

**PUBLIC LAW BOARD NO. 7602**

**Parties to the Dispute:**

<b>BROTHERHOOD OF MAINTENANCE OF WAY</b>	)
<b>EMPLOYES DIVISION—IBT</b>	)
	)
<b>v.</b>	)
	)
<b>BNSF RAILWAY COMPANY</b>	)

**Carrier File No. 10-14-0100**  
**Organization File No. C-14-D070-3**

**Claimant — Stanley M. Hoover**

**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on December 6, 2013, when it dismissed Claimant, Stanley M. Hoover, for violation of MWOR 1.225 Credit or Property and MWOR 1.6 Conduct, in connection with Claimant's use of a rental car and expense of car washes for personal use, use of a WEX card while on vacation, and fraudulent charging of fuel on multiple dates.
2. As a consequence of the violation referred to in part (1), Claimant's record should be cleared of the discipline and any mention of the investigation and shall be made whole for any losses.

**BACKGROUND:**

The Claimant entered service with the Carrier on May 27, 1992. At the time of the incident that resulted in his dismissal, he was working as a Machine Operator, based in Centralia, Illinois.

For many years of his employment with the Carrier, Claimant was a Maintenance of Way employee covered by the terms of the parties' collective bargaining agreement. However, in June 2010, he took a position as Coordinator of Tie Rails and became an

exempt employee. According to his personnel records, he continued as an exempt employee until October 9, 2013, when he was demoted to Machine Operator, becoming again an employee subject to the Agreement.

As a Tie Rail Coordinator, Claimant was part of a team that travels to sites throughout the BNSF system inspecting and identifying bad ties on the tracks. There are three such teams in the system, and they work ten days on and four days off, when they typically fly home. The teams use company vehicles for their inspection work, and team members are issued a travel credit card and a WEX fuel card, which is used to pay for gas while on the road. In addition, the Carrier pays for employees traveling on its business to get home from the airport. Claimant lives in Centralia, Illinois, which is some 85 miles from the St. Louis airport, which Claimant used. Claimant's supervisor, Mark Huston, Assistant Director of Maintenance Planning, gave him permission to rent a car at the airport to drive home and then back to the airport.

The chain of events leading up to this claim started in July 2013. Mark Huston received an e-mail from the ARI Fleet Fuel Cost Reduction Program Coordinator that raised questions about mileage discrepancies in Claimant's expense reports: his mileage claims were inconsistent and seemed excessive. Huston did some research and discovered some WEX charges in Centralia, Claimant's home town, at a time when Huston knew that the team's company-issued vehicle was elsewhere. Huston also found WEX charges in Centralia when Claimant was on vacation; he had a company vehicle but was not authorized to use it for personal transportation at any time. The number of WEX charges seemed excessive and Huston suspected that Claimant was using his WEX card to fill up his personal vehicles. In addition, Claimant seemed to be using his WEX card when he should have charged gas purchases to the travel credit card. Huston took his findings to his supervisor, who advised going to Corporate Audits; the matter finally ended up in the Special Agents' office, assigned to Special Agent Chris Loftis. At the investigatory hearing, Huston testified that during Claimant's PMP (annual performance evaluation) at the end of 2012, he had counseled Claimant about excess mileage charges on his weekend rental cars and had reminded Claimant that the rental car was strictly for driving to and from the airport, not for personal use. Sometime in 2013, Huston noticed the rental car mileage was starting to creep up again; he had planned to raise the issue again in Claimant's next PMP.

After a management meeting where Huston laid out his concerns that Claimant was, in essence, stealing fuel from the company, Special Agent Chris Loftis opened a criminal investigation. He reviewed the information provided by Huston and determined that Claimant was using his WEX card to purchase fuel while he was at home and on his days off. He verified the round-trip distance between Claimant's home and the St. Louis airport

(168.5 miles) and determined that the mileage on Claimant's rental cars was well in excess of that amount. The records showed that Claimant was charging fuel for rental cars simultaneously on the WEX card and on the travel credit card. Loftis decided to engage in field surveillance and on Monday, September 16, 2013, he observed the Claimant fueling his rental car at a Quik Trip gas station in St. John, Missouri, en route to the St. Louis airport, but was unable to reach any definitive conclusions. In his report, dated September 25, 2013, Loftis states that Claimant was using his WEX card improperly in that he should have used his company travel card rather than the WEX card to fuel the rental car but concluded that he would need to interview Claimant before making any recommendations.

