

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24800
Docket Number CL-24947

Eckehard Muessig, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9720)
that:

(a) Carrier violated the Clerks' Agreement at Topeka, Kansas, when it removed Patrick W. O'Mara from its service as a result of investigation held January 21, 1982, and

(b) Patrick W. O'Mara shall now be reinstated to Carrier service with all rights unimpaired and compensated for all monetary loss suffered on his clerical position at Topeka as a result of being removed from service, and

(c) In addition to the monies claimed, Patrick W. O'Mara shall now receive fifteen (15%) per cent interest on monies claimed, such interest to be compounded on each and every pay period from date of removal from service forward for the period of time Claimant is held out of service (40 hours per week).

OPINION OF BOARD: The Claimant was notified to attend an investigation on a charge relative to absence from duty, unauthorized entry of offices, and searching through office files.

Subsequent to the investigation, the Claimant was notified that he had been found guilty, and was dismissed from the Carrier's service. In arriving at its finding of rule violation, the Carrier placed primary reliance upon the testimony of a supervisor, who it contends observed the Claimant at the time of the incident under dispute.

The Board observes that a heavy burden of proof rests upon the Carrier in a discharge case to show that the employe is guilty of the charge upon which the dismissal is based. Mere suspicion is insufficient ground to take the place of such proof. The Carrier, in the record before us, has fallen short of a sufficient showing of rule violation. Accordingly, the claim is sustained to the extent that the Claimant is to be reinstated with all rights unimpaired and he is to be compensated for all monetary loss suffered as a result of being removed from the service.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

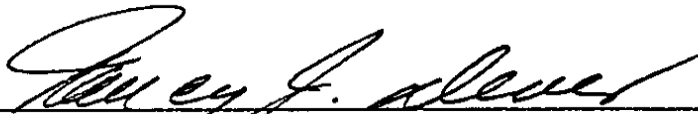
That the Agreement was violated.

A W A R D

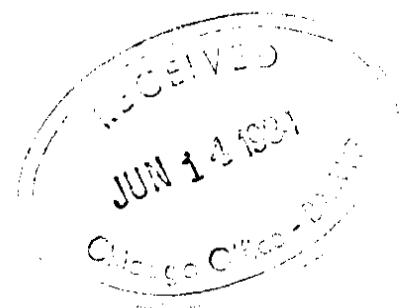
Claim sustained except for interest on the monies claimed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1984



NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO.1 to AWARD NO. 24800

DOCKET NO. CL-24947

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks
Freight Handlers, Express and Station Employees

NAME OF CARRIER: Atchison, Topeka and Santa Fe Railway Company

Award 24800 sustained the Claim in question, except that it denied the interest on the monies claimed. The Claim stated, in part, that:

"Patrick W. O'Mara shall now be reinstated to Carrier service with all rights unimpaired and compensated for all monetary losses suffered on his clerical position at Topeka as a result of being removed from service****"

The requested Interpretation arose because the Carrier deducted monies for a period of approximately nine months from the amount claimed as "monetary loss" under the Third Division Sustaining Award No. 24800. During that period of time, the Claimant was incarcerated in the Kansas Reception and Diagnostic Center, Topeka, Kansas (from July 27, 1982 through September 1, 1982) and later in the Hutchinson Kansas Reformatory (from September 1, 1982 through May 5, 1983).

The Organization, in the advancement of its Claim, argues that the Claimant is due all monies lost as a result of being removed from the service. It contends that unless the Carrier can show that it attempted to utilize the Claimant's services after he was taken out of service, he cannot be considered as "unavailable for service". Moreover, it points out that Award 24800 makes no exception to what was claimed except to disallow interest on the monies claimed.

For its part, the Carrier relies upon its construction of Rule 24-F which, in pertinent part, reads: "If the employee is dismissed or suspended from service for cause and subsequently it is found that such discipline was unwarranted, the employee will be restored to service with pay for time lost." It then argues that all Divisions of the National Railroad Adjustment Board have held that "pay for time lost" means the amount the employee would have earned in his former position had he not been held out of service. In essence, therefore, it maintains that if the employee had been in service, he would not have been available for work during the period of incarceration. Consequently, since he was not available for work, he suffered no monetary loss.

At the outset, the Board notes that it was not aware of the Claimant's incarceration at the time it issued its Award. In any event, the purpose of the Board's Sustaining Award was to reinstate the Claimant "with all rights unimpaired" and to compensate him "for all monetary loss". It is evident that the Claimant was not physically available for work with the Carrier because of his imprisonment. Divisions of this Board on numerous occasions have held that "pay for time lost" means the amount the employee would have earned had he not been held out of service and continued in his position. Accordingly, the Board finds both from the facts of this case and from the weight of decided cases, that the Claim for compensation for the period of time that the Claimant was incarcerated cannot be sustained.

Referee Eckehard Muessig, who sat with the Division as the Neutral member when Award No. 24800 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of November 1985.

