Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42440
Docket No. SG-42619
16-3-NRAB-00003-140073

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Railroad Signalmen**
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(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of M. K. Johnson, for the claim filed on his behalf dated September 6, 2012, which sought his restoration to service with all employment rights, payment for all time lost, and any mention of the discipline imposed upon him removed from his personal record, to be allowed as presented, account Carrier violated the current Signalmen′s Agreement, particularly Rule 53, when it failed to notify the Claimant or his representative in writing within sixty (60) calendar days its reasons for denying said claim. Carrier′s File No. 12-038-BNSF-121-T. General Chairman′s File No. 35-13-0002. BRS File Case No. 14947-BNSF."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On May 6, 2012, while assigned to a Company vehicle, the Claimant was cited by a Kountze Police Officer for public intoxication and open container. In the police report, the officer stated: "This officer's professional opinion is that Johnson presented a significant risk to himself and the public . . . ."

On May 8, 2012, the Company issued him a Notice of Investigation to take place May 16, 2012. After multiple postponements, the Carrier held an investigation hearing on June 2, 2012 for the purpose of assembling relevant evidence. The Claimant was found to have violated MOWOR 1.5 Drugs and Alcohol. Since it was his second such violation in ten years, he was dismissed from service.

The Organization protested the discipline, which the Carrier rejected on appeal. The claim was fully processed, without resolution. As a result, the Organization presented the dispute to the Board for hearing and decision.

The Carrier maintains that none of the Organization's procedural objections hold water and a late denial does not end the case. Rather, it tolls the Company's liability. It argues that the majority of decisions on the subject acknowledge the decision in NDC 16 and grant back pay for the duration of the delay while otherwise denying the claim. It also contends that public policy militates against a finding that this employee is fit to work.

As to the Organization's complaint that the failure of the police officer to testify rendered the hearing unfair, the Carrier asserts this protest has no legs because the Organization made no request for the officer to appear. The Carrier notes that documents such as a police reports are admissible. In its view, the Claimant is in a safety sensitive position and it is absolutely essential that he not be under the influence of alcohol while on duty. It asserts it had substantial evidence to support its disciplinary decision and the penalty must be found reasonable and proper.

The Organization takes the position that the Carrier violated Rule 53 of the collective bargaining agreement by failing to provide an answer within negotiated time limits. The untimeliness of the Carrier's response is uncontested. In the Organization's view, the Carrier cannot be allowed to cure this fatal error by offering eight days of compensation. It contends that due to this fatal procedural error, the merits of this case are not properly before Board. In its view, none of the awards cited by the Carrier apply to disciplinary cases. It distinguishes them on the grounds that they involved continuing liabilities, whereas the case here concerned involved disciplinary action, by definition entail a singular event.

The Organization emphasizes that no alcohol or breath test was performed, and concludes that there was no proof that the Claimant had been drinking or had an open container with alcohol in the vehicle. In support of this conclusion, it points out that the Claimant denied drinking and said a friend threw a coozie into his truck which happened to have an empty beer can in it. It notes that an empty beer can with no alcohol in it is not a violation of the rule against possession of alcohol.

The officer did not appear to testify and the Organization protests that it had no opportunity to cross examine him. The Organization maintains the Board must reject the police report as prejudicial since it was not corroborated by any other witness.

The initial claim was filed on September 6, 2012 and the Carrier denied the claim on November 13, 2012. This was the 68th day, eight days beyond what is allowed by the Agreement. The requirements of Ru1e 53 are as follows:

> **"RULE 53. TIME LIMIT ON CLAIMS-GRIEVANCES**
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> **A. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) calendar days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) calendar days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."**

The Board is not persuaded that the instant claim is continuing in nature. The dismissal was a distinct and singular action by the Carrier. The fact that a back pay remedy continues to accumulate does not alter this fact. Contract violations may be continuing in nature where time limits can walk with repeated violations. By contrast, the alleged contract violation here was a dismissal which took place on July 10, 2012.

The Carrier has cited numerous Division awards and Public Law Board cases in support of its position on the remedy for timeliness. However, a number of those awards do not provide interpretation of the mandatory default language "allowed as presented," and therefore fail to provide the Board any guidance: Third Division Awards 26239, 35395, 36305, Fourth Division Awards 4600, 4772, Public Law Board 5020, Award No. 1 and Public Law Board 4244, Award No. 357. The Organization

contends that the jurisdiction of the National Disputes Committee (NDC) is limited to proper interpretation and application of Article V, yet its Decision 16 did not involve that article. It maintains the Carrier has no support for its assertion that Decision 16 applies to discipline cases.

Two decisions by the National Disputes Committee (NDC) are repeatedly cited as the basis for the decisions reached: NDC 15 and NDC 16.

NDC 15, dated March 17, 1965 stated as follows:

> **"In this connection the National Disputes Committee points out that where either party has clearly failed to comply with the requirements of Article V the claim should be disposed of under Article V at the stage of handling in which such failure becomes apparent. If the carrier has defaulted, the claim should be allowed at that level as presented; and if the employee representatives have defaulted, the claim should be withdrawn."**

Under the terms of this decision, withdrawal of the claim resolves the claim in its entirety. By the same token, allowance of the claim would entail total resolution as well. In this instance, the Committee allowed the claims as presented on the basis of failure of the Carrier to comply with the requirements of Article V of the Agreement of August 21, 1954.

NDC 16, also dated March 17, 1965, ruled that receipt of the Carrier's denial letter dated December 29, 1959 stopped the Carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement. The Committee stated in pertinent part: "Claim for compensation for each day from August 16, 1959 to December 30, 1959 shall be allowed as presented, on the basis of failure of the Carrier to comply with the requirements of Article V of the Agreement."

The term "claim for compensation" as used in NDC 16 is at odds with "the claim or grievance" which is to "be allowed as presented" under Rule 53; indeed the term does not appear anywhere in that provision. Allowing a "claim for compensation" as the remedy for untimeliness is quite distinguishable from allowing the original claim or grievance filed under Rule. It follows that close examination of the terms of Rule 53 is warranted.

Rule 53 begins with the requirement that "All claims or grievances must be presented in writing" within 60 days. In this context, the term "claims or grievances" plainly refers to the initial claim. The 60-day time limit starts with "the date of the

occurrence on which the claim or grievance is based," again referring to the initial claim. The provision then goes on to establish a notification requirement "should any such claim or grievance be disallowed." The choice of the word "such" refers back to the claim originally filed. In establishing the notification requirement, the provision again refers to the original "claim or grievance," stating the Carrier shall "notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons."

It can be seen that the drafters of this provision repeatedly and consistently used the terms "claim or grievance" in reference to the original claim which initiated the grievance process. The provision goes on to require the "claim or grievance" to be "allowed as presented" in the event a party is not "so notified." The "claim or grievance" referred to in this instance does not appear to vary or depart from the terms "claim or grievance" heretofore used to refer to the initial claim. To the extent that Decision 16 and the awards it spawned have recognized a "claim for compensation" as inherent in existing claims or grievances, the Board is persuaded that this interpretation is limited to the non-disciplinary context, and is not applicable here. It follows that the "claim or grievance" which originally initiated the grievance process must be "allowed as presented."

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of October 2016.