PUBLIC LAW BOARD NO. 7394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

(Former St. Louis—San Francisco Railway Co.)

Case No. 63; Award No. 63 (Ponzer)
Carrier File No. 12-15-0127
Organization File No. 493-FR91D2-153
NMB Subject Code 119

STATEMENT OF CLAIM:

Claim of the Atchison Topeka & Santa Fe Frisco System Federation of the Brotherhood of Maintenance of Way Employes Division of the International Brotherhood of Teamsters, Region I that: ". . . Mr. Ponzer was not guilty and by the violations to due process of the Railway Labor Act, expressed in SLSF Agreement the Organization contends the assessed discipline is excessive and unwarranted Mr. Ponzer should be placed back in service immediately with all charges dismissed and removed from his record with ALL monetary losses incurred be repaid to Mr. Ponzer."

FINDINGS:

Public Law Board No. 7394, 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, Frank L. Ponzer, had been employed by the Carrier since 1992. On April 21, 2015, the Carrier charged Claimant to attend an investigation on May 4, 2015, to ascertain the facts and determine his responsibility, if any, in connection with his alleged falsification of payroll on April 7, 2015, when he claimed pay for working at a time he was observed conducting personal business. The Carrier claimed first knowledge on April 20, 2015. On July 9, 2015, the Carrier found that Claimant had falsified payroll on January 15, 2015 and dismissed him from the Carrier's employment. The Carrier stated that it had determined that Claimant had violated Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct, which prohibits dishonesty. Claimant had no previous disciplinary record.

At the time of the incident, Claimant was an independent Special Equipment Operator (SEO) headquartered at Cuba, Missouri. The Carrier maintains a hotline for employees and other individuals to report misconduct by Carrier employees. On or about January 15, 2015, the hotline received an anonymous call reporting that on or about January 15, 2015, Claimant had used a Carrier vehicle to travel to Smith Sand and Gravel in Rolla, Missouri, where he purchased stone for personal use, had it loaded into the Carrier vehicle and transported it to his home.

Carrier Roadmaster Whitney Weston testified at the investigation that on or about April 16, 2015, she received a report from Ann Chavez, the director of the Carrier's hotline for reports of employee misconduct. The report indicated that on or about January 15, 2015, the hotline received an anonymous call alleging that Claimant had, on that date, used his Carrier vehicle to transport gravel from Smith Sand and Gravel in Rolla, Missouri, to his home, for his personal use.

In her report, Ms. Chavez noted that she had, on April 14, 2015, spoken with an individual named Larry Smith, purportedly the owner of Smith Sand & Gravel, who remembered that Claimant had come in to pick up six tons of gravel, paying in cash. She stated that Mr. Smith told her he did not know if the gravel was for personal or Carrier use, and he did not have an invoice or receipt. The report concluded that Ms. Chavez had no further avenues to prove or disprove the anonymous hotline allegations.

On or about May 1, 2015, Ms. Weston checked Claimant's payroll records for January 15, 2015, which showed that Claimant worked his regular assigned hours of 7 a.m. to 5:30 p.m. on January 15, 2015. She also ascertained that he had been driving a Carrier dump truck on that date, and obtained records showing that he had fueled the truck. There were no records showing his actual location at any time.

The record also includes an e-mail to Ms. Weston, purportedly from Mr. Smith, dated May 20, 2015. Ms. Weston testified at the investigation that she met with Mr. Smith about a week before that, and asked for the e-mail to confirm their conversation. The email states that Mr. Smith knew who Claimant was, and he did pick up a load of river rock on January 15, 2015, in a Carrier vehicle. Ms. Weston stated that she did not show Mr. Smith a photograph of Claimant. The e-mail stated that Claimant had paid $40 in cash, but Mr. Smith did not have a receipt.

We have carefully reviewed the record in its entirety. The Organization asserts that the claim must be sustained on various procedural grounds. As the Organization points out, the Investigation Notice stated that Claimant was accused of falsifying time on April 7, 2015. At the opening of the hearing, which was eventually held on June 12, 2015, the Hearing Officer stated that the date was a typographical error, and the incident date was in fact January 15, 2015, and that is the date the investigation focused on, and the basis of the eventual dismissal. The parties' agreement requires that an investigation "shall be set promptly to be held not later than fifteen (15) days from the date of the 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..." Clearly the Notice of investigation and all of the subsequently scheduled and rescheduled investigation dates were well after 15 days from January 15th. The Organization claims two violations in connection with this. First, that the Notice identified the wrong date, and thereby

prejudiced Claimant and the Organization in preparing and presenting their case. Second, that the time for convening an investigation had long passed, and thus the Carrier should be barred from conducting any investigation.

The date of April 7 in the investigation Notice appears to have been copied from the Notice in a companion case, where Claimant was accused of untruthfulness in an interview on that date, concerning his conduct on January 15 . Simply claiming that misinformation in a notice is a typographical error should be subject to close scrutiny, lest the requirement of actual and accurate Notice be undermined. On the specific facts of this case, though, we find that the alleged prejudice is more apparent than real. The Organization and Claimant knew what conduct was in question, and when it occurred. They were offered the option of a recess or a postponement to allow for additional preparation. Their defense was vigorous and complete. Taken as a whole, we do not find that Claimant's right to a fair and impartial hearing was denied by the error.

