Carrier witness, who was on vacation and not reachable. In the case of an employee held out of service, such as the Appellant, Rule 40(B) requires that the Investigation be held within ten (10) days from the date the employee is withheld from service. The Appellant was withheld on or about June 15, 2004.

- The Investigation notice failed to make any reference to the Carrier's September 1, 2003 Policy on the Use of Alcohol and Drugs. (TR 9)

- Mr. Kennedy's testimony was teleconferenced, thereby depriving the Appellant (and his Organization Representative) from observing him during direct and cross-examination; (TR 12-13, 38)

- The testimony of Mr. Kennedy dealt with the Appellant's alleged failure to abide by the instructions of the Medical Department, and not the specifics set forth in the Notice of Investigation. (TR 15) Moreover, the Organization maintained that the dates at issue, February 23, 2004 to and including May 28, 2004, fall well outside the ten (10 day time limit set forth in Rule 40B, (TR 19, 24)

- Mr. Strop, who admittedly had no direct or first-hand knowledge of any relevant events giving rise to the Investigation, had to be "coached" in order to render testimony that made sense. (TR 35)

- That the Carrier tried to illicit credible testimony from the Appellant during their direct examination of him in an effort to bolster their case. In this regard, Mr. Garisto stated: "And it's very clear that the employee that's charged has no obligation to use his personal knowledge of an occurrence or incident if known to fill in the blanks of a general or indefinite or vague charge. . . .Mr. Sherlock is being asked to provide testimony that may, in fact, you know, he's not required to

provide knowledge of his, his knowledge of the incident to be in violation. The Carrier needs to prove that. (TR 44)

Rule 40 represents the results of the mutual understandings between the Carrier and the Organization relative to Investigations and Appeals, and by its very terms, encompasses a just cause requirement surrounded by strict time limits. While there are literally thousands of case decisions applying a just cause principle, just cause remains not an easily defined concept. In one respect, just cause can be shorthand for what the Referee thinks is fair. However, individual notions of fairness vary and the specific facts that lead to discipline are often unique, making it difficult to make a determination on "fairness" alone. More appropriate is a principle that combines established elements of "due process" with the preponderance of the evidence standard. Accordingly, in the instant matter, just cause will be found to exist where it has been established that:

- The due process standards incorporated in Rule 40 have been followed, and
- Where, given the facts, circumstances and evidence in this matter, "substantial evidence" supports the Carrier's conclusion that the Appellant did as he was charged.

Both elements must be present in order for the Carrier to succeed in its case.

While this procedure is appellant in nature, the Referee none-the-less serves as a check against mistaken decisions and provides a determination of whether reasonable grounds exist to believe that the charges made against this Appellant are true and support the proposed action, here, termination. This is the essence of just cause – that the Carrier, in carrying out its right to discipline employees, must do so in a manner that is not unreasonable, arbitrary, capricious or discriminatory. With this understanding firmly established, we now review the Organization's Rule 40 challenges.

A careful review of the record evidence reveals a clear violation of the Appellant's Rule 40 rights. While a degree of latitude can be given to the Carrier relative to the Organization's challenge regarding the relevant dates between February and May, 2004, due to the claim, (as supported by Mr. Kennedy's testimony), that the EAP was giving the Appellant sufficient time to comply with their directives, any latitude granted stops there. In this regard, any reading of the record in this case reveals numerous and material breaches of Rule 40. These breaches include:

- The unfounded delay of the Investigation due to the *inconvenience* of the attendance of a crucial Carrier witness.
- The failure by the Carrier to conduct its query of Mr. Kennedy in a *viva voce* (or live testimony) fashion, particularly given the objections raised by the Organization. In all but the most exceptional circumstances, not present here, due process requires that absent mutual agreement by the parties present, live testimony from crucial witnesses is required in order to give the party against whom the testimony is offered the opportunity to view the testimony first hand, the right to formulate its own credibility determinations, and the right to insure that such testimony is "pure" and not tainted by coaching of any kind.
- The attempt by the Carrier, who carries the burden of proof in this matter, to elicit damaging testimony from the Appellant in an obvious effort to bolster its case.

Given the foregoing material violations, Rule 40(J) requires that the charges against the appellant "[s]hall be considered as having been dismissed."

C. Substantial Evidence Does Not Exist to Support the Instant Charge

Even had Rule 40 been followed in this matter, for reasons noted and discussed below, there is a lack of substantial evidence to support the Carrier's determination.

