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NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 11223
Docket No. 10592
2-C&NW-CM-'87

The Second Division consisted of the regular members and in addition Referee Jonathan Klein when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada

Parties to Dispute: (

(Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Carman P. A. Miller was unjustly dismissed from service on October 22, 1982 without benefit of a fair and impartial investigation, because of an alleged conflict with Carrier's Policy No. 17.

2. That the Chicago & North Western Transportation Company be ordered to make whole Carman P. A. Miller, restore him to service with all seniority rights, vacation rights, holidays and all other benefits that are a condition of employment unimpaired, with compensation for all time lost from the date of dismissal plus 15% annual interest, reimbursement of all losses sustained account loss of coverage under health and welfare and life insurance agreements, during the time held out of service, in accordance with Rule 35.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This Award supersedes the Findings and Award No. 10746 rendered by this Board dated February 19, 1986, in accordance with the Memorandum Opinion and Order issued by the United States District Court in Miller v. Chicago and North Western Transportation Company, No. 86 C4181 (N.D. Ill, Nov. 17, 1986). The Order of the District Court, which granted the Claimant and the Organization's Motion for Summary Judgment and denied the Carrier's Motion for Dismissal, was not appealed and is, therefore, final and binding.

In setting forth the facts of this case, the District Court noted the total absence of factual controversy or of disputed inferences from the undisputed facts. These facts which were contained in this Board's initial Award are set forth in the District Court's Opinion as follows:

"In April 1980 North Western took over operation of portions of the bankrupt Chicago, Rock Island and Pacific Railroad Company (the 'Rock Island') under the provisions of an agreement known as the Miami Accord. Miller, who had worked as a carman with the Rock Island, became employed by North Western as a sheet metal worker. Although Miller requested transfer on several occasions to a carman's position in North Western's Car Department, transfer was denied because his brother worked there and North Western's Policy No. 17 precludes relatives from working within the same department.

On July 23, 1982 Miller was furloughed from his position as a sheet metal worker due to a reduction in force. When Miller's brother left North Western on medical disability some time after that, Miller again requested transfer to the Car Department. North Western, unaware Miller had still another relative (K. E. Reed) working as a carman, responded transfer would be permitted provided it was within the scope of the existing agreement between North Western and Union (the 'Joint Agreement'). Miller then formally requested and completed his permanent transfer to the Car Department October 4, 1982.

Miller's seniority as a carman began that day in accordance with General Rule 18 of the Joint Agreement:

Employees [sic] transferred from one point to another with a view of accepting a permanent transfer, will, after thirty days, lose their seniority at the point they left, and their seniority at the point to which transferred will begin on date of transfer, seniority to govern. Employees will not be compelled to accept a permanent transfer to another point.

Just 18 days after his permanent transfer to the Car Department (October 22, 1982) Miller received this notice from North Western:

Because your family relationship with carman K. E. Reed, a violation of Chicago and North Western Transportation Company Policy No. Seventeen (17) has occurred, therefore, your application for employment as carman has been rejected.

Effective close of shift October 22, 1982, you are hereby relieved of your assignment as carman. You will retain no rights or privileges associated with your tenure as carman.

Your employment status will revert to that of sheetmetal worker on furlough."

The District Court went on to delineate pertinent provisions of a May 1, 1977, Agreement governing the application of Rule 35:

"Because no formal investigation into the matter was ever conducted, Miller then challenged North Western's action as a dismissal in violation of a May 1, 1977 Union-North Western Memorandum of Agreement (the 'Memorandum'). In part the Memorandum, which governs application of Joint Agreement Rule 35 (Discipline and Investigation) to carmen, provides:

(a) Except as provided in section (f) hereof, an employe [sic throughout] in service more than sixty (60) days will not be disciplined or dismissed without a fair and impartial investigation. Such investigation shall be scheduled promptly and held not later than thirty (30) days from the date information concerning the alleged offense has reached his supervising officer.

* * * *

(h) If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from his 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, less any amount earned during the period such disciplinary action was in effect.

* * * *

(k) If investigation is not held or decision rendered within the time limits specified herein, as such time limits are extended by agreement or postponement, the charges against the employe shall be considered as having been dismissed."

Memorandum Opinion at pp. 2-4.

In its initial Award the Board concluded that the Claimant, employed by the Carrier since 1980 as a Sheet Metal Worker, was entitled to an Investigation in accordance with Rule 35 (referred to by the District Court as the "Memorandum"). This determination was based on the finding that Claimant was an employee in the Carrier's service for more than sixty days at the time of his approved intercraft transfer, and a rejection of the Carrier's contention that Rule 35(a)'s "in service" requirement meant an employee in service in his craft. The Board ordered the matter remanded to the Carrier's property for a fair and impartial investigation "to resolve the issue of whether Claimant's transfer to the Car Department was a violation of Policy No. 17."

