PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 475 – Award No. 475 – Leon
Carrier File No. 14-14-0300
Organization File No. 180-SF13C2-1410

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 14, 2014, when Claimant, Michael A. Leon (11169876) was dismissed for misuse of BNSF vehicle 21606 on March 20, and March 27, 2014, while working as a machine operator on the Needles Subdivision. The Carrier alleged violation of the BNSF Maintenance of Way Safety Rule (MOWSR) 12.0 Motor Vehicles and Trailers, MOWSR 12.1 Operation of Motor Vehicles, MOWSR 12.1.1 General Requirements, Engineering Instruction (EI) 15.1 Governing Policies and Procedures and Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct.

2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this dismissal and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing July 14, 2014, continuing forward and/ or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Michael A. Leon, had been employed by the Carrier since 1996. On April 22, 2014, the Carrier directed Claimant to attend an investigation on April 30, 2014, to ascertain the facts and determine his responsibility, if any, in connection with his alleged misuse of Carrier vehicle 21606 on March 20, 2014 and March 27, 2014 while

working as a machine operator on the Needles Subdivision. The Carrier claimed first knowledge on April 17, 2014. The Investigation Notice stated that the hearing would determine possible violations of BNSF Maintenance of Way Safety Rule (MOWSR) 12.0 Motor Vehicles and Trailers, MOWSR 12.1 Operation of Motor Vehicles, MOWSR 12.1.1 General Requirements, Engineering Instruction (EI) 15.1 Governing Policies and Procedures and Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct. Following the investigation, the Carrier found Claimant guilty of the violations alleged and dismissed him from service.

MOWOR 1.6 Conduct provides, in pertinent part:

> Employees must not be:
> ***
> 4. Dishonest
> ***

Carrier Needles, California Roadmaster Frank Barrera testified that at the relevant time, the surfacing gang that covers the Needles Subdivision was working on his territory and he was responsible for their overall day-to-day activities. He explained that the gang had some problems with their assigned vehicle and were waiting for a replacement. He obtained a loaner, but the employees still had to use the fuel card assigned to their original vehicle. An employee must enter his driver number to purchase fuel.

Mr. Barrera stated that as part of his budgetary responsibility he regularly pulls the vehicle fuel records on a monthly basis to monitor the fuel cards' use. Mr. Barrera took exception to two dates, March 20 and March 27, 2014, when Claimant fueled the vehicle in Barstow, California at times which did not match his pay records for hours of service on those days. Mr. Barrera added that Barstow is not part of his governing territory, which stops almost 60 miles east.

Mr. Barrera testified that ARI would usually generate fuel charge information within a day, but he pulled the information for March 20 and March 27 on April 17, 2014. April 17 was the first time he could confirm exactly where the vehicle had been. He requested the records on April 16.

Mr. Barrera stated that he then spoke with Claimant's foreman, Alex Villegas, who told him he had sent Claimant to Barstow to pick up broom elements for a regulator and bring them back, but he and Claimant then had a conversation about using the vehicle to travel home because he did not have a personal vehicle. Mr. Villegas, Mr. Barrera explained, told Claimant he would have to contact Mr. Barrera for that sort of permission.

Mr. Barrera testified that Claimant never contacted him to request permission. He stated that he and Claimant were together at an accident investigation on April 14, 2014,

and he asked Claimant if he had taken the vehicle home for personal use, and Claimant stated that he had. He asked Claimant who had given him permission, and Claimant replied that he did not get permission because he believed he was entitled to use the vehicle. Mr. Barrera stated that he told Claimant Carrier policy did not allow an employee in Claimant's position to use a Carrier vehicle for personal use.

Mr. Barrera stated that of the positions he supervises, only track supervisors who must be available to take calls for service interruptions 24/7 are allowed to take Carrier vehicles home. At that time, he testified, he and Claimant did not discuss the dates or times when Claimant had used the vehicle. Mr. Barrera added that he told Claimant they were at the location for another purpose and would take the matter up again later.

Mr. Barrera stated that Claimant later came to his office and apologized for using the vehicle without permission.

