Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39720
Docket No. MW-40359
09-3-NRAB-00003-080144

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
(
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal (seniority termination) of Mr. A. C. Olivetti by letter dated May 16, 2007 was improper and in violation of the Agreement. [System File C-07-P018-14/10-07-0240 (MW) BNR].

(2) As a consequence of the violation referred to in Part (I) above, Claimant A. C. Olivetti shall now ". . . be reinstated to service immediately with seniority unimpaired and paid for all time and benefits lost account this improper removal from service."

FINDINGS:

The Third 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 employee 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 were given due notice of hearing thereon.

The Claimant was granted a medical leave of absence from December 7, 2006 until February 8, 2007. By a letter dated February 12, the Claimant's medical leave of absence was extended until February 28. The letter advising him of that extension contained the language "you will be expected to markup for duty at or before 2359, February 28, 2007 . . . if you need to extend this leave of absence, you must provide an original doctor's statement on letterhead stationery to my office before the expiration of the above-referenced period that states your inability to perform any service and the length of time you will be unable to perform any service." It is undisputed that the Claimant did not mark up or request an extension of his medical leave. The Carrier informed the Organization in a May 16, 2007 letter that the Claimant had forfeited his seniority rights. The Organization filed a claim in a letter dated June 21, 2007 and included two doctor's notes from Claimant's treating psychiatrist dated April 30 and May 14.

The Organization does not deny that the Claimant neither reported for duty nor sought a medical leave extension by February 28, 2007. Rather, the Organization argues that the Claimant was suffering from a persistent and chronic mental illness that rendered him in a diminished capacity. According to the Organization, the Carrier improperly and arbitrarily cited the Claimant for failing to comply with Rule 15E. The Claimant was unable to comply with the requirements of the Carrier's medical leave policy. The Organization cites to Third Division Award 37603 in support.

The Carrier asserts that the Claimant automatically forfeited his employment and seniority rights on March 1, 2007, because of the self-executing nature of Rule 15E. Further, the Organization's claim must be rejected because it was not filed within the 60-day requirement of Rule 42. Rule 42 requires that claims be filed within 60 days of the date on which the occurrence giving rise to the claim occurred. According to the Carrier, the 60 days expired on April 29, 2007. The Carrier issued a letter to the Organization on May 16, 2007 informing of the Claimant's forfeiture. The Carrier cites a number of Awards in support of the proposition that Rule 15 is self-executing. It contends that the instant claim was not timely filed, the Claimant did not report for duty, and there was no medical leave extension beyond February 28, 2007.

In response to the Organization's contention that the Claimant's medical condition rendered him unable to comply with the medical leave policies, the Carrier provides three responses at page 8 of its Submission:

> "First, the Claimant was apparently able to submit paperwork extending his first leave of absence to February 28, showing that he understood the procedure and had the wherewithal to comply. Second psychiatrists are able and willing to send notes to their patients' employers, and routinely do so, and there is no reason that it should be any different in this case. Third, even if the Claimant was somehow unable to figure out how to send or fax a doctor's note to the Carrier – which is unlikely given the instructions were exceptionally clear in the Carrier's February 2 and 12, 2007 letters to the Claimant, and that he had apparently done it once before in order to secure his first extension the doctor's note is dated April 30, 2007, which is 60 days beyond the date that Claimant needed to submit it in order to secure another extension."

At the panel discussion on the instant matter, the Carrier also offered Third Division Awards 36214, 39145 and 39333 in support of its position.

The Board carefully reviewed the evidence. Clearly, Rule 15E is a self-executing Rule and the Claimant failed to report for duty or seek an additional medical leave extension prior to February 28, 2007.

Rule 15E reads, in relevant part, as follows:

> "An employee failing to report for duty on or before the expiration of their leave of absence will forfeit all seniority rights, unless an extension is granted."

As a self-executing Rule, Rule 15E is not disciplinary in nature and a formal Investigation is therefore not required. However, Third Division Award 36214 advises that "[w]e recognize that there have been a few limited exceptions to that general Rule, cited by the Organization, but they involve special circumstances not present here." Third Division Award 37603 provides insight into the "special circumstances" discussed in Award 36214. The instant matter is one of the "special circumstances" discussed in Award 36214.

The Organization established through the Medical Status Form dated April 12, 2007, that the Claimant was diagnosed with a Major Depressive Affective

Disorder and had been hospitalized since April 9, 2007. The form also reveals that the Claimant was "Unable to Perform Any Activity" from February 28 to April 27, 2007. The "Prescribed Medications" include a number of prescriptions.

A letter from a treating psychiatrist dated April 30, 2007, indicates that the Claimant is being treated, cannot return to work, and will be re-examined in two weeks. A subsequent letter from a treating psychiatrist dated May 14, 2007, indicates that the Claimant is being treated, cannot return to work, and will be re-examined in two weeks. A letter from a treating psychiatrist dated June 19, 2007 indicates that the Claimant is still being treated, but could return to work as of June 5, 2007. The Organization had been advised of the Claimant's forfeiture in May.