In the instant matter, the Carrier seeks the Appellant's termination from employment. In is well accepted that termination, often referred to as "industrial capital punishment", is

the most extreme penalty since the employee's job, seniority and other contractual rights and benefits are at stake. In order to safeguard an employee's rights, particularly where termination is sought, and as noted above, the Carrier and the Organization have agreed that the Carrier's determination following an investigation that comports with Rule 40 will not be disturbed where it can be demonstrated that the Carrier's determination is supported by "substantial evidence." It should be noted that while the burden imposed by substantial evidence is not as onerous as the burden imposed by "beyond a reasonable doubt", such burden is far greater than that imposed by a "preponderance of the evidence" standard.

A careful review of the record evidence demonstrates the absence of substantial evidence to support the Carrier's determination of guilt on the part of the Appellant. In this regard, the fatal flaw in the Organization's case centers on the uncontested determination of Dr. Rogers who released the Appellant to return to work, full duty, without restrictions with an effective date of April 16, 2004. The testimony of Carrier witness Kennedy on this crucial point is both inconsistent and troubling. Its inconsistency arises initially as a result of Mr. Kennedy's claim that he had never seen Dr. Roger's report, a report he initially labeled as a fabrication. He later admitted his awareness of the report, but attempted to explain it away as a breach of some form of "past practice". In this regard, Mr. Kennedy's earlier testimony established that neither he, as the CEAP nor the SAP had the authority to overrule the recommendation of a Medical Doctor. However, by refusing to return the Appellant to work full duty, without restrictions, as authorized by Dr. Rogers, this is precisely what the SAP attempted. While Mr. Kennedy's testimony attempts to waive off any conclusion that the CEAP and SAP's determination was a de facto overruling of Dr. Roger's recommendation by justifying the existence of a one month waiting period preceding the Appellant's return to work as the "standard practice", I don't buy it. Aside from Mr. Kennedy's attempt in this regard, the record is void of any evidence in support of this claim. Indeed, the Carrier could have called Mr. Lyle, the SAP, to testify, but it did not do so. Moreover, there is nothing in the record evidence to demonstrate that the SAP's determination to hold the Appellant out of work for one more month was fully explained to and understood by the Appellant. In fact, reliance on Mr.

Kennedy's letter of June 15, 2004, setting forth a series of dates on which the Appellant allegedly breached his agreement to follow the SAP's recommendations reveals a consistent and material lack of communication. Bolstering this conclusion is the uncontested testimony by the Appellant who stated that "[he] was pretty much kept in the dark. [he], [he] didn't receive a letter." (TR 47)

CONCLUSION AND AWARD

Given the foregoing discussion and analysis, it is the determination of this Referee that:

1. The Carrier has failed to comply with Rule 40;
2. Substantial evidence *does not* exist to support the charges at issue. Accordingly, just cause does not exist to support the Appellant's removal from service.

Given this conclusion, Rule 40 requires the following remedy:

- That as a result of the serious breach of the Appellant's Rule 40 rights, "[t]he charges against [him] shall be considered as having been dismissed." (Rule 40(J))

- Having found that the Appellant was unjustly disciplined and/or dismissed, such discipline giving rise to the Appellant's removal from service shall be set aside and removed from his record. Consistent with this determination, the Appellant shall be reinstated with his seniority rights unimpaired, and shall be compensated for wages lost, if any, suffered by him as a result of his unwarranted removal from service. (Rule 40(G)).

Finally, this Referee would be remiss if he did not remind the Appellant of his continued obligation to comply with the Carrier's Policy on the Use of Alcohol and Drugs.

22 Dec. 2004
Dated

Dennis J. Campagna, Referee
SBA No. 1112

SPECIAL BOARD OF ADJUSTMENT NO. 1112
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
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CASE # 77 – AWARD #78 – Maurice L. Sherlock
[Termination – Drugs – Failure to Comply with Medical Instructions]
CARRIER'S REQUEST FOR INTERPRETATION

Dennis J. Campagna, Esq., Referee
William A. Osborn, Carrier Member
Roy C. Robinson, Organization Member

BACKGROUND

A. The Conclusion and Award in Case #77

On or about December 22, 2004, an Opinion and Award was released in this matter in which it was the determination of this Referee that:

1. The Carrier failed to comply with Rule 40;
2. Substantial evidence *did not* exist to support the charges at issue. Accordingly, just cause did not exist to support the Appellant's removal from service.