Carrier Foreman Alex Villegas testified at the investigation that he was in charge of Claimant's gang at the time of the incident. He stated that Claimant talked about taking his Carrier vehicle home, and he told Claimant he would need to contact Mr. Barrera to ask if he could do that. Mr. Villegas stated that he did not have that authority. He explained that on one occasion, when some of his equipment was not in his area, he did authorize Claimant to take the truck to Barstow to pick up the needed materials. That trip, however, was for Carrier, not personal, purposes.

Machine Operator Frank Rivera, a member of Claimant's gang, stated that Claimant admitted that he used the truck for personal reasons but he never actually saw him do so.

Claimant testified at the investigation that he was working as a Tamper Operator at the time of the incident. He stated that when Mr. Barrera approached him on April 14, 2014 he did not deny that he drove his Carrier vehicle to Barstow. He stated that as far as he knew it was OK to do that. Claimant acknowledged that his foreman had spoken to him about the matter, but he did not recall that he was told to talk to Mr. Barrera. He did recall that one of the "other guys" had mentioned that he should talk to Mr. Barrera before using the vehicle. He explained, however, that he believed he could take the vehicle to Barstow for personal use. He acknowledged that he had access on the Carrier's website to the policies governing personal use of Carrier vehicles, but said he was not aware that those policies existed.

Claimant's personal record shows a formal reprimand in 1998 for leaving a Carrier radio unattended, and a Level S 30-day record suspension, with a 12-month review period, assessed on January 1, 2014 for failing to work within acquired track and time authority.

The Carrier's Policy for Employee Performance Accountability (PEPA) provides that for "Serious Rule Violations," as defined in the policy's Appendix A, an employee will receive a 30-day record suspension, and a second serious incident within a 36-month review period will subject the employee to dismissal. Section III of the policy, **Stand Alone Dismissible Violations,** provides that violations identified in Appendix B may result in immediate dismissal. Appendix B includes "1) Theft or any other fraudulent act, which may be evidenced by the intent to defraud BNSF or by the taking of BNSF monies or property not due" as a stand-alone dismissible offense.

With respect to the Organization's contention that the Carrier did not hold the investigation in a timely manner, the Carrier notes Roadmaster Barrera's testimony that although he mentioned the incidents to Claimant on April 14, 2014, he did not receive information from ARI, the department which monitors the Carrier's fuel cards, until April 17, 2014, and that is the date which triggers the time period for issuance of an investigation notice. Once the Carrier obtained ARI's information and became aware of a possible Rules violation, it timely issued the Notice, on April 22, 2014, and scheduled the investigation for April 30, 2014, within the Agreement timeline of 15 days. The Carrier also notes that the investigation was thereafter postponed three times by mutual agreement.

However, the Carrier explains, even if the Organization's argument has merit, Decision No. 16 of the National Disputes Committee, like an untimely letter issuing discipline, would cure the 15 days after the Carrier's first knowledge. In accordance with NDC 16, liability, if any, would be limited to the date of the initial letter. Therefore, the Carrier compensated Claimant for one day to mitigate this argument.

The Carrier points out that this question has been settled, especially in the award in PLB 4370 No. 63, which held that on the question as to whether a claim should be "allowed as presented, that is, the disciplinary action rescinded and the claimant made whole, or whether the carrier's reply terminated the period for which the carrier was liable, without respect to the merits of the matter." That Board stated it was persuaded that the Carrier's position was correct. The Carrier also references Third Division Award No. 32889, which recites several earlier decisions, and stated that it would follow that precedent, because it provided the parties a greater degree of certainty and predictability in their claims handling process. Therefore, the Carrier concludes, the Organization's procedural arguments must be rejected.

On the merits, the Carrier states that this case is not complicated. Claimant's foreman, Mr. Villegas, told Claimant he needed to talk to Roadmaster Barrera prior to taking the Carrier's car home for his personal use. The Carrier notes Mr. Barrera's testimony that not only did he find records for the vehicle that did not match his territory, but Claimant never did ask for permission to take the vehicle home.