Loftis completed a supplemental report, dated October 14, 2013, documenting his interview with Claimant on October 9, 2013. A representative from HR, Kelley Jimenez, was also present. According to the report, Claimant—who does not have a personal vehicle of his own—admitted that he used the rental vehicles for personal trips while off duty, such as taking his children to school, to visit his parents in a neighboring town, and “to get away from his wife.” He denied using his WEX card to fuel anything but the rental vehicles. Claimant was emotional and upset, saying that he was having personal and financial problems. He stated that he needed help but was not specific; Ms. Jimenez gave him a card with contact information for the Carrier's family help line. Loftis concluded that the violations of company policy were “solid and confirmed” but that there was an insufficient basis for filing criminal charges. At the end of the interview, Claimant's company property was taken from him, the keys to his company vehicle given to the local Roadmaster, and he was transported off BNSF property and to his residence. According to Claimant's personnel record, October 9, 2013, is the same date he was demoted to Machine Operator.

Claimant was sent a Notice of Investigation dated October 30, 2013, indicating that an investigation would be held “for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged dishonesty, fraud, misuse of company credit, and violation of the corporate travel policy when you: 1) used a rental car and expensed fuel and car washes for your personal use while at your home location of Centralia, IL, 2) used a WEX card in Centralia, IL while on vacation from December 6, 2012 through January 6, 2012 and 3) fraudulently charged for fuel on multiple dates ranging from December 1, 2012 through September 16, 2013.” Claimant was also notified that he was being held out of service pending the outcome of the investigation.

The original hearing date was mutually postponed and the investigation was held November 12, 2013. Mark Huston and Chris Loftis testified as set forth above. The Claimant testified, stating that he tried to the best of his ability to follow the Carrier's policies but acknowledged that “we all, sometimes, fall short.” He admitted having used the

rental cars for personal trips but denied ever having used the WEX card to refuel anything but the rental cars.

By letter dated December 6, 2013, the Carrier notified Claimant that he had been found in violation of MWOR 1.6, Conduct and MWOR 1.25 Credit or Property, for dishonesty and fraud when he misused company property and credit cards as charged in the original notice of investigation. The discipline assessed was dismissal, effective immediately.

**FINDINGS AND OPINION:**

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier 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 Board has jurisdiction over the dispute involved herein.

The Carrier found Claimant in violation of MWOR 1.25 Credit or Property and MWOR 1.6, Conduct, for dishonesty in misusing his travel credit card and WEX card and using company-paid rental cars for personal use when he was a Tie Inspector and exempt employee.

Before reaching the substantive charges against the Claimant, the Board must first address the procedural arguments raised by the Organization. This case presents a highly unusual set of circumstances. The Claimant, who had been a member of the Organization for many years, became an exempt employee in June 2010. On October 9, 2013, for reasons related to the same conduct that is at issue in this claim, Mr. Hoover was demoted. He lost his status as an exempt employee and became a bargaining unit employee again. With his termination, the Organization protests that Claimant is being punished twice for the same alleged infractions of Carrier rules, and that Carrier's charges in the case before the Board should be dismissed for that reason.

This Board is a creation of the collective bargaining agreement negotiated by BNSF and BMW. As such, the Board only has jurisdiction over claims brought pursuant to the collective bargaining agreement. It has no jurisdiction over exempt employees, who—as far as the Board is aware—are not subject to any collective bargaining agreement and are employees at will. The events that gave rise to the charges laid against the Claimant occurred when he was an exempt employee. The collective bargaining agreement did not apply to him at that time, and the Board's jurisdiction over such a case is unclear.