The question of the timeliness of the investigation is somewhat more involved. The conduct took place three months before the Notice was issued. The Carrier became aware of the allegations almost immediately after the alleged conduct, through an anonymous call to a hotline it operates. The caller identified the employee, the specific misconduct, the use of company vehicle, the time of the misconduct, and the name of the sand and gravel yard involved. The hotline supervisor, Ms. Chavez, promptly informed the Roadmaster, Ms. Weston, who told her to investigate further and try to confirm the report. Notwithstanding this directive, Ms. Chavez appears to have done little further until April, when she took the obvious step of calling the owner of the sand and gravel yard, who would have been the only witness to any of these events other than Claimant. She did this on April 13, roughly a week after Ms. Weston and the District Engineer had met with Claimant, heard his denials, and decided to counsel him on the rules and close the file for a lack of evidence. After Ms. Chavez informed Ms. Weston of her contact with the owner, Ms. Weston followed up and confirmed the information, then initiated this and the companion investigation.

The Carrier asserts that Ms. Weston had first knowledge of the critical information in mid-April. The Organization argues that first knowledge only matters in conduct cases, that the Notice made no mention of conduct, and thus the 15 days should run from January 15. We agree with the Carrier's observation, on page 7 of its response to the appeal, that a charge of falsifying payroll rather clearly involves conduct, even if that particular word is not used. First knowledge is therefore relevant, and prior cases make it clear that first knowledge by a Company officer means an officer with the authority to initiate an investigation. Ms. Chavez does not have that authority, while Ms. Weston does. While the Board has serious reservations about the inexplicable delay in following up on the hotline call, that issue was not argued on the property and is not squarely presented by the appeal. The date of first knowledge *is* squarely raised, and we conclude that first knowledge took place on April 16, 2015, when Ms. Chavez e-mailed Ms. Weston that the owner had confirmed the allegations made in the hotline call.[1] Fifteen days from April 16 is May 1. The investigation was not scheduled to be convened until May 4. The Board therefore concludes that

[1] The Carrier alleges that it had first knowledge on April 20. It is not at all clear how it identified that date, but the record is clear that Roadmaster Weston knew the hotline information had been confirmed as of April 16.

the Carrier failed to comply with the requirement that the investigation be held within fifteen (15) days of first knowledge, and that the claim should be sustained on that basis.[2]

AWARD

Claim sustained. The Carrier will comply with this Award within 45 days.

DAN NIELSEN
Neutral Member

MICHELLE MCBRIDE
Carrier Member

DAVID SCOVILLE
Organization Member

Dated this 30 **day of September, 2017.**

[2] We also note, as more fully discussed in Case 64, the companion case to this one, that the evidence on the merits is shockingly insufficient to support the dismissal of a 20-plus year employee with no prior discipline.

PUBLIC LAW BOARD NO. 7394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

(Former St. Louis—San Francisco Railway Co.)

Case No. 67; Award No. 67 (F. Ponzer Remedy)
Carrier File No. 12-15-0127
Organization File No. 493-FR91D2-153
NMB No. 173

Claimant Frank Ponzer was terminated from his employment in 2015, for alleged dishonesty. The Organization brought a claim on his behalf, which was heard as Case 63:

STATEMENT OF CLAIM IN CASE 63:

> Claim of the Atchison Topeka & Santa Fe Frisco System Federation of the Brotherhood of Maintenance of Way Employes Division of the International Brotherhood of Teamsters, Region I that: ". . . Mr. Ponzer was not guilty and by the violations to due process of the Railway Labor Act, expressed in SLSF Agreement the Organization contends the assessed discipline is excessive and unwarranted Mr. Ponzer should be placed back in service immediately with all charges dismissed and removed from his record with ALL monetary losses incurred be repaid to Mr. Ponzer."

This Board issued its decision on September 30, 2017, sustaining the claim, and directing the Carrier to comply within 45 days.

The Organization asserts in this case that the Carrier has failed to comply with the remedy ordered by the Board, in that it has failed to repay all monetary losses to Claimant. Specifically, the Organization claimed that Claimant incurred unreimbursed medical insurance expenses, and penalties for early withdrawals from his retirement account made necessary by the loss of his income upon termination. In the course of the September 28, 2018 hearing on the remedy claim, the Carrier asserted that its insurance plan had fully reimbursed Claimant for all COBRA premiums. This was investigated by the Organization, and the Organization Member confirmed it in an e-mail to the other Board members on October 3, 2018. This renders the insurance premium aspect of the claim moot, and that issue is not further addressed in this award. The remaining issue concerns the penalty for early withdrawals from Claimant's 401(k) account.

The Organization argues that a make whole remedy must include consequential damages from the termination, and that there is a strong and consistent line of cases with this Carrier in support of that proposition. The Carrier counters that make whole relief on this property has always been limited to lost wages and should not be expanded unless the parties specifically bargain for such an expansion.

In resolving this dispute, the Board finds it unnecessary to address the propriety of awarding damages beyond lost wages. The Organization has presented no evidence to support a conclusion that the claimed damages should be part of a reinstatement award under this agreement. Moreover, they are unable to point to a single incident of a past practice of including said damages under this agreement prior to this case. Finally, the record contains no detailed information as to the claimed loss. For all of these reasons, the remedy claim must be denied.

AWARD

Claim denied.

DAN NIELSEN
Neutral Member

MICHELLE McBRIDE
Carrier Member

LOUIS R. BELOW
Organization Member

Dated this 27th day of November 2018.