Moreover, the Carrier points out, Claimant admitted he used the Carrier truck, without permission, for personal business. It has been held repeatedly, the Carrier states, that such an admission of guilt is sufficient to satisfy the Carrier's burden of proof.

The Carrier adds that Claimant had 18 years of service and was well aware that he could not drive the Carrier vehicle home for personal use. It is clear, the Carrier asserts, that Claimant violated the applicable Rules by his dishonest behavior, and the Carrier's Policy for Employee Performance Accountability (PEPA), as well as established precedent, provide that such conduct is cause for dismissal regardless of the employee's length of service. The Carrier asserts that it has proven the charges against Claimant by substantial evidence and dismissal was the appropriate penalty. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive objections to the discipline issued against Claimant. The Organization argues that the Carrier did not hold the investigation in a timely manner, as ATSF Agreement Rule 13 clearly states that an investigation must be scheduled and held within 15 days of the occurrence. Mr. Barrera acknowledged that he questioned Claimant on April 14, 2014 about his use of the truck, and Claimant admitted that he had used it for personal reasons. The Investigation Notice states that first knowledge was April 17, 2014, but that is nothing more than a futile attempt by the Carrier to protect its time limits. ARI reports are generated whenever the Carrier requests them, the Organization asserts. Their failure to do so once they were aware of Claimant's conduct should not allow them to claim first knowledge when they received the report, the Organization contends. Therefore, the Organization contends, this hearing should have been cancelled.

On the merits, the Organization points out that Claimant was forthcoming and truthful throughout the investigation. Mr. Barrera never provided any evidence that Claimant was aware his practice was unacceptable, and the Carrier has failed to meet its burden of proof, the Organization contends. Even if it had, the penalty is extreme and unwarranted. The Organization contends that both the Rule 13 violation and the evidence require that the claim be sustained.

We have carefully reviewed the record in its entirety. With respect to the Organization's objection that the Carrier failed to schedule the investigation in a timely manner, the record is clear that the Carrier was aware that Claimant had violated Carrier Rules no later than April 14, 2014, when Claimant admitted as much to Mr. Barrera. The fact that Mr. Barrera did not procure the specific information about the dates at issue until April 17 cannot extend Carrier's "first knowledge" to that date. April 14 triggered the 15-day timeline for scheduling the investigation. However, the Carrier has asserted, and cited authority in support of the assertion, that in such situations the remedy is that the Claimant is entitled to compensation for the time outside the Notice period, not that the claim be automatically allowed. The Carrier contends that it did in fact compensate

Claimant in this manner. While the record is not conclusive on this point of interpretation, it contains nothing to the contrary. We are bound to the record before us, and we find that the weight of the record in this case provides greater support for the Carrier's position than for the Organization's position.

On the merits, Claimant admitted that he used the Carrier vehicle for personal use, even though the record clearly establishes he was aware he needed Roadmaster Barrera's permission to do so and did not obtain it. This is a harsh situation for an 18-year employee with a relatively minimal disciplinary history, but we cannot dispute the Carrier's determination that Claimant appropriated Carrier property to his own use and thereby committed theft. The Carrier has met its burden of proving Claimant's guilt by substantial evidence.

Given that fact, the question becomes whether the Carrier abused its discretion in determining that dismissal was the appropriate penalty for Claimant's misconduct. Theft is among the most serious offenses an employee can commit, as it goes to the very heart of the employer-employee relationship. Arbitration boards in this industry routinely uphold dismissal for such conduct, even for a first offense, and the penalty in this case was assessed in accordance with the Carrier's PEPA. The Organization's arguments are essentially requests for leniency. However, it is well established that leniency is the province of the Carrier, not this Board. Therefore, we find no reason to overturn the Carrier's determination to assess the penalty of dismissal against Claimant.

AWARD

Claim denied.

DAN NIELSEN
Neutral Member

JOY MENDEZ
Carrier Member – I Concur

DAVID SCOVILLE
Organization Member, Dissenting as per attached:

Dated this 12th **day of** Oct **, 2016.**

Labor Member's Dissent to
PLB 5850 Award 475
Neutral Member Daniel Nielson

The Labor Member of Public Law Board 5850 cannot and will not agree with the majority in the instant case. We believe the decision is based on flawed logic and is palpably wrong. Therefore it cannot be considered to hold any precedential value.

