

PUBLIC LAW BOARD NO. 7585

Case No. /Award No. 58
NMB 119
Carrier File No.: 11-15-0387
Organization File No.: S- P-2008-G
Claimant: K. D. Gallerson

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION - IBT)

FACTS:

On January 22, 2015 Claimant Gallerson pled guilty to a felony. He sent a letter to Human Resources advising of this. On March 6 he was sentenced. On March 9, BNSF issued a Notice of Investigation which was postponed by mutual agreement. Following investigation, Gallerson was dismissed on April 15, 2015. The Organization filed a claim on April 27. This was received by BNSF's mail carrier on April 30, confirmed by signature of a return receipt. The claim was not actually read by administrative staff until May 4. BNSF sent a reply on July 1 which was received July 3. The parties' collective bargaining agreement states as follows:

RULE 40. INVESTIGATIONS AND APPEALS

- A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such 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 (excluding employees of the Security Department) and except as provided in Section B of this rule.
- B. In the case of an employee who may be held out of service pending investigation in cases involving serious infraction of rules the

investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefor. * * *

- J . If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.

Rule 42A states as follows:

All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) 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 Company as to other similar claims or grievances.

CARRIER POSITION:

The Carrier asserts Claimant was not convicted until his judgment and sentencing on March 6. It maintains the Notice of Investigation was timely issued within the 15 day limit and the postponement was by mutual agreement, meaning the Organization waived any objection it may have had to the timeliness of the investigation. In the Carrier's assessment, the clock for issuing a reply did not start running until administration read the Organization's letter on May 4. It follows that the July 2 reply was within the 60 day limit and was timely. The Carrier asserts that damages for violating time limits must be tolled at the point when cured by the Company. It maintains that each day an employee is dismissed or suspended, until ruled upon, accrues liability because it is a continuing violation.

Daniel Baker testified that "Mr. Gallerson came to me after January 22nd and let me know that he had pled guilty to a felony. At that time he made it very clear to me that he could pull back his plea at any time he wanted. And we went over that that was not the date of conviction, that that was just the plea date."

ORGANIZATION POSITION:

The Organization asserts Claimant was convicted by plea on January 22, and he properly notified the Carrier at that point. It views the Notice of Investigation as untimely because the conviction occurred in January, far outside the 15 day limit. It does not agree that this time limit was waived when it agreed to a postponement of the investigation. It maintains that once BNSF's Mail Carrier signed for the Organization's letter, it was in the possession of BNSF and the 60 day time limit began running. Because the Carrier failed to issue or deliver a reply within 60 days, the Organization maintains the claim must be "allowed as presented" under Rule 42.

The parties disagreed about whether Claimant's dismissal constituted a continuing violation which renewed daily to reset timelines. In the Organization's view, a dismissal is final upon issuance and does not renew as a continuing violation.

DECISION:

Court documents establish as a matter of law that Claimant was convicted by plea on January 22, 2015. On March 6, 2015 the Superior Court of Washington for Pierce County filed a Judgment and Sentence in open court. This document plainly states that Claimant was found guilty on January 22, 2015 by plea. In the opinion of this Board, the March 6 judicial finding unequivocally establishes the date of Claimant's conviction.

As a result, the Notice of Investigation fell outside the 15 day limit. However, the postponement of investigation was by mutual agreement. Rule 40J states: "If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed." This language provides for an alternative to the time limits specified in the contract when the parties agree to a postponement. Because the Organization agreed to the postponement, it cannot be permitted to now complain that the Investigation was untimely.

The mail carrier, though not employed by BNSF, functions as its agent in the handling of mail. In this capacity, it was authorized to sign for BNSF acknowledging receipt of correspondence. It follows that BNSF must be deemed to have received the Organization's claim on April 30, 2015. A reply was not sent to the Organization until July 2.

Rule 42 is unambiguous and contains mandatory language. The intent of the parties is clear and unequivocal: failure to notify the employee or his representative in writing of the reasons for disallowance of a claim with 60 days from the date it was filed results in allowance of the claim.