Given this conclusion, the following was ordered as a remedy:

- That as a result of the serious breach of the Appellant's Rule 40 rights, "[t]he charges against [him] shall be considered as having been dismissed." (Rule 40(J))

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- Having found that the Appellant was unjustly disciplined and/or dismissed, such discipline giving rise to the Appellant's removal from service shall be set aside and removed from his record. Consistent with this determination, the Appellant shall be reinstated with his seniority rights unimpaired, and shall be compensated for wages lost, if any, suffered by him as a result of his unwarranted removal from service. (Rule 40(G)).

Finally, it was noted that "this Referee would be remiss if he did not remind the Appellant of his continued obligation to comply with the Carrier's Policy on the Use of Alcohol and Drugs."

B. <u>The Carrier's Request for Interpretation</u>

On or about January 19, 2005, the Carrier made its instant request for an Interpretation to Award No. 78, and based upon the Carrier's "[u]ncertainty as to the intent and application of this Award", it sought a determination of the following issues:

1. Whether the Carrier may require the Appellant, Mr. Sherlock, to be evaluated by EAP prior to his return to service and to submit to certain further drug testing and medical monitoring, all in accordance with the Policy on the Use of Alcohol and Drugs;
2. Whether allowing telephonic testimony, without the Organization's permission, is a violation of Rule 40;
3. Whether the Carrier's examination of the Appellant, as a witness, is a violation of Rule 40.

The Organization was directed to submit its position regarding each issue raised by the Carrier, and did so in a timely fashion by letter dated February 4, 2005. The positions of each party are set forth below.

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C. The Carrier's Position and the Organization's Response to Each Issue Posed

ISSUE 1: Drug Testing and Medical Monitoring

It is the **Carrier's Position** that this is a matter of safety. Moreover, while noting Dr. Roger's "release" of the Appellant in order to allow him to return to work, the Appellant's obligations to the EAP has not ended. Accordingly, referencing Section 8 of the Carrier's policy on the use of alcohol and drugs, the Carrier maintains that the Appellant must undergo an evaluation and follow-up by a Substance Abuse Professional ("SAP"). The Carrier also places great reliance on a letter from Dr. Michael Jarrard, the Carrier's Medical Officer, dated January 19, 2005. Among other things, Dr. Jarrard references a "correction letter" from Dr. Rogers dated September 14, 2004, wherein Dr. Rogers noted that the date he recorded on the form, April 17, 2004, was in error, and the correct date should have read May 15, 2004.[1] Accordingly, the Carrier notes, the Appellant's return to work cannot be approved until he has satisfied "all medically necessary evaluations" as set forth in the Carrier's Policy. Such appraisal is not satisfied by a return-to-work examination, but requires an SAP assessment interview together with other further testing and medical monitoring.

Putting aside for a moment the Organization's challenge to the attempted introduction of "new evidence", consisting in part of confidential information that should not be disclosed, it is the **Organization's Position** that the issue raised by the Carrier regarding the need for the EAP to evaluate the Claimant prior to his return to service "[i]s moot. It is crystal clear that the Board required that the Claimant comply with the Carrier's EAP."

[1] It is significant that neither letter was part of the record of the Official Investigation in this case. On this basis alone, these letters should not be given any weight by the Referee. A formal ruling on this issue is unnecessary as a result of the decision reached on the Issue posed by the Carrier as it relates to drug testing and medical monitoring.

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DETERMINATION ISSUE 1

The Award on this issue was a clear reminder to the Appellant of his obligation to comply with the Carrier's Policy on the Use of Alcohol and Drugs. In this regard, aside from the Organization's challenge to the Carrier's attempted introduction of materials that were not part of the record, or to other materials of a confidential nature, the Organization, in its response, did not raise an objection to the Issue posed by the Carrier. Accordingly, the Carrier's proposed Issue No. 1 is answered in the Affirmative in that the Carrier may, pursuant to its Policy on the Use of Alcohol and Drugs, require the Appellant to be evaluated by EAP prior to his return to service and to submit to certain further drug testing and medical monitoring that may be required by the EAP.