The Collective Bargaining Agreement rule controlling discipline investigations on this property clearly states that an employee in service sixty days or longer will not be disciplined or dismissed until after a fair and impartial investigation. "Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of occurrence, except that personal conduct cases **will be subject to the fifteen (15) day limit** from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rules." (Emphasis added) The Neutral correctly recognized and articulated that the Carrier's first knowledge was the date the Claimant admitted to his manager that he had used the truck for an unauthorized purpose and this first knowledge could not be extended by waiting for a report from the fuel management company. The hearing was subsequently scheduled and held outside of the time limit specified in the rule and was clearly in violation of the Rule. In short, the hearing should not have taken place and all of the discipline proceedings should have been canceled. The Carrier defended its failure to provide due process in scheduling the hearing by invoking National Disputes Committee Decision No. 16 (NDC 16) and effectively buying back the claimant's due process, something that is intrinsically absurd and leads to a nonsensical conclusion.

Moreover, NDC 16 did not address any time limit with respect to discipline. It was in fact, an interpretation of the consequences of defaulting under the Claims and Grievance rule (Article V of the 1964 National Agreement) in continuing claims. Award 92 of Public Law Board (PLB) No. 1582 defined a continuing claim and held:

> **"A discharge is not a continuing claim. A continuing claim is a type of claim which occurs daily or with certain frequency."**

Discipline, although there may be continuing liability, is based upon a single event and cannot be considered as a continuing claim. (see Third Division Award 37085 and cited awards therein). Third Division Award 37085 held:

> **"The Board has repeatedly held that while a claim may indeed have continuing liability flowing from a specific event, there cannot be a continuing claim when such claim is based on a specific act that occurred only once. Support for this principle is found in Third Division Awards 31043, 28826, 25538,23953,21376,20655, 14550, 12984, 11167 among others."**

Arbitral precedent holds that a discipline claim does not constitute a continuing claim and therefore, NDC 16 simply does not apply. (see Second Division Award 9354, Third Division Awards 27842, 41682, Award 445 of Special Board of Adjustment (SBA) 279, Award 133 of PLB No. 4554, and Award 1 of PLB No. 7702)

Even if a colorable argument could be made to apply NDC 16 in the instant case, the National Dispute Committee dealt with time limits regarding claims and grievances, not time limits for holding an investigation pursuant to a disciplinary rule. At the time of the instant violation to Rule 13, there as yet was no grievance or appeal. There had been no decision on which to base an appeal. NDC 16 did not interpret the time limits of a discipline rule. Therefore, NDC 16 would have no applicability to the instant dispute. Every award cited by the Carrier in support of its argument dealt with the time limits for claims or appeal which had been breached by one party or the other. In fact, Award 32889, cited by the Carrier, held

> **"The Proper Application of NDCD No. 16 has been the subject of many Awards of the various divisions of this Board as well as several Public Law Boards. Most of them, if not all of them, have been provided to us. They have all been studied in detail. Because a few have already done a thorough well-reasoned analysis of the proper application of NDCD No. 16, we will not attempt to do so again here. See, for example, Third Division Award 27842. On this property, however, the parties already have Award 63 of Public Law Board No. 4370, issue don march 7, 1997. This decision interpreted the identical time limits language. We will follow this precedent because to do so provides the parties with a greater degree of certainty and predictability in their claims handling process."**

Award 32889 clearly is interpreting the claims and grievance rule of the Colorado and Southern Railway Company and not the time limits contained within its discipline rule. Moreover, it acknowledged the correct application of NDC 16 was provided in Award 27842, which held that NDC 16 does not apply to discipline cases. Notwithstanding, Award 32889 held that it would ignore the correct application of NDC 16 and apply the findings of Award 63 of PLB No. 4370, which also interpreted the claims and grievance rule of the Colorado and Southern Railway Company. Accordingly, the Awards cited by the Carrier do not support the Board's application of NDC 16 to the instant case.

