PUBLIC LAW BOARD 7702

CASE NO. 2

BNSF RAILWAY COMPANY

CARRIER CASE NO. 11-11-0085

V.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION / IBT

ORGANIZATION CASE NO. B-M-2324-M

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The discipline (withheld from service) imposed by letter dated September 24, 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-2324-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.

The ruling, by this Board, in Public Law Board 7702, Case No. 1, sustained the claim made by the Claimant and the Organization. As such, since the Board ruled in favor of the issues contained within PLB 7702, Case No. 2, for all intents and purposes is hereby moot and needs no further discussion or decisions. Because procedural issues were violated in PLB 7702, Case No. 1, the charges, the issues and the merits of PLB Case No. 2, need not be adjudicated.

Marc A. Winters
Neutral Member

Dated: November 27, 2015

Joseph Heenan
Carrier Member

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