The Organization's challenge to the initial Award was premised on the contention that the Board exceeded its jurisdiction in failing to order the remedy mandated by Memorandum §(K), quoted above. The Carrier, on the other hand, defended the Award on the bases that: (1) the Board did not exceed its authority in interpreting the Memorandum to require a Hearing, and (2) the District Court lacked jurisdiction to review the Award because this Board, by remanding to the Carrier for a Hearing, retained jurisdiction over the dispute.

The District Court rejected the Carrier's jurisdictional arguments and ruled that the Railway Labor Act supported judicial review of the Board's order once rendered, regardless of whether the order had been satisfactorily executed. The Court also reasoned, citing Wilson v. Chicago and North Western Transportation Co., 728 F.2d 963 (7th Cir. 1984), that the Board's remedy which called for an Investigation on the issue of Claimant's alleged violation of Policy No. 17, rather than an order to the Carrier to dismiss the charges against the Claimant in accordance with Memorandum §(K) for failure to hold a timely Investigation, exceeded the scope of the Board's authority in violation of the Railway Labor Act and the applicable Agreement. The Court concluded its Opinion with the scope and relief to which the Claimant and Organization were entitled:

"[T]he Memorandum §(k) mandate, calling for dismissal of charges where there has been no timely investigation, means the underlying action (herein 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.

Memorandum Opinion at p. 17.

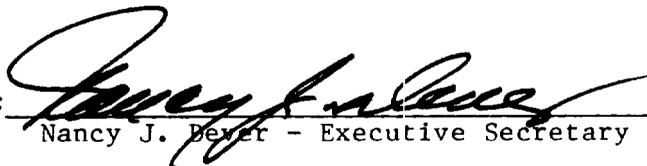
In compliance with the order of the District Court to provide Claimant the relief requested specified in Memorandum Agreement §(h), Claimant shall be reinstated as a carman with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him resulting from such discipline or suspension, less any amount earned during the period such disciplinary action was in effect.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 18th day of March 1987.

(REVISED)

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Serial No. 106

(The Second Division consisted of the regular members and in addition Referee Jonathan I. Klein when interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 11223

DOCKET NO. 10592

NAME OF ORGANIZATION: Brotherhood Railway Carmen of the United States
and Canada

NAME OF CARRIER: Chicago and North Western Transportation Company

QUESTION FOR INTERPRETATION

"Does the language in the Findings of Second Division Award No. 11223, reading as follows:

'In compliance with the order of the District Court to provide Claimant the relief requested specified in Memorandum Agreement Section (h), Claimant shall be reinstated as a carman with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him resulting from such discipline or suspension, less any amount earned during the period such disciplinary action was in effect.'

and the Award reading:

'Claim sustained.'

give the Carrier the authority in deducting interim earnings twice. First, by not including the period of employment as part of the backpay, and then by deducting the interim earnings from the total backpay? Was it proper for the Carrier to deduct the income Claimant earned during the periods in which North Western says he would have been on a reduction of force furlough?"

This matter comes before the Board after two previous Board Awards (10746, 11233) and two judicial opinions in the same case, and soon after the seventh anniversary of the event which triggered this dispute: Claimant's September 14, 1982 request for a transfer into the Des Moines Car Department.

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This Interpretation is rendered pursuant to the Memorandum Opinion and Order issued by the United States District Court in Miller v. Chicago and North Western Transportation Company, No. 88 C 6567 (N.D. Ill., Dec. 7, 1988) ("Memorandum Opinion"). The District Court remanded the case to the Board to interpret and clarify Award No. 11223 on the issue of the precise amount of damages due Claimant, including interest plus attorney's fees under 45 U.S.C. Section 153, First (p). While it may be argued that despite the 1966 amendment to 45 U.S.C. Section 153, First (m) of the Railway Labor Act, the District Court has jurisdiction to determine the amount of backpay which the Board ordered in Award No. 11233, see Sweeney v. Florida East Coast Railway Company, 389 F. 2d 113 (5th Cir. 1968), the Board will consider this issue so declined by the District Court under the rubric that to do otherwise calls for contractual interpretation of the collective bargaining agreement which is within the Board's exclusive jurisdiction.

