Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32565
Docket No. MW-33456
98-3-96-3-979

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of employee H. Hernandez, Jr. for alleged violation of Rules 1.6 and 1.7 of the General Code of Operating Rules on June 25, 1995 was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File B-M-403-F/MWB 95-11-17AA BNR).

(2) 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."

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 advised on June 26, 1995 to attend an Investigation to determine facts and place responsibility, if any, in connection with his alleged quarrelsome or vicious conduct on June 25, 1995 at approximately 9:40 A.M. while on duty at the Forsyth, Montana, section house.

After an Investigation was held the Claimant was advised that he had been found guilty as charged and he was dismissed from service. This discipline was appealed by the Organization in the proper manner under Section 3 of the Railway Labor Act and the operant Agreement, up to and including the highest Carrier officer designated to hear such. Absent settlement of this claim on property it was docketed before the Third Division of the Railroad Adjustment Board for final adjudication.

The Rules at bar state the following, in pertinent part.

"Rule 1.6

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Immoral
5. Quarrelsome
6. Discourteous"

"Rule 1.7

Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on railroad property."

The Claimant to this case is H. Hernandez, Jr. He held position as a regularly assigned Section Laborer with the Forsyth, Montana, section gang when the alleged incident happened which led to his dismissal. The section gang normally worked Monday through Friday, with Saturday and Sunday as rest days. The Claimant's Supervisor, who testified at his Investigation, was D. Bartholomew.

June 25, 1995 was a Sunday. The gang was assigned overtime work on this day. It was assigned to lay out new rail between Mile Posts 100 and 130 near Forsyth, Montana. All members of the gang reported to work at the Forsyth section house. The alleged incident took place while the gang was waiting for clearance. The alleged incident took place at about 9:40 A.M.

In the lunchroom of the section house Foreman D. Bartholomew, at around 9:40 A.M., used a small, "common pocket knife" to open an envelope which contained some Carrier documents which he had received. After Bartholomew opened the envelope he placed the knife on the lunch table. He then got up and turned and walked away reading the documents from the envelope he had just opened. There is no dispute that the Claimant picked up the knife and started to clean his fingernails with it. When the Foreman noticed what the Claimant was using the knife for he retrieved it, stating to the Claimant that he did not want his knife to be used for such purposes since he used it on occasions to cut fruit and so on. The Claimant returned the knife to the Foreman.

The instant case centers around whether the Claimant did anything else with the pocket knife in question except attempt to clean his finger nails with it at approximately 9:40 A.M. on the morning of June 25, 1995. Because the following morning the Claimant was charged with threatening another employee while he had the knife in his possession at the time and place described in the immediate foregoing.

According to testimony by Foreman Bartholomew at the Investigation, he was not aware that any incident allegedly occurred until the following morning. On June 26, 1995 ". . . three officials arrived. . . ." and requested that Mr. Hernandez be present. The Foreman and Mr. Hernandez were then given letters requesting them to be witnesses to an incident involving ". . . a knife and two of the employees" working on the Forsyth gang. According to Bartholomew he was not aware of any alleged incident prior to the morning of June 26, 1995. According to this witness, he was present when the alleged incident was supposed to have happened but he was ". . . aware of nothing . . . ." and ". . . nothing was brought to his attention either during or after the fact. . . ." He ". . . had no idea anything was amiss until. . . ." the morning of June 26, 1995.

According to the main witness against the Claimant, fellow worker D. J. Freed, Hernandez picked up the knife on that morning on June 25, 1995 and made a gesture with it that Freed apparently considered to be intimidating. According to this witness, there had also been other times in the past when the Claimant had tried to intimidate

him. For example, the Claimant had stared at Freed on a number of times which had made Freed uncomfortable. At other times the Claimant had not acknowledged greetings by Freed. The Claimant did not talk with Freed while on the job. According to Freed he told the Foreman about the June 25, 1995 knife incident within several minutes of its happening.

Testimony by the Claimant is that he made no gesture to Freed with the knife and just immediately gave it back to the Foreman after the latter asked him to do so. That was the sum total of what happened on the morning of June 25, 1995. If the Claimant had looked like he stared at Freed in the past the Claimant states that he neither meant to do so nor had any reason to have done so. At one time he may have been staring in the direction of Freed but was preoccupied with some issue involving his daughter and was not thinking of Freed. The Claimant states that he had never had a conversation with Freed. He just had nothing to say to him. The Claimant did remember one time when Freed offered him water and he had not answered because he had just been ". . . busy working. . . ."

The sum total of the evidence in the instant case against the Claimant centers on the testimony given at the Investigation by his accuser, Laborer Freed. According to Freed, the Claimant did not say anything to him while the latter was holding the knife at about 9:40 A.M. on June 25, 1995. The Claimant just looked at him in a way Freed considered intimidating, but the Claimant had not pointed the knife at him. But the Claimant did made a sweeping motion with the small knife across his chest, according to Freed. There were no other witness to this action even by those in close proximity. The Claimant denies he did this. The Foreman said he saw nothing. A Truck Driver present when the alleged incident took place testified also at the Investigation that he saw nothing. The main witness states that he told the Foreman about the incident several minutes later. The Foreman cannot corroborate this.

A review of the testimony by the main witness shows inconsistency about his own perceptions of the seriousness of what he states allegedly happened on the morning of June 25, 1995. The main witness, Mr. Freed, states: ". . . I do not know if he was just joking around, (or) kidding with me. . . ." Thus even if the incident had happened - and there is no corroborating evidence whatsoever that it did - it may have been a ". . . kidding around. . . ." type incident which Freed may have later decided was a threat.

