Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32485
Docket No. MW-32885
98-3-96-3-233

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Railroad

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of B&B Truck Driver M. L. Bourgeois for alleged violation of Rule 1.25 of the Maintenance of Way Operating Rules, for misuse of a Burlington Northern charge account at Metro Welding Supply, Minneapolis, Minnesota on November 4, 1994 was arbitrary, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File T-D-891-B/MWB 95-05-23AA).

(2) As a consequence of the violation referred to in Part (1) above, Claimant M. L. Bourgeois shall:

'. . . be reinstated to his position, paid for all time lost (including overtime), made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the January 19, 1995 letter from Mr. J. A. Hovland, General Roadmaster.'"

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.

On November 4, 1994 the Claimant, a B&B Truck Driver with almost 17 years of service and holder of an employment record free of any discipline, went to Metro Welding Supply to purchase grinding wheels for his own personal use. Once there he talked to the proprietor of Metro Welding Supply, William Wojick, discussing subjects relating to his employment with the Carrier. As their conversation ended with the completion of the transaction, the Claimant asked Wojick to "write up" the purchase adding that "he would cover it later." Wojick subsequently prepared an invoice for the purchase and, presuming that the Claimant purchased them for the Carrier, charged the purchase to the Carrier's account.

Subsequently the Carrier discovered that the Claimant had made the purchase in question without authorization and that the purchase had been charged to its account. The Carrier then commenced an investigation during which the Claimant, among others, was questioned. Moreover, during the course of the investigation the Claimant contacted Wojick and had the purchase taken off the Carrier's account and charged to himself. As a result, no charge was made to the Carrier nor did it disburse any funds for the purchase. Ultimately, the Carrier charged the Claimant with misusing Carrier credit for his personal use and removed him from service.

The Organization contests the Claimant's removal from service on both procedural grounds as well as attacking the merits of the charges made against him. With regard to procedure, the Organization contends that the notice of the charges to the Claimant was not specific as required by Rule 40(c), that the Carrier's investigation was untimely, and that the transcript of the Hearing on the property was inaccurate. We do not agree with the Organization on any of these points. First, the notice is attacked by the Organization because it informed the Claimant that he was being investigated regarding "...*an* item for your personal use *on or about* November 4, 1994." (Emphasis Supplied). Thus, the Organization contends the Claimant was unable to

mount any defense to the charge. We disagree. Perhaps if the record showed that the Claimant had made many purchases at Metro Welding during the period in question, there might be a basis for concluding that he could not know which purchase was the subject of the investigation. However, the record contains no such evidence and indeed appears to include evidence of only *one* such purchase during the period in question.

The Organization next argues that the Carrier's investigation was not timely because it was not undertaken within 15 days of the alleged offense. The record shows however that the notice of the Investigation was within 15 days of the completion of the Carrier's internal investigation by Special Agent Novak. Although the Organization is correct that there is no requirement that the Carrier complete its internal investigation before commencing its Rule 40 action, they can be little doubt that such caution works to the advantage of both the Carrier and the Claimant. Indeed, it is not unheard of that Carrier's action in holding an employee out of service is often challenged on the basis that the Carrier acted before getting the facts. Thus, the Carrier's actions here did not serve to invalidate the discharge.

The final procedural attack by the Organization turns on a portion of the transcript. More specifically, the Organization correctly points out that the portion of the transcript setting forth the recitation of the written statement of Wojick is not consistent with the written statement itself. However, it is undisputed that the statement itself is a part of the record as an attachment to the transcript. Thus, any inconsistency is cured. Moreover, this inconsistency, standing alone as it does, is not sufficient evidence of tampering, as alleged by the Organization. Rather, it rises, at best, to the level of inadvertent error resulting in no prejudice to the Claimant.

On the merits the Organization contends that the Carrier has failed to carry its burden of proof, which is higher than that ordinarily imposed on the Carrier because the allegation is one of theft, because the Claimant did not intend to use Carrier credit for a personal purchase and because the Carrier was never charged for the purchase nor did it disburse funds to pay the debt. Finally, the Organization relies on the Claimant's long record of unblemished service. In response, the Carrier asserts that the record clearly shows that the Claimant admitted to two Supervisors that he used Carrier credit to purchase the grinding wheels for personal use and that in the face of such an admission the Carrier has met its burden of proof. With regard to the propriety of discharge under such circumstances, dishonesty is a dischargeable offense without

regard to years of service and moreover, asserts that this Board does not have the authority to mete out justice based on leniency.