Contrary to the Carrier's assertions quoted above that the Medical Leave instructions were clear, that psychiatrists routinely fax notes to employers, and that the 60 days to file a claim had elapsed, the Organization established that the Claimant was unable to perform any activity because of his illness from February 28 until at least April 27, 2007 – well beyond the Carrier's cited forfeiture date of March 1, 2007.

The Board finds that the circumstances presented in the instant matter constitute one of the limited "special circumstances" discussed in Award 36214. Here, the Claimant was unable to perform any activity from February 28, 2007. Seeking a leave extension or even notifying the Organization, under the unique circumstances presented in this matter, were some of those activities that he was unable to perform. By the time he was able to perform any activity, the Carrier had considered him as having forfeited his seniority and employment. In effect, under the unique and special circumstances of the instant matter where the Claimant was suffering from mental illness, the Claimant cannot be found to have violated the requirements of the Carrier's medical leave policy when he was unable to perform any activity.

The Claimant shall be reinstated to service with seniority unimpaired and compensated for all time lost commencing Friday, June 29, 2007. The Claimant's reinstatement is contingent upon his successful completion of the Carrier's applicable return-to-duty examinations.

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(s) 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of June 2009.

SERIAL NO. 411

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 39720

DOCKET NO. MW-40359

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes
(Division - IBT Rail Conference

NAME OF CARRIER: (BNSF Railway Company (former Burlington
(Northern Railroad Company)

This matter has been returned to the Board on the request of the Organization for an Interpretation. In Award 39720, issued June 26, 2009, we sustained the claim in accordance with the Findings and stated that ". . . [T]he Claimant shall be reinstated to service with seniority unimpaired and compensated for all time lost commencing Friday, June 29, 2007. . . ."

The Carrier contends that the award of backpay should be offset with outside earnings during the period that the Claimant was off work. It asserts that the language of the Agreement, the inherent right of management, as well as on-property precedent of awarding "make whole" remedies for reinstated employees, allows for such deductions. The Organization counters that the Carrier waived offset of backpay because it was not raised during the handling of the claim on the property and even if raised, there is no Agreement provision under Rule 40G that allows for the deduction of outside earnings from an award of backpay. Further, according to the Organization, the Awards cited by the Carrier did not interpret the instant Agreement.

The Carrier argues that the Claimant is not entitled to a windfall or double recovery that he would receive if there were no offset. The Organization replies that if the Carrier's analysis is adopted, then monetary loss and damages resulting from an improper dismissal should be part of the computation. Further, if income was from a part-time job that the Claimant had prior to his dismissal, that income should not be considered.

The Carrier cites Awards for the proposition that the Claimant should be made whole for the period he was off work prior to his reinstatement.

The Organization argues that a make-whole award is improper because the Agreement is clear that a reinstated employee is to be paid for time lost – with no mention of offset for outside earnings.

The Carrier cites to the decision in First Division Award 25971, Interpretation 1 as res judicata on the instant Interpretation. After reviewing the record, Submissions, and arguments in the instant matter, the Board agrees with the Carrier. Interpretation 1 to Award 25971 provides a lengthy discussion of the issue of offset in backpay Awards and the pertinent portion is cited below.

> ". . . The Carrier offset outside earnings received by the Claimant from the time of his dismissal until his reinstatement. The Organization contends that the Carrier could not do so.
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> There are really two questions before this Board: (1) whether the Carrier can offset from the backpay owed the Claimant the outside earnings received by the Claimant from the time of his dismissal until his reinstatement?; and (2) if the Carrier can offset outside earnings, whether because the Claimant was self-employed after his dismissal, the Carrier must take into account expenses incurred by the Clamant in the operation of his business as a reduction of the amount the Carrier can offset? We find the answers to both questions are 'yes.'
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> A. Can The Carrier Offset The Claimants Outside Earnings?
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> With citation to authority from this Division (which authority is disputed by the Carrier), the Organization argues in its Submission at 2-3:
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> > '. . . While deductions are commonly made in the non-operating crafts, and in other industries, the historical treatment of this issue is different for the operating crafts, and the general custom and usage of the phrase "pay for time lost" has not included deductions for outside earnings. . . .'
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> We find, as in similar cases before the other Divisions of this Board, that the Carrier can offset outside earnings earned by the Claimant from the backpay due the Claimant.