PLB 7702 Case #1 involved the same issue of the Carrier's failure to respond to a claim within 60 days. In that case, the Carrier argued that the dismissal was a continuing violation. The Board flatly rejected this claim, stating:

A termination of an employee is a claim that is based on a single triggering event. A violation by the Employer for the improper termination of that employee is not continuing violation. The mere fact that the termination carries an ongoing liability in the form of a backpay award does not make the termination or the backpay award a continuing claim.

The clear and unambiguous provisions outlined in Rule 42A is controlling and cannot be altered or changed by this Board. Likewise, those procedural timeframes must be followed by the Employer. To do otherwise renders that clear and ambiguous language meaningless.

See also Third Division Award #41816, stating:

Once it is determined, as it has been in this case, that the requirement of Rule 42 A that the Carrier "notify whoever filed the claim or grievance . . . of the reasons for such disallowance" has not been observed, the Board has no alternative but to obey the remainder of the Rule; namely, "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 Company as to other similar claims or grievances.

In Second Division Award 13005, the Board reviewed Award 12580 which had been remanded to it by the United States District Court, Northern District of Illinois, Eastern Division. The Court found the Board in Award 12580 violated the Railway Labor Act because it did not confine itself to matters within its jurisdiction. The 12580 Board had denied a grievance despite the Carrier's failure to respond to the grievance within 60 days. The Court found this decision at odds with the contract's mandatory language and granted the Organization's Motion for Summary Judgment. Accordingly, the 13005 Board granted the claim.

The Carrier's references to Third Division Cases 41437 and 41438 are not persuasive. Award 41438 followed 41437 which relied on National Disputes Committee Decision 16 in reaching its conclusion that it did not have to follow the precise language of Rule 42. In the opinion of this Board, National Disputes Committee Decision 16 cannot and does not revoke or annul the clear, mandatory

language of Rule 42, and this Board has no authority to deviate from such language. The conclusion is inescapable that Rule 42 must be followed, and the claim must be “granted as presented.”

The parties are at odds regarding the extent to which Claimant should be reimbursed. This Board is guided by the well accepted principle of rendering a “make whole” remedy in a labor contract dispute such as the one here concerned. The goal of such a remedy is “to place the parties in the position they would have been in had there been no violation.”¹ Under this analysis, Claimant would have received medical benefits, regular compensation, overtime, and all the other benefits of an employee working under the parties’ collective bargaining agreement.

The Organization contends that any wages earned by Claimant during his period away from BNSF are properly his and should not be deducted from his awarded compensation. This Board does not agree. Had Claimant remained employed at BNSF, he would have worked and earned wages from BNSF. Instead he worked elsewhere and was paid by another employer. Were he to receive this pay in addition to pay for the time he would have worked for BNSF, he would receive a pay as if he had been working in two places at the same time. This Board does not consider such a windfall to fall within the principles of a “make whole” remedy.

AWARD:

The claim is sustained in full. The Carrier shall immediately remove the discipline from Claimant’s record and reinstate Claimant, subject to its policies on return to work, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident. Lost overtime shall be compensated at the overtime rate. His compensation shall be reduced by any interim earnings he may have had from outside employment. Claimant shall be reimbursed for medical benefits to the extent that he provides the Carrier and the Organization with receipts of medical expenditures that would have been covered but for the lapse in his Health and Welfare Benefits. The Parties shall then jointly determine what co-pays, premiums and other medical costs would otherwise have been covered by his insurance had he continued in the Carrier’s employ uninterrupted by dismissal. Any other claims to compensation not specifically granted in this award are hereby denied.

¹ Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., BNA Books, 2003, p. 1202.

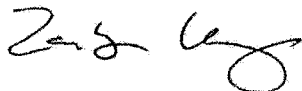
ORDER:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

September 11, 2017; Park City, Utah



Patricia T. Bittel, Neutral Member



Zachary Voegel, Organization Member



Zahn Reuther, BNSF Member