Moreover, the National Disputes Committee itself never intended for NCD 16 to apply to discipline. In this connection, Award 133 of PLB No. 4544 held:

> **"First the contemporary understanding when NDC No. 16 was adopted thirty years ago, was that it was only applicable to 'rules' cases, and that it would have no application to discharge cases. The minutes and notes of the members of the National Disputes Committee will show that discipline cases were to be dealt with in a later decision. The case involved in NDC 16 was the claim in the Docket before the 3rd Division in Award No. 13780, BRC and DRGW, (July 29, 1965). That docket was not a discipline case - it was a rules case - it involved the abolishment of a position. And, review of the early awards applying the teachings of NDC 16 indicate that few if any were dismissal cases."**

To believe that simply buying up liability could bring back due process to an aggrieved individual is naive at best. Using that logic, a Carrier could hide in the weeds for six months or a year before charging an individual with something that had occurred in the distant past, then resolve its time limit issue by compensating the employee for his time leading up to the charge. One can see that an employee working up until the time of the filing of charges, would be helpless to regain due process while the Carrier would arguably have no liability. This nonsensical logic renders Rule 13(a) impotent and meaningless. That is not the intent of the rule and that does not serve due process. Applying NDC 16 to discipline cases would create an unjust result. In this connection, Award 133 of PLB No. 4544 held:

"And, third, and perhaps most important, applying the concepts of NDC 16 to discharge cases is patently unfair. If a Carrier would 'blow the time limits' all that is necessary is that they make a monetary payment and the case proceeds on its merits thereafter. However, if the Organization 'blows the time limits' for whatever the reason, the matter is ended then and there, and the Grievant would never be able to have the matter considered on its merits. For example, the Grievant would not just lose the monetary remedy he was seeking, but the merits aspect of the case as well. Without involving NDC 16 into dismissal cases the players are on even ground."

Put another way, applying NDC 16 to express due process provisions allows the Carrier to undermine the fundamental fairness by use of its check book. In other words, the Carrier is not providing fundamental due process, but instead just takes it from the employee, and then issues a check. However, that check cannot bring back the fundamental fairness that was lost. Express due process provisions such as time limits the Carrier has to charge an employee should not be open to manipulation by either party.

More applicable are the scores of awards that have held that arbitrators must enforce the party's time limits. First Division Award 26973, 27539, Second Division Award 11186, Third Division Awards 23459, 26722, and 28927. Typical thereof are First Division Award 26973, Second Division Award 11186 and Third Division Award 28927, which held:

First Division Award 26973:

"The Board has consistently held that if time limits for holding Hearing or rendering decisions have been breached, the discipline must be set aside. Accordingly the claim will be sustained."

Second Division Award 11186:

The investigation of September 5, 1985, was not conducted within the specified time limits of Rule 23(b). The National Railroad Adjustment Board has held in numerous decisions that where time limits for holding Hearings or for rendering decisions have been breached, Carrier's action violates the Agreement and Carrier's disciplinary action must be set aside. First Division Awards Nos. 19378, 16366, 15046.

Third Division Award 28927:

"The time limit as set forth is clear, unambiguous, and mandatory. It has not been met by the Carrier in this case. We will not, therefore, examine the merits of the discipline inasmuch as the Investigation was not timely held. This Board has ruled in many cases, too numerous to require citation here, that time limits such as those found in Rule No. 25 are meant to be complied with. When they are not complied with, we will sustain the Claim of the Organization."

In the instant case, the Neutral simply misapplied NDC 16. The Carrier might argue that this was not argued on the property. We firmly believe that it is within the purview, indeed the obligation of the neutral to consider whether an argument or in this case, a purported supporting award, is on point. The party's failure to raise specific issue with the applicability of an award, does not make it applicable or on point. That is up to the arbitrator to determine. In the instant case, the arbitrator bought into an

argument presented by the Carrier without considering whether that argument was on point; as clearly it was not. This case should have never reached the merits and the Claimant should not have suffered dismissal because the Carrier undeniably violated the Agreement by not providing the Claimant with his due process rights. No amount of money can get that back!

I vigorously dissent to this decision

David R. Scoville, Labor Member