We begin our analysis of this matter with the observation that we agree with the Organization, as we must, that the burden of proof lies on the Carrier and that in a case of this nature the burden is a heavy one. We next consider the record evidence surrounding the transaction in nature to determine if the Claimant did in fact intentionally use Carrier credit for personal gain. On this note, the only record evidence is the testimony of the Claimant and the written statement of Wojick. A close review of that evidence reveals that the Claimant did not assert in any way, shape or form the purpose of the purchase. At best the only possible evidence on this point is the Claimant's statement that "he" would cover the purchase later. In our view this statement, to the extent that it is conclusive at all, leans toward a conclusion that the purchase was indeed for personal use and that the Claimant would use his personal funds for payment. Similarly, we note that the Claimant did not follow the ordinary process used at Metro when one purchases material on Carrier credit. Again, another factor leading to a conclusion that Carrier credit was not to be used. In fact, a close review of the record shows that the *only* evidence from the point of transaction that the purchase was to be placed on Carrier credit was the fact that the purchase was made by a person known to Wojick to be an employee of the Carrier and in the course of a discussion between the two of them relating to Carrier business. In light of the heavy burden that the Carrier carries on this matter we do not believe that evidence to be sufficient to justify the Claimant's discharge.

We are mindful that the competing credibility of the two Supervisors who testified that the Claimant admitted using Carrier credit for the purchase was apparently deemed more persuasive than the Claimant's denial that he made those statements. We are also mindful that the credibility assessments made on the property are not to be lightly disturbed. However, as noted above, the burden of proof in this case is not that which is ordinarily applicable. Accordingly, we believe that it is inherently incredible that the Claimant, having made a purchase under the circumstances described above which do not lead to the conclusion that he intentionally use Carrier credit for personal gain, would admit doing so. Rather, it strikes us under the circumstances to be more likely that he would deny making any such admission.

In light of the foregoing we find that the Carrier has failed to meet its burden of proving the charges assessed against the Claimant.

AWARD

Claim sustained.

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 23rd day of February 1998.

SERIAL NO. 379

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 32485

DOCKET NO. MW-32885

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (The Burlington Northern and Santa Fe Railway
(Company

On February 23, 1998 the Board sustained a claim in the above case which read as follows:

"The dismissal of B&B Truck Driver M.L. Bourgeois for alleged violation of Rule 1.25 of the Maintenance of Way Operating Rules, for misuse of a Burlington Northern charge account at Metro Welding Supply, Minneapolis, Minnesota on November 4, 1994 was arbitrary, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.

As a consequence of the violation. . . Claimant. . . shall:

'. . . paid for all time lost. . . , made whole for any and all benefits. . . .'"

The Board thereupon issued an Order to make effective Award 32485. Thereafter a dispute arose between the parties with respect to implementation of the Award, more specifically, whether the Carrier can ask the Claimant for information with respect to any interim earnings he might have had while the claim was pending for the purposes of off setting the Carrier's backpay liability pursuant to the Award.

Before reaching the merits of the dispute, the parties first disagree whether the issue is even properly before the Board. The Organization contends that because the Carrier did not raise the issue of any set-off for interim earnings until after the Award was issued it constitutes "new evidence" and is therefore not properly before the Board for consideration. In support of its position it cited Interpretation No. 1

to Third Division Award 32565. The Carrier, on the other hand, renews the arguments made at that time and continued in its Dissenting Opinion to Interpretation No. 1.

We carefully reviewed the Majority and Dissenting Opinions to Interpretation No. 1 to Award 32565, as well as the other authority cited by the parties and find that the authority cited by the parties on this discrete issue is less than helpful. Unfortunately, the authority relied upon by the parties is hopelessly in conflict and seemingly irreconcilable even to the point that individual referees are not always consistent over time. Thus, we believe that the debate is best joined by examining the underlying basis for the "new evidence" prohibition and looking to see whether it applies to this matter.