The description of the conclusion of Claimant's October 9, 2013, interview by Chris Loftis and Kelley Jimenez—with Claimant being required to return all company property and being escorted off the Carrier's premises—has all the earmarks of an employee termination. The Carrier could have terminated Claimant at that time, and as an exempt employee, he would have had no recourse. But Claimant's personnel record indicates that he was not terminated on October 9; instead he was demoted to a bargaining unit position as a Machine Operator. The charges before the Board were not brought against him until the Carrier issued the notice of investigation on October 30, 2013. (The record does not indicate whether Claimant actually worked as a Machine Operator between October 9 and October 30, when he was removed from service pursuant to the notice of investigation.)

With his transfer to a bargaining unit position, the Claimant became subject to the terms of the parties' Agreement. Rule 40 establishes certain due process protections that apply to employees facing discipline and discharge. Paragraph A states:

An employee in service sixty (60) days or more will not be discharged 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 ....

The parties have not directed the Board's attention to any provision of the Agreement that excepts former exempt employees from the due process protections of Rule 40. Accordingly, the time limits set forth in Rule 40 apply to this case. Claimant was demoted and reentered the bargaining unit on October 9, 2013. There can be no dispute that the Carrier had knowledge on that date of Claimant's alleged misconduct; it was the reason for his demotion. Pursuant to Rule 40.A, any investigation "shall be set promptly to be held *not later than fifteen (15) days from the date of the occurrence ... or from the date information is obtained by an officer of the Company.*" (Emphasis added.) The notice of investigation was issued October 30, or 21 days later—which makes it untimely under Rule 40.A. The record does not include any explanation for the delay or suggest any mitigating factors that would excuse the Carrier's failure to issue a timely notice of investigation.

Timeliness is sufficiently critical to due process that this Board has previously dismissed charges involving untimely notice. Accordingly, regardless of any questions about the Board's jurisdiction to make determinations about an employee's conduct when he was not subject to the terms of the collective bargaining agreement, once Claimant became a member of the bargaining unit, the due process protections of the Agreement became applicable to him, the untimely charges must be dismissed, and the claim sustained.

However, during Claimant's October 9, 2013, interview, he admitted to personal use of the rental cars provided to him by the Carrier to travel between his home and the St. Louis airport. That is misuse of company property. Furthermore, Claimant stated that he had not used the WEX card to buy fuel for any vehicles except the rental cars. Because he made personal use of the rental cars, however, it is likely that gasoline purchased with his WEX card fueled his personal use. This is another misuse of company property (the gasoline) and misuse of the WEX card. With the charges against him dismissed for untimeliness, the Claimant is entitled to be restored to his position as a Machine Operator with his seniority intact. However, under the circumstances, it would not be appropriate to order back pay.


**AWARD**

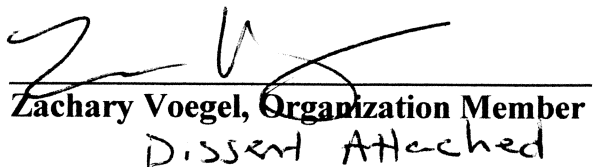
Claim sustained in accordance with the findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant 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.

  
Andria S. Knapp, Neutral Member

  
Nathan Moayyad, Carrier Member

  
Zachary Voegel, Organization Member  
Dissent Attached

8/17/16  
Date

LABOR MEMBER'S CONCURRENCE AND DISSENT  
TO  
AWARD 40 OF PUBLIC LAW BOARD NO. 7602  
(Referee A. Knapp)

A concurrence is necessary because the Majority correctly held that the Carrier failed to timely hold an investigation pursuant to Rule 40A. The Board correctly applied the clear and unambiguous language of Rule 40J and held that the charges must be dismissed and the claim must be sustained. However, the Majority erred when it improperly fashioned an equitable remedy and failed to award the remedy prescribed by Rule 40G.

Once the Majority determined that all charges were dismissed as a result of the Carrier's time limit violation, it must follow that the Claimant is not guilty of any violation of Carrier rules (regardless of how the case would have been decided on the merits). Accordingly, imposing any discipline would be unjust pursuant to the Agreement. See *Miller v. Chicago and North Western Transp. Co.*, 647 F.Supp. 1432 (1986), which held:

"Only one question remains: the scope of relief to which Miller and Union are entitled. By definition Board's Award viewed Miller as having been 'disciplined or dismissed,' else Memorandum § (a) would never have come into play for the proposed 'fair and impartial investigation.' And by definition the Memorandum § (k) mandate, calling for dismissal of charges where there has been no timely investigation, means the underlying action (here the termination of Miller's assignment as carman) was 'unjust' as a matter of law—irrespective of what a timely investigation might have disclosed on the merits. Because Miller was thus 'unjustly disciplined or dismissed' in legal terms, Memorandum § (h) defines the relief to which he is entitled."