The Order of the Court requires the Board to determine whether the Carrier complied with the language of the May 1, 1977 Memorandum of Agreement, Section (h) ("Memorandum Section (h)"), when it deducted from the amount of backpay due Claimant those pay periods during which he would have been furloughed as a carman in April through November 1983, and then proceeded to deduct from the total wages all income the Claimant earned as a temporary trackman employed by Carrier during the period from August 9, 1983 through November 30, 1983. The Organization challenged in District Court only the \$7,979.35 deduction for income earned as a trackman in the Carrier's backpay calculation.

Memorandum (h) states, as follows:

"If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from his 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, less any amount earned during the period such disciplinary action was in effect."

(Emphasis supplied)

The District Court framed the issue to be a question of whether it constitutes an "impermissible double deduction" to subtract both the amount of income attributable to the period Claimant would have been furloughed as a carman in 1983 due to a reduction-in-force, and the income he earned as a trackman during the same furlough period. See Memorandum Opinion at 6 n.7. The Board would restate the determinative issue to be whether the disciplinary action was in effect during the period Claimant would otherwise have been in furloughed status as a carman from April through November 1983, and, therefore, a deduction for any earnings during the same time period comports with the contractual language contained in Memorandum Section (h).

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The Board finds that Memorandum Section (h), wherein it states that an unjustly disciplined employee "shall ... be compensated for wage loss, if any, suffered by him," requires that an initial, total "wage loss" be determined. The Organization did not contest the Carrier's calculation of this wage loss based, in part, on a reduction for the period Claimant would have been furloughed as a carman had he remained in the craft subsequent to October 22, 1982. Thus, both parties to this dispute are in agreement that when, as a carman, Claimant would have been furloughed, he is entitled to receive none of the wages normally paid to the occupant of that job position for the duration of the furlough period as a component of the initial, total "wage loss."

The contract language agreed to by the parties in Memorandum Section (h) and the focus of this Interpretation - "less any amount earned during the period such disciplinary action was in effect" - is clear and unambiguous. For the Organization to suggest that Carrier's disciplinary action had no "adverse impact" on Claimant during the furlough period in terms of wage loss, and, therefore, the disciplinary action was not actually in effect (Memorandum Opinion at 4.), does not, in our opinion, comport with the clear and unambiguous meaning of the phrase, nor the arguments and evidence before this Board.

There is no evidence to show that the parties intended for this particular phrase, as applied here, to mean anything other than the entire "disciplinary" period beginning October 22, 1982 through October 31, 1986. There is no evidence to support a finding by this Board, as implied by the Organization's argument, that the parties intended, yet somehow failed to add a phrase to qualify the earning deduction contained in Memorandum Section (h), e.g., "save and except any amount earned in any such period during which the unjustly disciplined or dismissed employee would have been furloughed from his position due to a reduction in force."

It cannot reasonably be suggested otherwise, based upon the record before us, that at the time Memorandum Section (h) was agreed to by the parties each had full knowledge of its terms and understood the significance of the earnings deduction provision. The Board recognizes that this conclusion may appear harsh, or contrary to the Organization's understanding of the language contained in Memorandum Section (h). Nevertheless, the Board must approve the earnings deduction of \$7,979.35 based upon the clear and unambiguous language of the contract, and the absence of any evidence to show that a contrary result was intended.

The District Court's Order further instructed the Board to decide the precise amount of any related relief, including interest on the amount of compensation plus attorneys' fees under 45 U.S.C. Section 153 First (p). Inasmuch as the Board determines no further compensation are due Claimant, the question of interest is moot. Further, the parties have made no provision in the contract for an award of attorneys' fees subject to this Board's interpretation or application, whether or not the applicant for such fees is successful in obtaining an order for further review of an award and/or in the assertion of the underlying claim. Moreover, the question of an award of attorney

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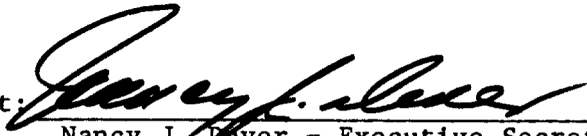
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fees to a party in an action to enforce or clarify an award rendered by the Board falls within the jurisdiction and special competence of the District Court, rather than this Board, to apply the appropriate factors in the determination of reasonable attorneys' fees, if any. United Transportation Union v. Soo Line Railroad Co., 457 F.2d 285 (7th Cir. 1972); Brotherhood of Railroad Signalmen of America v. Southern Railway Co., 380 F.2d 59, 69, cert. denied, 389 U.S. 958 (1967).

Referee Jonathan I. Klein sat with the Division as a Member when Award No. 11223 was rendered, and also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois the 27th day of September 1989.