It seems that the basis for the new evidence prohibition is several fold. First, as pointed out in Interpretation No. 1 to Award 32565, it leads to finality and stability in claims processing and, hopefully, labor relations. Second, it prevents surprise and prejudice in claims handling. In our view, neither laudable goal is served by applying the rule to this case. For example, any request for a remedy to an improper discharge is by definition a demand that the employee be placed in the position he or she would have enjoyed had he or she not be discharged. In other words, there would have been no discharge and the Claimant would have continued to work. Thus, the remedy sought therefore implies that the issue is what the Claimant would have earned had he or she not been discharged which would have excluded earnings from other concurrent employment. Under such circumstances we do not believe that a dispute over this issue, which is not ripe until the claim is sustained, constitutes "new" evidence and therefore does not undermine the finality or the stability of the original resolution of the claim. Moreover, to rule otherwise would require that in every discipline case the Carrier would be required to raise the issue, not only before the Board, but conceivably at the Hearing, in order to make the record on the claim and to preserve the claim for eventual resolution. This would be true because if it failed to do so the Organization could then argue that there had been surprise or prejudice. We do not believe that any such process would lead to stable labor relations and claim processing and could lead to just the opposite result.

Accordingly, we find that the matter is properly before the Board and we therefore consider the arguments of the parties. In so doing we find that it is

appropriate and proper that in complying with an Award sustaining a claim that a discharge was a violation of the labor Agreement necessarily requires, absent language in the Award to the contrary, that there be a set-off to the Carrier's back-pay liability for any interim earnings. The basis for doing so is again to consider what circumstances the Claimant would have encountered had the discharge not taken place. Clearly, in that case he or she would have continued to work and therefore the Carrier is liable for the earnings, accrual of seniority, and application of benefits that the Claimant would have enjoyed but for the discharge. By the same token had the Claimant not been improperly discharged, he or she would not have found concurrent employment. Therefore, the earnings from that employment should serve as a set-off to the Carrier's liability.

It is true, as the Organization argues, that neither the claim nor the parties' Agreement provides for any set-off. However, there is nothing in the Agreement that prohibits any set-off and therefore, the rules of logic prevail.

In view of the foregoing the Board rules that the issue of a set-off for interim earnings is properly before the Board and that there must be a set-off. The parties are to see that the necessary data for determining the amount is provided to off-set the Carrier's backpay liability under Award 32485.

Referee Robert Perkovich who sat with the Division as a neutral member when Award 32485 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 24th day of January, 2000.

LABOR MEMBER'S DISSENT
TO
INTERPRETATION NO. 1 TO THIRD DIVISION AWARD 32485
(Referee Perkovich)

Although normally a Dissent to an Opinion of the Board is filed within a certain time frame, this Dissent is tardy due to our awaiting the outcome of a challenge of the interpretation in court. Despite all the faults built into this system, the Organization Member of the Board is not ready to conclude that reason has become meaningless. Therefore, the Organization Member has no alternative but to file this emphatic Dissent.

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 be reinstated and be paid for all time lost and made whole for all benefits. 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, true to form, 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. Some three (3) years and (3) months had elapsed since the Claimant was removed from service and not one time did the Carrier ever mention the deduction of outside earnings. 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. The Organization requested an interpretation from the Board as to the validity of the Carrier's new contention and even if it could be considered, could it be supported by clear and unambiguous Agreement language. The Majority's actions in allowing for the deduction of outside earnings have effectively created a new Award in the guise of an interpretation which numerous Awards of the Board has eschewed.

First, the Majority exceeded its jurisdiction by even considering the deduction of outside earnings by declaring that such an argument is proper. The Majority then attempts to justify its position by asserting that Interpretation No. 1 to Award 32565, involving the same parties and an identical question, was not applicable here. The question resolved by Interpretation No. 1 to Award 32565 was a clone of this case and could not have been colored any other way. In that case, the Board held:

> "The Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

As in the case that is now before the Board for interpretation, the Carrier raised a new argument relative to the remedy concerning the deduction of outside earnings. The Board held in Interpretation No. 1 to Award 32565:

> "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."

Rather than following the findings of the Board in the above-cited Interpretation, the Majority in this case attempts to justify the consideration of the deduction of outside earnings to Interpretation No. 1 to Award 32485 by contending that the Carrier would be required to raise the issue "*** not only before the Board, but conceivably at the Hearing ***"

The problem with the Majority's reasoning is twofold. First, if the Carrier raised the issue before the Board, without ever raising it during the handling on the property, it clearly violates the appellate nature of the National Railroad Adjustment Board (NRAB). Because cases brought before the Board are appellate in nature, the Board does not take evidence "de novo". Both parties are bound by the arguments and contentions that were raised during the on-property handling of the claim. As we stated earlier, this case was actively discussed by the parties for more than one (1) year after the Carrier dismissed the Claimant from service. The Carrier was required, in accordance with the well-established principles of the NRAB, to raise the issue of outside earnings during that period of time before the case was listed before the Board. Since the Carrier did not do so, it was estopped from raising the contention before the Board and most certainly after the Award was rendered.