ISSUE 2: The Use of Telephonic Testimony Absent the Organization's Consent

During the formal investigation, the Organization raised numerous objections maintaining that the Carrier, in carrying out its duty to conduct a timely, fair and impartial investigation, failed to comply with Rule 40. Among such objections, the Organization challenged the Carrier's methodology of conducting its examination of Jim Kennedy, the Certified EAP Professional ("CEAP") via teleconference, maintaining that the Carrier's action in this regard, deprived the Appellant (and his Organization Representative) from observing Mr. Kennedy during direct and cross-examination; (TR 12-13, 38) The Organization further bolstered its objection maintaining that the testimony of Mr. Kennedy dealt with the Appellant's alleged failure to abide by the instructions of the Medical Department, and not the specifics set forth in the Notice of Investigation. (TR 15)

I held, under the specific facts of this case, that the Carrier's action, noted above, breached the Appellant's due process rights under Rule 40.

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It is the **Carrier's Position** that there is nothing in Rule 40 that prohibits the use of telephonic testimony, with or without the Organization's consent. In the instant matter, the Carrier maintains that live testimony from Mr. Kennedy was neither practical nor necessary since he only testified from "medical records, so his demeanor was not at issue." Moreover, the Carrier adds that "[m]ost referees decided that live testimony from medical personnel was unnecessary, except in the most extraordinary cases. In fact, today most such medical testimony is by written statements or by medical records – it is not even by telephone, let alone by personal appearance."

It is the **Organization's Position** that live testimony is required to comply with Rule 40, a position it asserts is supported by numerous decisions from the National Railroad Adjustment Board. (Referring to Awards 25371 and 36945 as attached to their position papers) The underlying concern in each of these cases the Organization notes it's the ability to observe the demeanor of the witness and to make credibility determinations, each of which was lacking in this case.

DETERMINATION ISSUE 2

It is well accepted arbitration precedent, with which this Referee agrees, that the proposed use of telephonic testimony by either party is a case-by-case determination that must be assessed by the specific facts and circumstances of each such case. While the use of telephonic testimony has been generally accepted where such testimony is "pro forma" in nature, such as to authenticate and review documents kept in the ordinary course of business, it is also well accepted that the more substantive and material the testimony becomes, the more likely such testimony, absent the consent of both parties, must be live. Of course, the presence of "extraordinary circumstances", such as where any such witness is truly and legitimately unavailable must be considered as part of the case-by-case analysis. This is the rule from which the Carrier in the instant matter seriously departed.

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In the instant matter, it was clear to this Referee that Mr. Kennedy was called by the Carrier as a crucial witness. Moreover, and in this regard, it was also clear that the testimony from Mr. Kennedy was not solicited by the Carrier simply as part of its pro-forma intent of introducing or authenticating documents kept by the EAP in the ordinary course of business. Rather, it was clear, following a careful review of the Investigative Record, that Mr. Kennedy's testimony went well beyond the normal pro forma boundary, offering specifics and opinions as to why the Carrier was correct in its assertion that the Appellant's actions or inactions violated the Carrier's Policy for Employee Performance Accountability. Indeed, it was apparent that Mr. Kennedy's testimony went well beyond the simple recitation of the chronology of listed events that gave rise to Mr. Crespin, the Manager of Medical Support Services, to state in his letter of June 16, 2004, that the Appellant "*may* be in violation of the Carrier's Policy on the Use of Alcohol and Drugs for his alleged failure to abide by EAP instructions regarding his treatment, education and follow-up testing." (Exhibit 1-B, emphasis added) It was the object of Mr. Kennedy's testimony to fill in the blanks, by showing why the "may be in violation" in Mr. Crespin's letter was really "is in violation". The fact that neither Mr. Crespin nor Dr. Rogers, the Medical Doctor who released the Appellant to return to work, without restrictions on April 16, 2004 were called to testify amplified the material and substantive nature of Mr. Kennedy's testimony. Finally, there was no showing by the Carrier that Mr. Kennedy was truly and legitimately unavailable. Rather, the solicitation of Mr. Kennedy as a live and crucial witness was more of an inconvenience.

Given the foregoing specific facts as they relate to this case, the determination by this Referee that the Carrier's actions breached the Appellant's Rule 40 due process rights stands.