First, there is no specific contract provision which prohibits the Carrier from offsetting outside earnings from backpay awards. The point the Organization misses is that absent such prohibitive language (which, if it existed, we would be bound to follow), this Board's authority to formulate remedies is discretionary. See First Division Award 26088 where, after finding the employees were improperly dismissed and sustaining the claim, this Board offset outside earnings in the formulation of a make whole remedy:

> '. . . [I]n the formulation of remedies, it has long been held that arbitration tribunals have substantial discretion for crafting a remedy to fit a particular circumstance.' See United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960):
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> > When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.
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> See also, Local 369 Bakery and Confectionery Workers International Union of America v. Cotton Baking Company, Inc., 514 F.2d 1235, 1237, reh. denied, 520 F.2d 943 (5th Cir. 1975), cert. denied, 423 U.S. 1055 and cases cited therein:
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> > In view of the variety and novelty of many labor-management disputes, reviewing courts must not unduly restrain an arbitrator's flexibility.
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> The courts are particularly mindful of deferring to that discretion in decisions made in this industry. Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 91, 94 [citations omitted]:

> . . . [T]he scope of judicial review of Adjustment Board decisions is 'among the narrowest know[n] to the law.'
>
> Congress considered it essential to keep these so called 'minor' disputes within the Adjustment Board and out of the courts.'

Second, it has long been held that where a contract violation has been shown, the purpose of a remedy is to restore the status quo ante and to make any adversely affected employees whole. See Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867):

> 'The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.'

See also, W. C. Nabors Co. v. NLRB, 323 F.2d 686, 690 (5th Cir. 1963) ('. . . the "make whole" concept does not turn on whether the pay was wholly obligatory or gratuitous, but on the restoration of the status quo ante.').

It was with that 'make whole . . . restoration of the status quo ante' approach in mind that we noted in First Division Award 26088":

> '. . . [A] function of a remedy is to make an adversely affected employee whole. A remedy is not meant to reward the employee or make the employee rich.'

The result argued for by the Organization is that an employee could be dismissed, earn substantial outside earnings after the dismissal, and then be reinstated by this Board and allowed to receive full lost backpay from the Carrier in addition to the substantial outside earnings. That is a windfall for the employee and is directly contrary to the function of a remedy which seeks to restore the status quo ante and make the adversely [affected] employee whole. This Board has the discretion to not allow that result to occur.

Third, we can look to other sources as a guide in determining how to treat this issue. While not binding upon this Board, the National Labor Relations Board approaches backpay awards in the same manner argued for by the Carrier and found appropriate in First Division Award 26088 - i.e., to allow the Carrier to offset the Claimant's outside earnings. See NLRB Casehandling Manual, Part Three - - Compliance Proceedings [emphasis added]:

'10530 Backpay

* * *

10530.1 . . .

The goal in determining backpay is the same in all cases. The Act is remedial; when it has been violated, its intent is to restore the situation to that which would have taken place had the violation not occurred. Backpay awards are to make whole the person who has suffered from a violation for earnings and other compensation lost as a result of that violation. Backpay awards do not include punitive damages nor do they include compensation for collateral losses, such as from stress or credit problems. The backpay award should leave the discriminatee compensated as though the unlawful action had not occurred.

* * *

Backpay is based first on the earnings a discriminatee would have had but for the unlawful action. Against this gross amount is offset the discriminatee's actual earnings from other employment that took place after the unlawful action. . . .

* * *

10550 Net Backpay

10550.1 . . .

> The final calculation of net backpay is simply all gross backpay minus all offsets from interim employment within the backpay period.'

Fourth, in this case and given the facts presented, we choose to exercise our discretion to not allow the Claimant to be the beneficiary of a potential windfall.

Fifth, we are cognizant of a line of authority cited by the Organization that '. . . this issue is different for the operating crafts. . . .' But the bright line of precedent the Organization seeks to paint does not exist. The Carrier has cited us to awards of this Division and boards involving the operating crafts where outside earnings have been offset from backpay awards. See PLB No. 3491, Interpretation to Award No. 1:

> 'The matter of deduction of outside earnings is one of the most disputatious issues in this industry. It stems from the fact that this Organization [the UTU] has refused to concede that the common law rule of damages has general applicability to situations where employees are reinstated under contracts that provide for payment for all time lost. The Organization maintains that such provision must be literally applied, and that even if the affected employee lost little or no compensation as a result of being unjustly disciplined. The prevailing legal concept that the employee should be whole but not unjustly enriched, has not been accepted by the Organization. The record is clear that in the early days of the First Division, the Organizations view predominated.
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> * * *
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> We find that the former older awards are not persuasive or binding since they are not in conformance to the current holdings of federal courts regarding damages, and that the terms "all time lost" must acknowledge and give credit to outside earnings, if any, that Claimant received during the period that he was out of service.'

See also, Interpretation No. 1 to First Division Award 24718:

> 'In sustaining this claim for ". . . all earnings lost as a result of the unjustified discipline . . . ." it is the intent of this Board that the Claimant be "made whole," i.e., that so far as possible Carrier must restore him to the status and position he would have been in but for the violation of his rights under the Agreement. It is our intent that he be compensated monetarily in an amount neither less not [sic] more than the earnings he would have made if he had been retained in the Carriers service during the period he was wrongfully discharged. Perforce, and in accordance with the well-established precedent and principles, this means offsetting his outside earnings, if any, during the period in question. . . .'