Second, the notion that the Carrier would be required to raise the issue of outside earnings "conceivably at the hearing" is so farfetched it defies logic that any Referee would make such a statement. If a carrier ever raised that contention at the hearing, prior to the decision of the Hearing Officer, this would lead to such a barrage of procedural challenges to the Claimant's right to a fair hearing that the record before the Board would be voluminous.

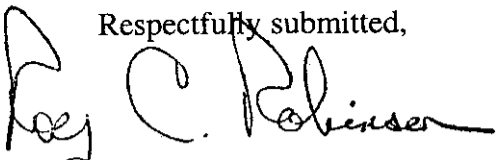
It was the aforementioned flawed reasoning the Majority used as a basis to consider the issue of outside earnings. The Majority's skewed reasoning did not stop there. It continued by granting the Carrier the right to deduct outside earnings. The Majority reasoned that the basis for doing so was to consider what circumstance the Claimant would have encountered absent the improper discharge. The Majority stated that absent the improper dismissal, the Claimant would have continued to earn his wages, accumulate seniority and benefits and would not have found other employment. With that said, what the Majority failed to consider is the collateral damages suffered by the Claimant. The Claimant was branded by his community as a thief, a pariah in their eyes, and his family was shamed. Moreover, the Claimant, a long-term employe of the Carrier,

suffered the psychological stress of being wrongfully accused and ultimately dismissed for a charge that was never proven. The drudgery of seeking other employment and answering the inevitable question asked on all employment applications, i.e., had he ever been discharged for cause, is incomprehensible. The thought of answering such questions, cognizant of ones innocence, is enough to make your skin crawl. The threat of losing all accumulated savings, the family home and automobile must have weighed heavily on the Claimant's mind. All of this played out over a period of three (3) years and three (3) months and must have been a nightmare. For the Majority to allow the deduction of outside earnings, without ever considering the Claimant's collateral damages is mind boggling at best. In effect, the Majority's decision to allow the deduction of outside earnings was that the wrongfully discharged Claimant ended up subsidizing his wrongful discharge. The Majority's decision to allow the deduction of outside earnings can only be described as incredible.

Finally, the Majority's statement that although the Agreement does not provide for a deduction of outside earnings; therefore, under the veil of "logic", such does not prohibit a deduction and is bizarre. Within our submission requesting an interpretation, we pointed out that other agreements provide for the deduction of outside earnings. The Agreement at issue here does not provide for such a deduction. We can only imagine what kind of mischief would be spawned if this kind of reasoning is allowed to prevail at the Board.

For all of these reasons, I emphatically dissent with respect to the damages finding in this interpretation.

Respectfully submitted,



Roy C. Robinson
Labor Member

Carrier Members' Response
to the Labor Member's Dissent to
Interpretation No. 1 to Third Division Award 32485, Serial No. 379
(Referee Perkovich)

The White Rabbit in Alice in Wonderland was scurrying around because he was late and was fearful of the consequences. The Organization Member's late Dissent to the Interpretation of Award 32485 is such an "unnecessary act" now that it accomplishes nothing.

For the record Award 32485 was adopted by the Board on February 23, 1998 and the Interpretation was adopted on January 24, 2000. The U.S. District Court District of Minnesota's decision was filed on June 17, 2002 and the Organization's Dissent was received on September 4, 2002 although we understand that it was filed at the Board sometime in late August. By any stretch, the Organization's filing is so late that it cannot warrant any serious consideration, nor does it carry any merit and by the Organization's procrastinated action invalidates any legitimate purpose the filing might have attempted to provide.

The Organization very belatedly contends that the deduction of outside earnings requested was wrong. The Organization could have properly raised its objection in January 2000 when Serial No. 379 was issued. Whether or not the Organization was successful in court, the Interpretation was a part of the disposition of the docket submitted to the NRAB and would be and continues to be available for use in matters raised in railroad arbitration. There was no need to wait for the court decision.