ISSUE 3: **<u>The Carrier's Examination of the Appellant</u>**

During the formal Investigation conducted in this matter, the Organization raised an objection to the Carrier's questioning of the Appellant noting as follows:

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> Mr. Kennedy nor Mr. Strop, as the Carrier witnesses, have provided any information or evidence that would bring forth any violations or, or non cooperation, other than to say it happened. There's no evidence to support the written statements here that Mr. Sherlock did not comply, or violated major programs, or did not cooperate. And it's very clear that the employee that's charged has no obligation to use his personal knowledge of an occurrence or incident if known to fill in the blanks of a general or indefinite or vague charge. The officers of the Carrier have a responsibility to make an investigation prior to serving notice of charges against Mr. Sherlock in this case. (TR 44)

One of the basis upon which this Referee determined that a violation of the Appellant's Rule 40 rights had occurred was "[t]he attempt by the Carrier, who carries the burden of proof in this matter, to elicit damaging testimony from the Appellant in an obvious effort to bolster its case." It is this conclusion to which the Carrier objects.

It is the **Carrier's Position** that "due process, in order to be fair, must extend to the Carrier as well as to the Appellant." Accordingly, the Carrier maintains that a decision that precludes an Appellant from testifying interferes with the Carrier's fundamental right to examine witnesses. Moreover, the Carrier asserts, it is well established that the Appellant possesses no right against self-incrimination under labor law. Accordingly, the Board may draw a negative inference against an Appellant who refuses to testify.

It is the **Organization's Position** that since the Carrier has total control over the investigation process, it is incumbent upon them to insure that the Claimant's due process rights are protected. In this regard, the Organization notes its disagreement with the Carrier's claim of due process rights of its own, in addition to those which must be afforded the Appellant, maintaining that under Rule 40, it is only the Appellant who possesses due process rights. And the Appellant's due process rights were violated by the Carrier's attempt to make its case "[b]y distorting the Claimant's testimony when its own witness was unable to do so."

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DETERMINATION ISSUE 3

As an initial matter, the Organization is correct in its assertion that it is the Appellant, and the Appellant alone who possesses due process rights under Rule 40. In this regard, it is well accepted that where, as here, the Carrier maintains total control over the decision to discipline and employee, and where such decision is followed by an investigation over which the Carrier maintains total control, the Carrier's claim to "due process" becomes oxymoronic in nature.

As to the issue regarding the Carrier's right to examine an Appellant, it is clear that they possess the right to do so. Such right however is not without limitation. For example, in the instant matter, it was clear that the Carrier was attempting to solicit a response from the Appellant in an effort to fill in the many gaps left by Mr. Kennedy, its chief witness. In this regard, during his questioning of the Appellant, Mr. Lonngren asked the following: "You hear testimony provided by Mr. Kennedy today regarding your participation in that program. Can you account for those instances in which he repeatedly enumerated instances of noncompliance?" A complete response by the Appellant to this question posed by Mr. Lonngren would necessarily have required the Appellant to disclose information of a confidential nature, information the Appellant had already informed Mr. Kennedy he did not wish to be disclosed. This tactic was improper.

At the 19th annual meeting of the National Academy of Arbitrators, a New York tripartite committee found it permissible for a party to call a witnesses from the opposing side, such as the Appellant, and to treat him/her as hostile, but warned that the Arbitrator should assume responsibility for ensuring that direct examination is proper and that the witness is protected against unfair tactics.[2] This Referee subscribes to this proposition. Indeed, this obligation on the part of the Arbitrator/Referee is consistent with the Appellant's right to due process under the just cause principle inherent in Rule 40. In the

[2] See Jones, in Problems of Proof in Arbitration," Proceedings of the 19th Annual Meeting of the NAA, at 301.

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instant matter, this Referee concluded that this particular line of questioning by the Investigating Officer was improper for the reason noted above.

CONCLUSION

For the reasons noted and discussed above, it is the Conclusion of this Referee that the Issues raised by the Carrier be answered as follows:

ISSUE 1 – Answered in the Affirmative.

ISSUE 2: - The use of telephonic testimony remains a case-by-case determination. Under the specific facts of this case, the Carrier's use of telephonic testimony to examine a primary witness for the purpose of soliciting testimony of a material and substantive nature was improper, particularly where, as here, there was no showing by the Carrier that such witness was legitimately unavailable.

ISSUE 3: - While the Carrier maintains the right to call and examine an Appellant as a witness, the Carrier's examination of the Appellant as a witness in this case was improper for the reasons noted above.

02-05-09
Dated

Dennis J. Campagna, Referee
SBA No. 1112