Further, see First Division Awards 25932 ('Backpay will be subject to all appropriate offsets, including unemployment compensation he received and any earnings he may have had from other employment during the period of his dismissal'); Interpretation No. 1 to Award No. 25309 ('. . . the Carrier has a right to use outside earnings to offset any money that might be due . . . [a]n employee should not [be] rewarded with a windfall as a result of the Award'); 24156 ('The Claim must be sustained compensating the Claimant for all time lost, subject to deductions of outside earnings');15765 ('His earnings so made are deductible from the amount he would have made but for the breach in determining the amount of damages he is entitled to receive from the party committing the breach of contract.'). Additionally, see PLB No. 6681, Award No. 2; PLB No. 6192, Award Nos. 7, 34; PLB No. 5760, Award No. 41; PLB No. 5726, Award No. 9; PLB No. 4901, Award Nos. 127, 207.

As part of the make whole remedy fashioned in this case, the Carrier shall therefore be allowed to offset Claimant's outside earnings from the time of his dismissal until the time of his reinstatement."

The above discussion is dispositive. The Carrier can deduct outside earnings from the backpay of the Claimant in the instant matter.

The second issue of whether the Carrier had made the required health and welfare payments for the Claimant was also discussed at the Interpretation Hearing. The parties agreed that the matter could be readily resolved by a copy of the receipt indicating that the required payment had been made. The Carrier is ordered to forward a copy of that receipt to the Organization.

Accordingly, the Claimant shall be made whole consistent with the terms of this Interpretation. The Carrier is entitled to offset outside earnings against the gross backpay owed the Claimant from the time he was dismissed until he was reinstated.

Referee Brian Clauss who sat with the Division as a neutral member when Award 39720 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of November 2012.

LABOR MEMBER'S DISSENT
TO
INTERPRETATION NO. 1 TO THIRD DIVISION AWARD 39720,
NRAB DOCKET NO. MW-40359
(Referee Clauss)

Interpretation No. 1 to Third Division Award 39720 ignores the longstanding rules of the Board prohibiting either party from raising arguments and/or introducing evidence at the Board if such arguments and evidence have not been raised during the handling of the dispute on the property. The principle that such new argument and/or evidence is to be rejected by the Board is so well settled as to preclude the necessity of citation of supporting precedent. Had the Majority properly rejected the new arguments raised by the Carrier, it would have saved itself from compounding its error by deciding the new issue by totally ignoring the precedent decisions of this Division under the rules of the applicable Agreement and its and predecessor Agreements and, instead, importing the reasoning in an interpretation from another Division of this Board that interpreted a different collective bargaining agreement.

The Organization Member wholeheartedly concurs with the Referee's initial finding that the Carrier violated the Agreement in this case when it dismissed the Claimant and, in part, still does insofar as his return to service is concerned. The Board properly held the Claimant must be reinstated and be paid for all time lost. As soon as the award was adopted, the Organization attempted to have the Claimant compensated in accordance with the clear terms of the award. However, rather than to comply with the Order of the Division, this Carrier raised a new contention that was never discussed by the parties during the handling of this dispute on the property. That contention was that the Claimant was to provide documentation to show what he had earned in the interim period from the time he was improperly dismissed until he was reinstated to service. The Carrier had more than one (1) year after his dismissal to raise that argument within the on-property correspondence, but chose to stand mute on the subject, but waited to spring the requirement on the Claimant just as he was preparing to return to work.

Clearly the Majority grievously erred when it failed to reject the Carrier's position based on its untimeliness. However, even if the merits of the Carrier's position could have been reached, the Majority erred when it failed to take into consideration the precedent under this and predecessor Agreements. This is true for several reasons. First, it is obvious that the Carrier's improper argument on remedy, centered on the issue of the deduction of outside earnings from any award of monetary damages, constitutes a naked attempt to mitigate its liability on the basis of common law concepts of equity. However, the awards establishing the principle that common law issues of equity are not properly before this Board are legion. Typical of such precedent are Third Division Awards 9437 and 11446.

Rather than to have adopted the common law rule of "make whole" relief, within the Agreement, the parties have agreed on the remedy for employes who are found to have been

unjustly disciplined or dismissed from their employment with the Carrier. Such remedy is specifically provided under Rule 40G of the Agreement, which reads:

> "G. If it is found that an employe 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."

