PUBLIC LAW BOARD NO. 7394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

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

Case No. 64; Award No. 64 (Ponzer)
Carrier File No. 12-15-0128
Organization File No. 493-FR91C5-1510
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 "Due to violations of due process and the 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 by 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 20, 2016, the Carrier charged Claimant to attend an investigation for the purposes of ascertaining the facts and determining his responsibility, if any, in connection with his alleged misconduct and dishonesty on April 7, 2015 during a conversation with Division Engineer Scott Schon when questioned about his alleged misuse of BNSF equipment for personal use. The Carrier claimed first knowledge on April 16, 2015. Following the investigation, the Carrier found Claimant guilty of the allegations, and 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 a quarry and purchase and load rock for personal purposes.

The hotline director, Ann Chavez, notified Division Engineer Scott Schon and Roadmaster Whitney Weston on or about February 9, 2015. They testified at the investigation that due to various vacation and other leaves, they could not meet with Claimant until on or about April 7, 2015. Claimant denied that the meeting took place on that date, but acknowledged that a meeting had occurred.

The two Carrier Officers asked Claimant about the conduct alleged in the hotline call, and he replied that he was aware of the Carrier policy prohibiting personal use of Carrier vehicles and had not violated it. He stated that he had no recollection of what had occurred on January 15, 2015. Mr. Schon testified that he took Claimant at his word and therefore told Ms. Chavez to close out the hotline investigation. However, he later learned she had performed additional research without communicating that to anyone.

Ms. Chavez officially closed the hotline investigation in a report dated April 16, 2015. In it, she noted that she had, on April 13, 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 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. Mr. Schon maintained that he did not know until he received Ms. Chavez' report that there had been a possible misuse of a Carrier vehicle.

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. It 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, and Mr. Smith did not have a receipt.

We have carefully reviewed the record in its entirety. We find that the case against Claimant, a 20-plus year employee with no previous discipline, is shockingly insufficient to support the Carrier's determination to dismiss him for dishonesty. The evidence consists of double hearsay – a statement from Ms. Chavez, who did not testify at the hearing—reporting what she had allegedly been told by a Mr. Smith, who also did not testify at the hearing, and the hearsay testimony of Ms. Weston as to what Mr. Smith allegedly told her. While hearsay is admissible in arbitration, this sort of hearsay as the

only evidence against Claimant falls far short of what is necessary for the Carrier to meet its burden of proof.

Moreover, it is asserted that Mr. Smith recalled, more than three months after the fact, that Claimant visited his facility on a date certain and paid a certain amount of cash, although Mr. Smith kept no records. The Carrier apparently concluded that the payment of cash, established only by the supposed word of Mr. Smith, was, in and of itself, sufficient to prove that Claimant had used a Carrier vehicle for personal use. This evidence falls far short of substantial evidence, which what is necessary for the Carrier to prove serious charges against a long-term employee. The claim will be sustained, with Claimant reinstated, made whole in accordance with the prevailing practices on this property, and his record corrected accordingly.

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.**

PUBLIC LAW BOARD NO. 7394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former St. Louis—San Francisco Railway Co.)

Case No. 68; Award No. 68 (F. Ponzer remedy)
Carrier File No. 12-15-0128
Organization File No. 493-FR91C5-1510
NMB Subject Code 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 64:

STATEMENT OF CLAIM IN CASE 64:

> 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 "Due to violations of due process and the 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.