Of particular note is that Memorandum § (h) and § (k) mirror that of the Agreement involved herein. Moreover, *Miller v. CNW* held "\*\*\*\* irrespective of what a timely investigation might have disclosed on the merits. \*\*\*\*" the discipline was unjust and ordered the remedy as prescribed in Memorandum § (h). Following that precedent, the Majority erred when it failed to award the remedy required under Rule 40G of the Agreement, which reads:

"G. If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension."

The clear and unambiguous language of the Agreement requires this Board to provide the Claimant with the remedy prescribed by Rule 40G. Moreover, on property precedent supports the

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Organization's position that the Claimant is entitled to the remedy prescribed by Rule 40G, as evidenced by Third Division Awards 36041, 41708, Award 81 of Public Law Board (PLB) No. 5850 and Award 216 of PLB No. 5850.

AWARD 36041:

Moreover, notwithstanding the Carrier's arguments to the contrary, the Board's findings necessitate that we sustain the claim without reaching the merits and without fashioning an equitable remedy by engaging in an analysis of weighing the procedural defect against the misconduct. The Awards cited by the Carrier in support of its position with respect to remedy are not concerned with the interpretation and application of the precisely formulated time limit Rule with regard to the holding of Hearings in discipline cases, and, as such, they are inapposite here. Instead, the Board must be guided by the language of the Agreement itself, which provides:

'Rule 40 Investigations and Appeals

- J. If an 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.'

In view of the foregoing clear and unambiguous directive, the claims must be sustained in their entirety."

AWARD 41708:

"The Investigation was held on July 15, 2010. That date is 16 days from June 29; the date information was obtained by an Officer of the Carrier. Rule 40 (A) requires that the Investigation be held ' . . . not later than fifteen (15) days . . . from the date information is obtained by an officer of the Company . . . and except as provided in Section B of this rule.'

The clear implication of Section B of the Rule is that in cases where an employee is held out of service, an interval of fewer days is allowed before the Investigation must be held. Holding off suspension for more than a week after



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"Rule 40 (A) notification does not provide more days before the Investigation is held.

The Board finds that the Investigation was untimely. Rule 40 (J) specifically states:

'If an 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.'

Accordingly, the charges against Claimant J. House shall be considered as having been dismissed." (Emphasis in original)

AWARD 81 - PLB NO. 5850:

\*\*\*\* Section J of Rule 40 leaves this Board no other choice. It must consider the charges as having been dismissed. The claim will be sustained. Claimant is to be paid for all time lost in accordance with the practice on the property.

This Board does so solely because of the Agreement even though the charges are serious, and had it not been for the administrative glitch of the belated notice, the decision would clearly have been different. \*\*\*\*"

AWARD 216 - PLB NO. 5850:

"This Board finds that the time limit issue raised by Claimant's representative is valid and Rule 40J stipulates what is to occur if the time limits are not adhered to; i.e., 'the charges against the employee shall be considered as having been dismissed.'

Claimant's representative raised this issue when he found that the Carrier witness first commenced the audit in October, he immediately became aware of some of the discrepancies and should have set the investigation then, rather than waiting to complete the entire audit.

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"The Time Limit Rule requires a notice of an investigation to be held within 15 days from the date of occurrence, except in personal conduct cases, within 15 days from the date the information is obtained by a Carrier Official.

This Board will not rule on whether this was a personal conduct case that tolls the fifteen days to commence when knowledge is first obtained by an Officer of the Carrier or whether it is an occurrence. In either scenario, the investigation was not timely held.

Claimant's Foreman's date is reinstated and he is to be paid for any time lost because of the discipline assessed as provided for in the Agreement."

Accordingly, the Majority erred when it considered the merits of the case and failed to award the remedy prescribed by Rule 40G.

Respectfully submitted,

  
Zachary C. Voegel  
Labor Member