Inasmuch as the Agreement governs the employment relationship between the Carrier and its employes and not that of any outside party, it is clear that the wages lost by a claimant as a result of the improper discipline or dismissal include all the wages the Claimant would have received from the Carrier absent the imposition of unjust discipline. In some cases, such as with the issuance of a written reprimand or a "record suspension", the employe may suffer no wage loss as a result of the disciplinary action and no monetary remedy would be required. In the case of an unjust suspension or dismissal, a monetary remedy is required. Whether or not a claimant receives other income during that period is irrelevant in determining the wages lost by the employe as a result of the unjust discipline or dismissal. The determination of these questions does not depend on factors or evidence outside the property. In fact, the Carrier and its predecessors have, in the past, recognized that no authority to deduct from that payment of full back pay can be found in the language of the Agreement.

Historical Background

On December 7, 1945, the NRAB Third Division adopted Award 3011, between the Brotherhood of Railway and Steamship Clerks and the Chicago, Burlington and Quincy RR (CB&Q), a predecessor of the Burlington Northern and of BNSF as it exists today. In Award 3011, the Board sustained the claim for the employe's reinstatement and pay for all time lost due to her unjust dismissal. After the award was rendered, the Carrier returned to the Board to request an interpretation, seeking to deduct the Claimant's outside earnings from the damages owed under the terms of the award. That action clearly indicates that the Carrier recognized that under the rules of the Agreement controlling in that dispute, the clear language of the award did not allow a deduction for outside earnings and that it came to the Board in that instance requesting an interpretation that would allow it to make such deduction. In its Interpretation, the Board found, in pertinent part:

> "This controversy, therefore, resolves itself into the rather narrow issue as to the meaning of Rule 52, which we here quote in its entirety:

> "'If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge; if dismissed, the employe shall be reinstated and compensated for wage loss (if any) suffered by him.'
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> Stated another way, the question is whether Rule 52 is merely declaratory of the common law rule, or whether it establishes a more liberal formula for measuring the claimant's compensation rights.
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> * * *
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> Inasmuch as Rule 52 expressly embraces only a part of the common law rule, entitling the claimant to what she would have earned had she been allowed to work, without embodying therein, also, the correlative right of the carrier to deduct other earnings, we must conclude that it was not the intent of the parties to apply the common law doctrine in cases such as this.
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> * * *
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> It is our conclusion, therefore, that a proper construction of Award 3011 precludes the application urged on behalf of the carrier."

Interpretation No. 1 to Third Division Award 3011, dated November 21, 1946, is relevant to the application of Rule 40G of the current BN/BMWE Agreement because the language of the rules are virtually identical, having their origins in the predecessor agreements on the CB&Q. Inasmuch as the Board has interpreted the language of the rule and the parties have not negotiated any substantive change to that rule, the rule must mean the same as it did when the Board did rule on its correct interpretation. Consequently, the proper interpretation of Rule 40G does not embody any right of the Carrier to make any deduction for outside earnings.

After Award 3011 was issued, but before the Division had adopted its Interpretation No. 1 thereto, on February 1, 1946, the Third Division adopted Award 3113, between BMWE and CB&Q. Following the issuance of that award, the Carrier returned to the Board and asked that said award be interpreted in such a way as to allow it to deduct the outside earnings of the claimant therein when making the ordered payment for lost wages. That action clearly indicates that the Carrier recognized that under the Agreement then in effect, the clear language of the award did not allow a deduction for outside earnings and that it came to the Board in that instance requesting an interpretation that would allow it to make such deduction. The Board, however, declined to do so. Rather, the Board held that the Carrier's attempt to have the issue of deduction of outside earnings considered after the Board had rendered its award was improper because the issue was not properly raised by the Carrier when the Board originally considered the claim. Of

course, had the Carrier attempted to raise such issue for the first time in its submission or presentation to the Board, it would have been improper inasmuch as it had not been raised during the handling of the dispute on the property and was barred from consideration. Moreover, in view of the contemporaneous Interpretation No. 1 to Award 3011, it was already clear that the Board viewed the quoted language of the Agreement as to preclude any deduction for outside earnings.

There can be no question but that in Interpretation No. 1 to Award 3113, the Carrier's attempt to argue this new issue was seen as an attempt to have the Board modify its award so as to reduce the amount of monetary damages the claimant therein would receive and that without such modification, the Carrier was required to pay the full measure of the wages he would have received from the Carrier had he not been unjustly suspended, with no deduction for outside earnings. The same principles hold true to this day.

In December of 1970, CB&Q, Northern Pacific (NP), Great Northern (GN) and Spokane, Portland and Seattle (SP&S) merged to form the Burlington Northern Railroad. Following the merger, BMWE and the Carrier negotiated a new system-wide Agreement to replace the separate agreements that had been in effect on each of the predecessor carriers. That consolidated Agreement became effective May 1, 1971. Rule 69C thereof explicitly preserved the rights accruing to employes covered by the Agreements that had been in effect. Rule 69C of the May 1, 1971 Agreement reads:

> "C. It is the intent of this Agreement to preserve pre-existing rights accruing to employes covered by the Agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S Railroads prior to the date of merger; and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging Companies which were in effect prior to the date of merger."