Further, the matter of the deduction of outside earnings has been before this Board for some time and, as will be described below, had been resolved via several decisions rendered over a substantial period of time to warrant the conclusion that the matter had been settled. The District Court echoed this common sense disposition when it pointed out:

> **"While set-off specifically had not been raised in the submissions, the closely related issues of remedy and back pay had been." (page 4)**
>
> **"It is clear that the Board intended to make Bourgeois 'whole', but avoid awarding him a windfall, which is accomplished by allowing a set-off. Given that nothing in the CBA prohibits a set-off, the Court cannot find that the remedy fashioned by the Board is 'without reason or fact'...." (page 7)**

In Interpretation No. 1 to Second Division Award 9264, Serial No. 93 dated May 30, 1984, we find the following:

> "The next issue to be considered is whether the Board has the jurisdiction to consider the deduction issues because they were not raised during the handling of the Claim. The contentions of both Parties reveal that this is a crucial issue. Certainly it must be addressed as a threshold matter. The Organization basically challenges our jurisdiction to consider the question, because to do so, would be in violation of the rule and procedures of the Board and Section 3 First (i) of the Railway Labor Act prohibiting the consideration of new issues and evidence not handled in the ususal manner. Moreover underlying their position is the view that the Board cannot have anything more in mind at the time of the Award than was at issue in the original Award.
>
> The Organization's viewpoint has support in case law, particularly Referee Dorsey's interpretation of Third Division Award 14162 based on a remand from the United States District Court for the Northern District of Illinois (Eastern Division). Referee Dorsey exhaustively and in no uncertain terms indicated a deduction for outside earnings was not permissible because it was not raised in the original handling before the Board. He stated:
>
> > 'The application of the 'make whole' theory, which in reality is the common law of damages, in this case sounds eminently reasonable for the first hearing. But, it is to be noted that this Board has no equity or other inherent powers. It is a creature of statute. It has no jurisdiction other than that vested in it by the statute. If in the exercise and application of its statutory mandated jurisdiction a Claimant is the beneficiary of a monetary award that appears to be a windfall, application for a cure should be addressed to the Congress; not to this Board or the courts, neither of whom can invade the powers reserved to the legislature by the Constitution....'
>
> On the other hand the Carrier argues that not only does the 'make whole theory' apply, but that other neutrals have specifically held that specific

issues relating to damages need not be handled prior to the interpretation of an Award and that to consider such issues is not violative of the long-standing prohibition against new evidence or issues....

In weighing the two divergent views regarding the question whether the Board can consider the deduction issue, we ultimately gave more weight to the theory subscribed to by the Carrier for the following reasons: First, the viewpoint taken by Referee Dorsey is too simplistic. It is easy to say that absolutely no new evidence can be considered. However, this ignores the practical realities involved in determining the appropriate damages due a dismissed employe. In many instances it is impossible in the handling of a case to bring up each and every factor that may bear on such a question. Questions of lost time can get incredibly complex, especially where an employe may be considered an extra employee or subject to frequent layoffs during dismissal. Moreover, to embrace the Dorsey view would put such questions in the helpless equilibrium. This is because, technically, if the Board cannot consider the Carrier's viewpoint on the appropriate damages, it cannot consider the Organization's either. Referee Blackwell, when considering the new evidence issue, stated it this way in the interpretation to Award 25 of Public Law Board 1315:

> 'Coming now to the method of computation of 'time lost,' which is the major issue in this case, it is noteworthy that the parties' Submissions on the request for Interpretation advance conflicting methods for making the time lost computation. Neither of these methods was raised in the proceedings which led to Award No. 25 and in fact, except for the subject of outside earnings, nothing was said in the prior proceedings in respect to the method of computation. Accordingly, if the Board now declines to consider the Carrier's method of computation on the ground that the method has not been timely raised, the Board would be compelled to consider the Organization's method of computation on the same ground. Obviously, such a 'non-decision' (i.e., a declination to consider both parties' method of computation) would leave the parties in limbo on the application of Award No. 25, and in consequence the Board

> concludes that it is appropriate to make findings on the method of computation in the consideration of the instant request for Interpretation.'

To illustrate Referee Blackwell's point one step further, the Union might agree that a deduction is proper but might disagree over the precise method. The Dorsey view would preclude consideration of this issue if it had not been raised during the handling of the claim. It may not have been raised during the handling of the claim because neither party anticipated it being a problem. This, the Dorsey view would be absurd because the Board would have no mechanism to consider the problem. It would be argued that a new grievance over the problem could be filed and progressed, however, the end result is the same. The problem must be considered at some point in time.

