Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41513
Docket No. MW-41900
13-3-NRAB-00003-120073

The Third Division consisted of the regular members and in addition Referee Dr. Lou Imundo when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed by letter dated September 23, 2010 upon Mr. L. Bailey for alleged violation of EI 2.6 Inspecting Track Repair and Renewals and EI 23.1.2 Foreman's Roles, Responsibilities and Expectations in connection with alleged failure to detect irregular surface conditions, including but not limited to line swing and track deviations and alleged failure to apply proper remedial actions to these surface conditions, left behind by the high-speed Surfacing Unit SC-31 after the MDZ-2000 machine (09-3X) was extricated from the track while working at Curve 188 on the Jamestown Subdivision on July 9, 2010 which allegedly contributed to the derailment of Train C-ABMBEN1-23A on July 10, 2010 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-3804-W/11-11-0005 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant L. Bailey shall now be reinstated to service with all seniority rights restored, and he shall '*** be paid for his lost time, including any and all overtime paid to the position he was assigned to, any overtime on any position where the claimant could hold, or the work performed by any junior employe in the absence of the claimant and any expenses lost. We also request that Mr. Bailey be

made whole for any and all benefits, including accreditation for vacation, and any and all insurance benefits, and reimbursement for health care from the time [he] was wrongfully removed from service until his insurance benefits are renewed. His personal record must be cleared of any reference to any of the discipline set forth in the notice received by the Organization on September 24, 2010 in a September 23, 2010 letter, from the address of Rico Walker, Division Engineer."

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 not the beneficiary of a fair and impartial Investigation. Even if such had been conducted, the Carrier failed to make its case.

Although the Claimant did not perform his job duties in accordance with Engineering Instructions 2.6 and 23.1.2 he acted as he had done in the past with Management's knowledge and tacit, if not expressed approval. When he did so, the responsibility for track safety shifted to S. Gustafson. When Gustafson accepted what the Claimant had not done instead of directing the Claimant to go back and take measurements, he assumed full responsibility for performing all tasks that the Claimant had failed to perform.

The Claimant's dismissal is hereby rescinded. The Claimant is to be reinstated to his former position without loss of seniority or benefits. He is to be returned to work as soon as practical. The Claimant is to be compensated for all lost wages from

the date of his dismissal to the date he is returned to work. The monies owed to the Claimant are to be reduced by the wages he has earned and the monies he has been paid from any and all sources during the aforementioned period of time.

The Claimant is to fully cooperate with the Carrier in providing all requested information that is relevant to determining the monies he has earned and/or been paid during the stated period. Any refusal on the Claimant's part to fully cooperate with the Carrier will be deemed to be an abandonment of the claim for monies. Any proven omission on the Claimant's part to provide the requested information will void his claim for compensation.

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 19th day of February 2013.

LABOR MEMBER'S
CONCURRENCE AND DISSENT
TO
AWARD 41513, DOCKET MW- 41900
(Referee Imundo)

In the dispute decided in Award 41513, the Claimant was charged with failure to detect a track defect that allegedly contributed to a derailment that occurred the following day. The Majority correctly found that the Carrier bore the burden as a threshold issue to establish that the Claimant had a responsibility to inspect the track at the time and at the location where he was alleged to have failed to perform said duty. Inasmuch as that during the Investigation, the roadmaster testified that the Claimant was relieved of that responsibility, the Majority was compelled to find, as we did in Award 41529, that the Carrier's failure to establish the foundational premise of the charge against the Claimant required that the consequent decisions relying on that premise be rejected. Thus, the Labor Member wholeheartedly concurs with the Majority's finding that the Carrier violated the Agreement in this case when it dismissed the Claimant and that the Claimant must be reinstated and be paid for all time lost.

Notwithstanding the reinstatement of the Claimant, however, the Majority erred when it ignored 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, acting the rogue by, in essence, awarding the Carrier any wages earned by the Claimant during the period of his unjust dismissal.

Clearly the Majority grievously erred when it failed to reject the Carrier's position concerning the deduction for outside earnings 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", an employe may suffer no wage loss as a result of a 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:
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> > '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.'

> "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. However, contrary to the long-settled interpretation of the agreement language involved here, the majority decided to chart a different course, while providing no rationale or even a hint of explanation for its departure from the well-reasoned awards that provided stability to the parties over that extensive period.

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 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
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> (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
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> 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."

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."

Moreover, such items have been the subject of bargaining between BNSF and other organizations. For instance, in the collective bargaining agreement between BNSF and the Brotherhood of Railroad Signalmen, those parties negotiated the following language:

> "**RULE 54. INVESTIGATIONS AND APPEALS**
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> * * *
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> G. If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from the record. He shall be reinstated with his seniority rights unimpaired with pay for time lost, but any earnings in other employment will be used to offset loss of earnings."

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, including BNSF, 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.

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 standing in the community damaged, 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.

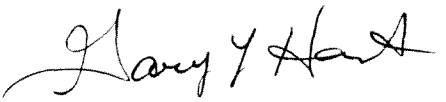
It Would Be Unjust To Allow The Carrier To Deduct Outside Earnings Made By The Claimant That He Would Have Earned Absent The Unjust Discipline.

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.

The Majority's finding in applying an offset for earnings in other employment during the period of the Claimant's unjust dismissal effectively ignored the language and interpretive history

of Rule 40G. Inasmuch as the Majority committed the dual errors of ignoring the Board's prohibition on consideration of arguments that were not raised during the handling on the property and reaching a decision on the issue of an earnings offset that has no basis in the Agreement, the finding that the Claimant's outside earnings can be used to offset the monetary damages due the Claimant is palpably erroneous and should be given no consideration as precedent on that issue.

Respectfully submitted,



Gary L. Hart
Labor Member