PUBLIC LAW BOARD 7702

CASE NO. 1

BNSF RAILWAY COMPANY

CARRIER CASE NO. 11-11-0085

V.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION / IBT

ORGANIZATION CASE NO. B-M-2294-M

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed by letter dated November 3, 2010 upon Mr. D. D. Moore for alleged violation of BNSF Railway Policy on the use of Alcohol and Drugs "while working as a machine operator on September 24, 2010 was arbitrary, capricious and in violation of the Agreement (System File B-M-2294-M/11-11-0085 BNR).

2. The claim* as presented by Vice General Chairman D. L. Maier on December 7, 2010 to Mr. R. T. Bartoskewitz, General Manager Montana Division, shall be allowed as presented because said claim was not disallowed by Mr. R. T. Bartoskewitz in accordance with Rule 42(A).

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant D. D. Moore shall now have his record '... cleared of the charges and proceedings of this investigation (File Number MON-MOW-10-0434).We also request that Mr. Moore be made whole for any loss of earnings from the time withheld from service on September 24, 2010, until he is returned to service. We further request Mr. Moore be made whole of any loss of fringe benefits, including but not limited to, insurance, railroad retirement credit, vacation credit, etc.'

FINDINGS:

The carrier and the employee or employees involved in this dispute are respectively the carrier and the employee or employees within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7702 has jurisdiction over the parties and the dispute involved herein.

Claimant D. Moore, a 53 year old employee, established and held in excess of thirty-three (33) years of seniority with the Carrier's Maintenance of Way Department and, prior to his dismissal, was assigned as a machine operator.

In September of 2010, Claimant allegedly violated his track authority and the Carrier required him to submit to a substance screen. Claimant was subsequently charged on the basis of an alleged positive substance screen.

October 11, 2010, the Carrier conducted a formal investigation and on November 3, 2010 Claimant was informed that he was dismissed from service, effective immediately.

On December 7, 2010, the Organization properly filed a claim to General Manager Montana Division R. Bartoskewitz and requested that Claimant's dismissal of November 3, 2010 be rescinded. This claim clearly listed the Organization's objection to the Carrier's dismissal of Claimant, listed the various ways in which the Carrier violated the Agreement and set forth a requested remedy.

As of sixty (60) days later, General Manager R. Bartoskewitz had not disallowed the Organization's claim pursuant to the terms contained in Rule 42A.

RULE 42. TIME LIMIT ON CLAIMS

A. All claims or grievances must be presented in writing by or on behalf of the employe 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 employe 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.

B. If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance, and the representative of the Company shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other

similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of the Company designated for that purpose."

This claim was timely presented and properly presented and handled by the Employes at all stages of appeal up to and including the Carrier's highest appellate officer.

The Organization argues this claim deals solely with the Carrier's failure to respond to the Organization's claim within sixty (60) days and how that triggered the default provisions contained within Rule 42A. Rule 42A controls in this matter and contains clear and unambiguous time limits for handling claims and appeals. Furthermore, it also sets forth a clear cut, and, undeniable remedy when the Carrier is in breach of the sixty (60) day time limit. The Organization further argues that the Carrier readily admits that it failed to respond to the Organization's claim of December 7, 2010 for over one-hundred (100) days. Based on Rule 42A, there was a sixty (60) day time limit for the Carrier to respond to the Organization's claim and the Carrier's failure to comply to triggered the default provisions of Rule 42A and that these are dispositive in this matter. Nonetheless, the Carrier attempts to circumvent this bargained for remedy and argues as if Rule 42A simply does not exist.

On the basis of the aforementioned, the Organization asks that the Board fully sustain this claim.

The Carrier argues that the procedural objection by the Organization are without merit.

The Organization asserts the Company has failed to respond to the claim and is in default under Rule 42 of the Agreement. But in this case, the Company did respond to the Organization's claim. The Company's response to the Organization's claim was dated March 22, 2011. At that point, the application of National Disputes Committee (NDC) Decision 16 comes into play.

The proper remedy is not to 'allow the claim as presented. Instead, it is to allow backpay up to the date of the denial, and then still consider the case on its merits.

The Company is only required to compensate the Claimant for the workdays between the 60 day following receipt of the Organization's claim, and the date of the Company's response to the claim.

After weighing the evidence presented it is determined that the Carriers reliance on NDC 16 and its interpretation of a continuing claim, here, is flawed and in error.

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.

AWARD:

The Claim is hereby sustained. The Carrier is ordered to make the Claimant whole for all loss of earnings and benefits from the time Claimant was withheld from service on September 24, 2010, until he is returned to service.