Second, the Organization's basic view of an interpretation is too narrow. There is no reason to believe that the framers of the Railway Labor Act or the framers of the Board's rules, sought to exclude the Board from considering common law principles relating to questions about damages. The Railway Labor Act and the rules of the Board are vehicles to interpret and apply contracts, and these contracts, insofar as the law is concerned, do not exist in a vacuum. Just as we have to rely on common law principles of contract interpretation, when determining whether a contract has been violated, we also have to rely on certain common law principles relating to damages when assessing remedies for contracts we find to be violated.

Further, in this view, it is noted that other boards under the Railway Labor Act have adopted a view opposite to the Dorsey view of the new evidence issue and the question of merit as it relates to the instant issue. Thus, while there are divergent views, the greater weight of authority rests with the Carrier's position. For instance, see Award No. 2, Public Law Board 1135 (Referee Ritter), the Interpretation to Award No. 2, Public Law Board 1535, Report of Special Master Raymond H. Cluster in United Transportation Union vs. Chicago Northwestern in Civil 4-77-432 before the United States District Court of Minnesota, and United States Court Judge Miles W. Lord's adoption of the report and recommendation of the Special Master."

This view has not been unique as the following citations will attest:

Interpretation to Third Division Award 22484, Serial 305 ('81)

"The Board holds that Carrier is entitled to take credit for any increased earnings of the Claimant. . . . This would make Claimant whole for any wage loss that he suffered. The Claimant should furnish to the Carrier proper information, or copies of his income tax returns, for the four-year period prior to his discharge, and for the period involved herein, so that such determination can properly be made." (Emphasis Added)

Interpretation to Third Division Award 22862, Serial 306 ('81)

"In our view the Carrier was within its rights in requesting the submission of the income tax returns in order to determine from the best available information what credit, if any, should be applied to the back pay. (See Interpretation No. 1 to Award No. 19744, Docket No. CL-19696, Serial No. 276.)" (Emphasis added)

Interpretation to Second Division Award 8256, Serial 91 ('83)

"The practice of offsetting... payments in such cases is consistent with the concept of 'make whole' damages whereby boards such as our attempt within the limits of possibility to put the wrongfully discharged employees in the position they would have occupied had the discharge never occurred. See SBA No. 235, Interpretation No. 1 of Award 2360 (Referee Cluster) and Public Law Board 1547, Interpretation No. 1 of Award 13 (Referee Weston)." (Emphasis Added)

Interpretation to Third Division Award 23541, Serial 320 ('85)

"Most assuredly, the Board's Award which was issued previously was not intended to provide a 'windfall' for Claimant, nor was it intended that a 'penalty payment' was to be directed against Carrier. . . . Despite the Organization's assertions to the contrary, penalty payments (or, the simultaneous payment of wages for two jobs) are the exception rather than the rule in fashioning an Award; and, unless clearly stated in the

> **Award itself, it can only be assumed that the award intended for the Claimant to be 'made whole for his 'losses'. . . .'"**

Interpretation to Third Division Award 27797, Serial 340 ('91)

> **"It was the intent of the Board that Claimant be made whole for wage losses she incurred pursuant to her claim. Payment to Claimant for wages she would have earned with the Carrier and additionally for wages she did in fact earn with another employer would go beyond what the Board considered just compensation under the circumstances." (Emphasis added)**

Interpretation to Third Division Award 27835, Serial 341 ('91)

> **"The Organization opposed any deduction of outside earnings on grounds that no set off was addressed in claim handling nor mentioned by the Board in our Award. . . . Our analysis of these various authorities persuades us that the better reasoned view is that debates over deduction of outside earnings are not new evidence, particularly where, as here, the Agreement language expressly and unambiguously provides for such deductions. Cf. Third Division Award 14162 with PLB 1315-25, PLB 1844-8, Interpretation No. 1 to Second Division Award 8256 and 9264." (Emphasis Added)**

Interpretation to Third Division Award 28159, Serial 342 ('91)

> **"In the main, Carrier argues that its responsibility to make Claimant 'whole' requires it to pay no more than what Claimant would have earned had he been employed by the railroad during the period in question and that no punitive damages are warranted. . . . the better reasoned Awards are supportive of the Carrier's position. As in Award 4 and 13 of Public Law Board No. 1437, there was no mention of the deduction of outside earnings in the governing Agreement and the Award called for pay for all time lost. In an Interpretation of those Awards, the Board concluded that:**

> '. . .the Board is of the opinion, and so finds, that the common law rule of mitigation of damages applicable to personal Contracts of Employment is also controlling in this case.'