In view of Interpretation No. 1 to Third Division Award 3011 and Interpretation No. 1 to Third Division Award 3113, Rule 69C of the May 1, 1971 Agreement explicitly operated to preserve the contractual right of Maintenance of Way employes, if it is found that an employe has been unjustly disciplined or dismissed, to have such discipline or employment termination set aside and removed from record, to be reinstated with seniority rights unimpaired and to be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension, without any deduction for any income he may have earned while unjustly suspended or dismissed when it preserved the "... pre-existing rights accruing to employes covered by the Agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S Railroads prior to the date of merger." Thereafter, when the parties negotiated a new Agreement that became effective

September 1, 1982, Rule 69C was preserved and continued, unchanged but for renumbering as Rule 78C – preserving those same pre-existing rights accruing to the employes.

On April 29, 1998, the Third Division adopted Award 32565 (decided under the September 1, 1982 Agreement) in which it found that BNSF had wrongfully terminated the employment of the claimant therein. In Third Division Award 32565, the Board found that "*** The Claimant shall be put back to work with back pay for all time lost and with seniority unimpaired. ***" The Board thereupon issued an order to make effective Award 32565 and directed Carrier to pay to the employe the sum he was entitled under the award.

Following the issuance of Award 32565, the Carrier returned to the Board and asked that said award be interpreted in such a way as to allow it to deduct the outside earnings of the claimant therein when making the ordered payment for lost wages, just as it had in Award 3113. That action clearly indicates that the Carrier continued to recognize that in light of the clear language of the Agreement and the pre-existing rights accruing to employes covered by the Agreement as it existed under similar rules in effect on the CB&Q prior to the date of the 1970 merger, Award 32565 did not allow a deduction for outside earnings and that it came to the Board in that instance requesting an interpretation that would in essence modify the award and the previous interpretations of the Third Division so as to allow it to make such deduction. The Board, however, declined to overturn its precedent decisions, quoted above. In this connection, in Interpretation No. 1 to Third Division Award 32565, the Board found:

> "In view of the foregoing the Board rules that arguments presented by the Carrier for deducting outside earnings of the Claimant when implementing Third Division Award 32565 are arguments which are not properly before the Board. Specific request for any amendment to Board Award 32565 by the Carrier is, therefore, dismissed.
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> Claimant Hernandez shall be compensated for all wage loss suffered after his dismissal on June 25, 1996 without deduction of any outside earnings."

Here, the Board again held that the Carrier's attempt to have the issue of deduction of outside earnings considered for the first time at the Board was improper because the issue was not raised by the Carrier during the handling of the dispute on the property. It must also be noted that the Board viewed the Carrier's attempt to argue this new issue was an attempt to have the Board modify or amend its award under the guise of interpretation so as to reduce the amount of damages the claimant therein would receive. Moreover, the Board determined that the clear language of the Agreement required that the claimant be compensated for all wage loss suffered without deduction of any outside earnings.

In 2002, the parties updated the September 1, 1982 Agreement. However, according to its own explicit terms, that Updated Agreement, dated December, 2002, is a synthesis of the parties' existing agreements as of that date and is intended only as a convenient updated reference guide for both the Carrier and the employes and nothing contained or omitted therein is to be construed to amend or nullify all or any part of the existing Agreements between the parties. Within the December, 2002 Agreement synthesis, Rule 78C of the September 1, 1982 Agreement is included therein saved for being renumbered as Rule 80B. Rule 80B reads:

> "B. It is the intent of this Agreement synthesis to preserve pre-existing rights accruing to employes covered by the Agreements as they existed under similar rules in effect on the CB&Q, NP, GN, and SP&S Railroads prior to the date of the 1970 merger; and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging Companies which were in effect prior to the date of the 1970 merger."

In view of Interpretation No. 1 to Third Division Award 3011, Interpretation No. 1 to Third Division Award 3113 and Interpretation No. 1 to Third Division Award 32565, it is clear that Rule 78C of the September 1, 1982 Agreement explicitly operated to preserve the contractual right of Maintenance of Way employes, if it is found that an employe has been unjustly disciplined or dismissed, to have such discipline or employment termination set aside and removed from record, to be reinstated with his seniority rights unimpaired and to be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension, without any deduction for any income he may have earned while unjustly suspended or dismissed when it preserved the "... pre-existing rights accruing to employes covered by the Agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S Railroads prior to the date of the 1970 merger." Clearly, the December, 2002 Agreement synthesis preserved and continued, unchanged but for renumbering as Rule 80B, the same pre-existing right was preserved under the September 1, 1982 Agreement. Moreover, the December 2002 Agreement synthesis, by its very terms, did not serve to amend or nullify all or any part of the existing Agreements between the parties. Consequently, the Claimant has the same right to be compensated for wage loss without deduction for any outside earnings as existed under the CB&Q Agreement prior to 1970 and that right has been explicitly preserved in all subsequent updates and revisions to the Agreement.