Marc A. Winters
Neutral Member

Dated: November 27, 2015

Joseph Heenan
Carrier Member

Dissenting opinion attached

Kevin Evanski
Organization Member

Carrier Members' Dissent
to Awards 1-2 of Public Law Board 7702
(Referee Winters)

For years, National Disputes Committee, Award 16 ("NDC 16") has been the governing principle for curing time limit violations for continuing discipline claims. The industry standard that controls was succinctly recounted in Third Division Award 32889:

> **On this property [BMWED], however the parties already have Award 63 of Public Law Board No. 4730, issued on 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.**
> ...
> **Despite the raging debate over whether NDC No. 16 applies to disciplinary matters as well as continuing rules claims, the operation of the decision is well settled. It operates to limit a Carrier's liability for an untimely response where the claim involved is one where liability is not fixed and continues to accrue day by day. NDCD No. 16 does not impact claims where the liability is finite and already fixed. NDCD No. 16 also made clear that the Carrier's response time limit begins when a claim or appeal is received by the Carrier. (Emphasis added).**

See also, Public Law Board 4370, Award 63, Third Division Award 41437, Third Division Award 41438, Third Division Award 41438, Third Division Award 35395, Public Law Board 4244, Award 357, Third Division Award 36305 and Third Division Award 26239.

The facts of this case were simple, Claimant, Darryl Moore, was working as a Machine Operator and occupied track outside of his authority limits. He admitted his guilt for the violation and signed a waiver. He then submitted a drug test where he tested positive for marijuana and subsequently had his employment with BNSF terminated.

However, Mr. Winters chose to blatantly disregard the prevailing industry norms as well as arbitral precedent and overturned the time-honored understanding and application of Rule 42. And by doing so, Mr. Winters also disregarded the history of collective bargaining between the parties themselves.

Rule 42A of the Agreement derived its language from the 1954 National Agreement, which involved several carriers and unions, including the BMWE. That language is the same language in the holding of NDC 16. Yet, somehow Mr. Winters, when the "letter of the law" and the "spirit of the law" were identical, decided to ignore well-established precedent and instead substituted his personal opinion.

In doing so, Mr. Winters is also placing an admitted violator of the Company's drug and alcohol policy back into the workforce with backpay and without restriction.

As a matter of public policy, Company has an obligation to provide and maintain a safe workplace. But this burden is not shouldered by Company alone; it is shared with Company's employees, in that they must follow the rules put in place for their own safety and well-being, as well as the safety of others. This duty to provide a safe workplace is clearly set forth in Third Division Award 28551, when it stated:

> **There can be no doubt about the serious concern over the use of drugs by employees or about the obligation of the Carrier to provide a safe work place for all of its employees or about the right of the Carrier, and the concomitant responsibility of the Organization, to attempt to remove such violators from the service.**

Mr. Winters failure to address a matter of such important in this award is troubling and, in the Company's view, a significant error in judgment.

I respectfully, but vigorously, dissent.

Joe R. Heenan
Carrier Member

LABOR MEMBER'S RESPONSE TO
CARRIER MEMBER'S DISSENT
TO
AWARDS 1 AND 2 OF PUBLIC LAW BOARD NO. 7702
(Referee Marc A. Winters)

Had the Carrier Member's dissent not been so seasoned with inaccuracies, this Board Member would have allowed the eloquent silence such a rant deserves. While the dissent is mostly a personal attack on the Neutral Referee, the author of the dissent is clearly unfamiliar with the basic tenants of contract interpretation. Here, the Majority correctly applied the clear and unambiguous language of the Agreement to the Carrier's admitted default violation of Rule 42A. While the Carrier argued before the Board that National Disputes Committee (NDC) Decision 16 should apply and the Board should ignore the Carrier's admitted Rule 42A default and the agreement defined remedy, this position is in serious error inasmuch as it is based on the carrier incorrectly classifying this as a "continuing discipline claim". In this regard, Railroad Boards of Adjustment have consistently held that a discipline claim is not a continuing claim even though it may have continuing or ongoing liability. The Majority in this case agreed that the clear and unambiguous language of Rule 42A as well as its proscribed remedy prevails. The Majority rejected the Carrier reliance on past practice inasmuch as no past practice could prevail over such clear and unambiguous agreement language defining the intent of the parties.

The Agreement is clear and unambiguous as to what happens in the event of a default on a claim. Rule 42A reads:

> "A. All claims or grievances must be presented in writing by or on behalf of the employe 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 employe 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." (Bold and underscore added)

The language of Rule 42A has been determined to be clear and unambiguous and has been applied as written. Third Division Awards 20900, 34995, 37269, 37811 and 41816 held that in the event of a default by the Carrier, the clear and unambiguous language of the Agreement must be applied and the claim must be "allowed as presented". Notably, these awards all involve the same Organization, same Carrier and agreement rule as the case decided by this Board. Because the Agreement is clear and unambiguous, the Board correctly applied the Agreement as written and did not look to extrinsic evidence.