This reasoning assumes that the payment of monies over and above that normally earned by a Claimant during the period in question would constitute the payment of punitive damages. Regardless of whether the issue is addressed on the property, this general principle applies."

Interpretation to Third Division Award 31140, Serial 366 ('97)

"A review of the on-property handling to determine the parties interpretation of the claim 'for all time unjustly withheld from service,' reveals that the Organization objected to deducting outside earnings because Claimant held a part-time job while employed. Apparently, the Organization had no objection to the deduction if it would be for jobs secured subsequent to his termination. There is no indication on the part of the Claimant that he worked more or less hours following his termination than he did prior thereto, thus that argument is not persuasive. Carrier can, under these circumstances, deduct Claimant's outside earnings, but only those earnings he had subsequent to his termination up to his reinstatement."

Interpretation to First Division Award 24718 ('99)

"It is our intent that he be compensated monetarily in an amount neither less nor more than the earnings he would have made if he had been retained in the Carrier's 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. . . ."

Interpretation to Third Division Award 33024, Serial 384 ('00)

"We need not join the abstract debate over deductions of outside earnings to resolve the dispute presented. The Carrier has cited to relevant

> authority that has decided these issues on this property. In Public Law Board No. 2406, Interpretation to Award 21, involving the same parties, the Board held that the Carrier could offset outside earnings even though it had not raised the issue prior to the issuance of the Award reinstating the Claimant with compensation for time held out of service. Furthermore, the Board interpreted Rule 74 of the Agreement to provide for such offsets. The Organization offered no contrary authority emanating from this property. When faced with controlling authority on the property we should follow it unless we conclude that the authority is palpably wrong. In light of the diversity of arbitral opinion on the issue in the abstract, we cannot conclude that the Interpretation to Award 21 of Public Law Board No. 2406 is palpably wrong. Accordingly, we will follow it. The Carrier may deduct the Claimant's outside earnings."

Further, we reviewed the Third Division Interpretations since 1983, i.e., Serial Nos. 320-386 and found but one decision supporting the Organization's view, Interpretation to Award 32565, Serial No. 376. In fact, as noted above, subsequent dispositions have not followed that singular disposition. Nor have we found a finding supporting the Organization in the Interpretations of the First, Second, or Fourth Divisions of this Board covering the same period.

As has been noted in the decisions cited above, the intent of a sustaining decision is to make the individual whole under the contract. It is not to provide a windfall to the individual, nor is it to assert a penalty against the Carrier. Despite the fact that the original claim filed with this Board sought to make the Claimant whole (note item 2 of the claim) the Organization refused to provide information to verify any outside earnings because such was not specifically stated in the Award. The subsequent decision of the U.S. District Court in June 2002 upheld the Carrier's request, as had been done for years on this property.

Next the Dissentor contends that the, ". . . .question resolved by Interpretation No. 1 to Award 32565 was a clone of this case. . . ." To that characterization we concur and we did expect that the matter of the deduction of outside earnings in fashioning a "make whole" remedy would have been the same. However, the neutral involved, despite having been provided with relevant on-property precedent for the deduction of outside earnings concluded that there was, "a change in arbitral thinking with respect to this property. . . ." on the matter. Nothing could have been further from reality! Such was used simply to bolster the incorrect conclusion rendered. Despite such

pronunciations, the right to secure outside earnings information for the purpose of a "make whole" disposition has subsequently been stated as the proper course of action on this property - see PLB 6204 Awards 1 and 11, adopted in December 1999 and October 2001 respectively, long before the filing of the Organization's Dissent in this matter.

Finally, Dissentor raises the contention that the Interpretation Majority decided, ". . . .to allow the deduction of outside earnings, without ever considering the Claimant's collateral damages. . . ." (Emphasis added). Had the Organization actually considered such collateral damages relevant such could have been raised in connection with the application of Rule 40 (g) of the Agreement. It is indicative that the Dissentor raises such pleading now in his Dissent when such could have been better addressed much earlier. Instead, the Organization stonewalled any attempt to dispose of the matter on any ground other than its demands.

The Interpretation issued in Award 32485 was properly decided on the Agreement and the precedent developed in this industry. It has now been affirmed as proper by the U.S. District Court. The matter should be considered settled.

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