For over fifty (50) years after the adoption of the Interpretations to Third Division Awards 3011 and 3113, the record reveals no controversy concerning the implementation of the findings therein. Had the majority considered the historical interpretation and application of the rules of the instant Agreement, perhaps there would have been a well-reasoned interpretation in this case. However, the Majority instead chose to fill its "interpretation" with a lengthy quotation

of an award of a different Division, interpreting a different rule and importing principles that are not to be found within the Agreement and which have specifically been found NOT to apply.

The Board should note that in a dispute wherein the carrier involved did raise the issue of outside earnings deduction during the handling of the dispute on the property, First Division Award 26788 (with the same Referee sitting as the neutral member) interpreted similar Agreement language to that involved here and found that the language of that Agreement did not contemplate a deduction for outside earnings and, therefore, none could be made. In First Division Award 26788, the Board recognized that the interpretation of Collective Bargaining Agreements under the Railway Labor Act are not governed by the same common law concepts as those arising outside of it. Consequently, the common law concept of a "make whole" remedy cannot properly be applied thereto unless such terms have been included in the Agreement by the parties. In this connection, the Board recognized that any earnings offsets would be items for bargaining. Indeed, such items have been the subject of bargaining and some agreements between other carriers and BMWE contain a provision to deduct outside earnings earned during a wrongful suspension or discharge of an employe. The Duluth, Missabe and Iron Range Railway Company and BMWE negotiated Rule 10(g), which reads:

> "RULE 10 Discipline
>
> (g) If final decision decrees that the charges against the employee are not sustained or that the offense does not warrant the discipline administered, the employee shall be returned to his former position from which removed, and compensated in the amount he would have earned had there been no suspension or dismissal less any amount earned through any other employment, provided an employee who has earnings from other employment may deduct from those earnings necessary expenses in securing and performing the work."

The Seaboard System Railroad, now a part of the CSX Corporation and BMWE negotiated Rule 39, Section 5, which reads:

> "Section 5
>
> If the decision is in favor of the employee, his record shall be cleared of the charge, and if suspended or dismissed, he will be reinstated to his former position with seniority unimpaired and shall be compensated in the amount he would have earned had he continued in the service less the amount earned in other employment."

Finally, the Agreement between BMWED and BNSF governing the former St. Louis-San Francisco (Frisco) provides within Rule 91(b):

> "If the charge against the employe is not sustained, it shall be stricken from the record. If by reason of such unsustained charge the employe has been removed from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost while out of the service of the Carrier at not less than the rate of pay of position formerly held, or for the difference in rate of pay earned if in the service, less any amount earned in other employment."

As will be noted from a comparison of the above-quoted rules with the rule applicable here, when negotiators in the railroad industry intended to provide for the deduction of outside earnings from payments for lost time for employes who are found to have been unjustly suspended or dismissed, those negotiators knew how to write such contract language. In contrast, in Rule 40G of the Agreement controlling in this case, this Carrier and BMWE did not negotiate a remedy which would allow for the deduction of outside earnings during a wrongful suspension or dismissal of any employe. If it had been the intention of the parties to include such a provision, they would have clearly stated such in the rule. They did not do so. The Majority is in total error when it unilaterally rewrites Rule 40G in such a manner when the parties have not mutually agreed to do so. Instead, the Majority is willing to take away an important contractual right that the Organization secured within the Agreement and rightly had relied on for decades. The fact that the Majority is willing to do so without so much as a cursory examination of the historical precedent under this Agreement is indefensible.

In addition to the comments above, it is submitted that the language of Rule 40G, "*** wage loss, if any, suffered by him, resulting from such discipline or suspension." was in part negotiated and intended to protect the Carrier from having to compensate an employe for wages that the employe would not have earned during the period of wrongful suspension or dismissal. For example, assume the instance of an employe who was suspended for six (6) months between the months of December through May of any given year. If said employe would have been furloughed for any period of time during those six (6) months, the Carrier, in the event the discipline was later found to have been unjustified, would calculate the "wage loss suffered" only on the portion of time the wronged employe would have been entitled to work in accordance with his seniority. In the case of a record suspension or probation, there could well be no wage loss suffered at all. Any attempt take the giant leap from applying Rule 40G in the manner described above to also rewrite the terms of the Agreement to insert a provision for the deduction of outside earnings is not supported by logic and reason and would force the Claimant to subsidize the Carrier's unjust imposition of dismissal or suspension.