The Carrier's assertion that NDC Decision 16 applies to discipline claims is in error. The Board considered the Carrier's argument and flatly rejected it. This is because NDC Decision 16 was in connection with one type of claim and that is a claim that is filed as a "continuing violation". A claim filed as a continuing violation, is essentially a single claim letter advanced but covers multiple instances of a repeating agreement violation with new triggering dates. While one claim letter covers multiple occurrences of the same agreement violation, each violation is still independent of one another except that a new claim does not have to be filed each and every time the violation occurs again. However, since each new occurrence is a separate and distinct violation, each new violation brings with it a new sixty (60) days in which the Carrier would have to respond. Thus, the Carrier may cure its default for the continuing violations, but cannot cure its default for those continuing violations that are untimely before the date of the declination. This is exactly what NDC Decision 16 held and all one has to do is review the other decisions of the National Disputes Committee to arrive at this conclusion. Discipline cases are not continuing violations but are based on a single triggering event and thus NDC Decision 16 does not apply to discipline cases.

Discipline claims have consistently been held to be based on a single triggering event and not be continuing in nature. See Third Division Awards 9510, 41682 and Award 92 of Public Law Board No. 1582. Of particular importance is Award 9510, which described the absurdity that would result from classifying a discipline claim as a "continuing claim" and reads:

> "*** If the Board were to find that discipline cases or cases involving employes held out of service for any other reason constituted a continuing claim, then, as a result, the employe could lie back for years without losing the right to come in at a late date and file claim for his alleged mistreatment. It was the intent of the TLOC Rule to establish limits of time in which the Carriers and Organizations would discharge their responsibility to promptly settle claims and grievances. ***"

The Carrier's dissent cited multiple awards that it argued have already decided this issue and applied NDC 16 to discipline cases. However, a closer looks at the awards cited by the Carrier will show that many of the awards involve other organizations and other agreements. Some of the other agreements do not contain the mandatory language similar to that of Rule 42A. Moreover, even if one of the Carrier's cited awards did interpret the same language as that involved herein, the award would be palpably erroneous as it failed to apply the clear and unambiguous language of the Agreement.

The Majority addressed each of the Carrier's contentions contained in its dissent and flat out rejected those arguments. In this regard, the Majority correctly applied the plain terms of the Agreement to the facts of these cases and these awards are absolutely persuasive precedent for the interpretation of Rule 42A in similar cases. The findings of the Majority of this Board are consistent with the findings in Third Division Award 41816 as well as Third Division Award 41682 and the Labor Member's Concurring Opinions from that award, which are by reference made a part of this response to the Carrier Member's Dissent.

Respectfully submitted,

Kevin Evanski
Labor Member

PUBLIC LAW BOARD 7702

CASE NO. 9

Interpretation of Case No. 1 Award

BNSF RAILWAY COMPANY

CARRIER CASE NO. 11-11-0085

V.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION / IBT

ORGANIZATION CASE NO. B-M-2294-M

The Award for PLB 7702, Case No. 1 was adopted on November 27, 2015.

That Award states:

The Claim is hereby sustained. The Carrier is ordered to make the Claimant whole for all loss of earnings and benefits from the time Claimant was withheld from service on September 24, 2010, until he is returned to service.

The Organization has claimed that the proper remedy has not been applied by the Carrier and requests that the Board interpret the meaning of the Award as to the appropriate remedy in two areas:

1. Whether the Claimant is entitled to reimbursement for medical insurance costs and medical expenses incurred during the period he was improperly withheld from service. (Dismissed)

2. Whether the Claimant is entitled to reimbursement for withdrawals and penalty costs made from his 401k plan during the period he was improperly withheld from service. (Dismissed)

With respect to Item No. 1:

Whether the Claimant is entitled to reimbursement for medical insurance costs and medical expenses incurred during the period he was improperly withheld from service. (Dismissed)

After a thorough review of the evidence and arguments, including arbitrable precedent, not only in the Railroad industry but across all industries, the Board finds for the Organization.

A make whole award properly includes any expenses incurred by reason of removal from the Carrier provided healthcare insurance benefit. Those expenses includes all out of pocket insurance premiums, medical costs, deductibles, co-pays, and all other medical expenses, as a consequence of the Claimants dismissal that would have not otherwise been incurred but for the improper dismissal of the Claimant.

The Claimant is hereby instructed to provide the Carrier and the Organization with any and all medical receipts in his possession, for the period he was improperly withheld from service, in order to help both the Carrier and the Organization jointly determine the proper amount of reimbursement due to the Claimant.

With respect to Item No. 2:

Whether the Claimant is entitled to reimbursement for withdrawals and penalty costs made from his 401k plan during the period he was improperly withheld from service. (Dismissed)

After a thorough review of the evidence and arguments the Board finds for the Carrier as the Organization did not prove its case.

Normally before any type of a monetary remedy is awarded, the grieving party must establish a causal relationship between, here, the unjust dismissal, and the loss of a contractual benefit. Additionally, not enough evidence existed to know or have known as to whether the Claimant would have made the 401k withdraws irrespective of being improperly withheld from service and whether his 401k withdraws were his only resource to income during the period he was improperly withheld from service.

Marc A. Winters
Neutral Member

Dated: November 27, 2017

Corey Kellam
Carrier Member

Date: December 13, 2017

Kevin D. Evanski
Organization Member

Date: December 13, 2017