Notwithstanding the foregoing, it seems the majority in this case wishes to open up the process to issues of equity and the common law of damages. The majority, thus, must be ready to consider all such issues, involving not only the Claimant's lost wages, but also all monetary and other damages suffered by him as a result of his arbitrary and unjust dismissal from service. As held in First Division Award 11670:

> "If a carrier has the right to present to this Board the issue of mitigation of damages, then under the same legal principles an employe should have the right to present issues involving not only his loss of wages, but, in addition, issues relative to such special damages as were sustained by him because of the breach of his employment contract. It would seem that this Board could not properly authorize mitigation of an employe's damages for breach of his employment contract, unless it first has permitted such an employe to establish all his damages, special and general, arising from such breach. But, as hereinbefore indicated, such general issues cannot be determined without the presentation of testimony, subjected to cross-examination; without reference to factors and considerations entirely outside of the property involved and the governing schedules; and without the presence of a fact-finding tribunal to finally determine the same."

The findings of First Division Award 11670 are important here because they recognize that the issues raised by the Carrier's deduction for outside earnings also invite attention to similar issues involving the Claimant's damages and that such issues arise entirely outside of the property involved and outside of the governing agreement. It appears the Carrier would consider the Claimant's outside earnings a "benefit" of his having to suffer through dismissal as a railroad employe and, thus, should be deducted from a back pay award. However, if one were to subscribe to that notion, one would necessarily have to consider the consequential damages suffered by the aggrieved party also. Obviously, a balance could not be had unless both sides of the story were examined. For example, the unjustly suspended or dismissed claimant suffers a loss of contractually provided health, dental and vision care insurance for himself and his family; medical prescription benefits; credited service and compensation under Railroad Retirement; paid time off in the form of paid holidays and vacation; etc. While some of those medical, dental and vision care expenses may be reimbursed upon his reinstatement to service, there may have been other consequential damages as a result of not having been covered at the time those expenses were incurred and/or damages when medical care may have been deferred because of a lack of coverage. How would we find a remedy for a serious illness that could have been prevented had a claimant's medical insurance not lapsed? What monetary damages would be required to compensate the unjustly suspended or dismissed employe for the physical, emotional and other damages suffered by the employe as a result of his being unjustly withheld or fired from his railroad job.

Furthermore, the employe could well see his credit rating damaged, resulting in higher interest payments on mortgage and other loans, higher insurance rates, etc. It would obviously be necessary to compensate the Claimant for those readily foreseeable losses as well, should the issue of compensation for damages be opened up to a full examination of the damages suffered. And, of course, the Claimant would undoubtedly be entitled to receive a fair rate of interest on any back wages he would ultimately receive. Countless other losses could be cited and examined. If the Carrier argues for the application of the common law of damages, it must be prepared for the monetary compensation to be increased, as well.

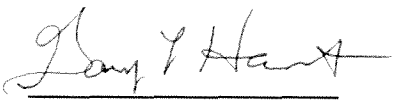
It Would Be Unjust To Allow The Carrier To Deduct Outside Earnings Made By The Claimant That He Would Have Earned Absent The Unjust Discipline.

Not only did the Majority ignore the precedent decisions of this Division, it also failed to take into consideration the entire question of the outside earnings the Claimant would have had even if he had never been unjustly dismissed. Clearly it would be patently unjust to deduct the Claimant's outside earnings for any period of time he would have been observing paid time off from the Carrier, such as vacation, personal leave days and recognized holidays, had he not been unjustly dismissed, because that work and those earnings would have been available to him absent the unjust dismissal. Likewise, it would be unjust to allow the Carrier to deduct outside earnings made by the Claimant that he would have earned even if he had not been unjustly dismissed. Countless employes earn outside income through part-time employment, rental income, farming and/or other small business enterprises that they engage in outside of the time devoted to the performance of their railroad employment. The Carrier has no claim on those outside earnings regardless of whether the employe is working, furloughed or unjustly held out of service. The fact that the Carrier unjustly suspended or dismissed an employe does not and cannot operate to confer to the Carrier a claim to those earnings. Moreover, even if the Carrier were justified in deducting outside earnings that an employe could not have made while employed by BNSF (which under this Agreement it plainly cannot), the Carrier would necessarily be required to prove the amount of those outside earnings versus the outside earnings the Claimant could have made in the absence of the unjust dismissal. Inasmuch as the majority failed to address that issue, it must be assumed that the majority's endorsement of a "make whole" remedy would work to protect from the Carrier's reach, the income the Claimant would have made had he not been unjustly dismissed.

The Majority's findings in this instance have effectively created a new award in the guise of an interpretation which numerous awards of the Board has eschewed. In view of the foregoing, it is clear that the Interpretation reached by the Majority is seriously and palpably erroneous. It is improper in that the majority chose to ignore the prohibition on new evidence and argument that

was not raised during the handling on the property. It is devoid of reasoning concerning the historical interpretation and precedent concerning the very contract language involved here. For the reasons detailed above, Interpretation No. 1 to Award 39720 is palpably erroneous and I dissent.

Respectfully submitted,



Gary L. Hart
Labor Member