The Board notes that the whole incident involved in this case occurred under considerable time and space constraints. The room involved was about 12 by 20 feet. The Claimant was not but some 8 feet away from the Foreman throughout the time the incident was supposed to have taken place. The Foreman heard nothing, saw nothing, and no one said anything to the Foreman. The Foreman, who is the Carrier's witness, cannot even corroborate that the main witness told him, within a few minutes, that the alleged incident had happened.

The main witness intimates that the alleged incident was but one of a series of incidents which had happened between he and the Claimant. According to this witness, the Claimant had not responded, in the past, to salutations and that he did not talk with the witness while on the job. Further, on one instance the Claimant apparently disregarded an offer for water. The witness also states that the Claimant had stared at him in the past. The Board is simply in no position to conclude that any of these things, if they had happened, which are occurrences which probably happen on daily basis in a multitude of work environments, amount to threats by one employee against another. Further, the Claimant's versions of all these events are quite different than the perceptions of them by the main witness. The Claimant states that he had never really ever had a conversation with the Claimant, of any kind, and that he had declined taking water on one occasion but only because he was busy and so on. None of these occurrences individually, nor all of them collectively, are basis for an employer to discharge an employee because another employee complains of such behavior. The Claimant testifies that the so-called staring incidents were, in his mind, just misunderstandings and the Board must conclude, given all facts of this case, that such is not an unreasonable conclusion.

This Board must frame conclusions on basis of substantial evidence. Such has been defined, in this industry, as such ". . . relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . ." (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). The burden of such evidence must be borne, in the instant case, by the Carrier (Third Division Awards 22180, 22292, 22760). A review of the full record warrants conclusion that there is not a scintilla of evidence from any other source to support the rendition of facts by the chief witness to this case. Not only is there no corroborating evidence to this witness' version of what happened, but in important areas, the Carrier's own witness contradicts his version of the facts. Of particular concern here, for example, is that the chief witness claims he immediately told the Foreman of the incident after it happened on June 25,1995. But the latter categorically

denies this. The chief witness also testified that he saw the Claimant make - what may or may not have been, in his mind, at the time - a threat with a knife. Everyone else who was in close proximity to the Claimant and the chief witness on June 25, 1995 are simply not able to confirm this. The Board has no other alternative but to conclude that the credibility of the one and only witness against the Claimant is suspect.

There is insufficient substantial evidence in this case to support conclusion by this Board that the Claimant to this case merits discharge. The Claimant shall be put back to work with back pay for all time lost and with seniority unimpaired. Any and all reference to his discharge shall be removed from his file.

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 29th day of April 1998.

SERIAL NO. 376

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 32565

DOCKET NO. MW-33456

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (Burlington Northern Santa Fe Railroad

On April 29, 1998 the Board sustained a claim in the above case which read as follows:

> "The dismissal of employee H. Hernandez, Jr. for alleged violation of Rules 1.6 and 1.7 of the General Code of Operating Rules on June 25, 1996 was unwarranted on the basis of unproven charges and in violation of the Agreement.
>
> 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."

The Board thereupon issued an order to make effective Award 32565 and directed Carrier to pay to the employee the sum he was entitled under the Award. The Award was issued on April 29, 1998. In that Award the Board stated the following:

> "There is insufficient substantial evidence in this case to support conclusion by this Board that the Claimant to this case merits discharge. The Claimant shall be put back to work with back pay for all time lost and with seniority unimpaired. Any and all reference to his discharge shall be removed from his file."

Thereafter a dispute arose between the parties with respect to implementation of the Award.

Background

On May 21, 1998 the Claimant was sent correspondence by the Carrier's Supervisor of Maintenance Timekeeping. Therein the Supervisor requested "....verification of all outside earnings for the time period in question in order to complete (the) process...." of putting the Claimant back to work and of paying him "....for all time lost....". Shortly thereafter the General Chairman of the Organization sent correspondence to the Carrier's Labor Relations Department advising that implementation of Third Division Award 32565 was in arrears and that request for information from the Claimant with respect to outside earnings was "misplaced". On July 16, 1998 the Claimant was again sent a letter by Maintenance Timekeeping requesting verification of outside earnings. Following additional correspondence between Labor Relations of the Carrier and the Organization the Carrier advised the National Railroad Adjustment Board on October 2, 1998 that "....an obvious dispute exists regarding application of Award 32565 as it relates to making Claimant whole for wage loss suffered while dismissed....". In that same letter the Carrier requested that the "...,Board be reconvened....to decide the issue of whether or not, in light of Rule 40G of the September 1, 1982 Agreement....the Board intended in its Award 32565 to prohibit the Carrier, when calculating wage loss, from deducting outside earnings from the amount Claimant would have earned had he not been dismissed....". Thereafter the Board reconvened on May 12, 1999 in order that an interpretation of Award 32565 be made.

Discussion

There is varying arbitral precedent in the railroad industry with respect to the issue raised in this case. In fact there is varying arbitral precedent between this Carrier and this Organization with respect to this issue. In somewhat older Awards issued in the middle 1980s, for example, off Special Board of Adjustment 925 (1985 & 1986),[1] as well as PLB 4161 (1987)[2] back pay was granted in sustaining Awards with deductions made

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[1]See Special Board of Adjustment 925, Awards 20-21, 27 & 33 (Burlington Northern vs. Brotherhood of Maintenance of Way Employees).

[2]See Public Law Board 4161, Awards 1, 8 & 32 (Burlington Northern vs. Brotherhood of Maintenance of Way Employees).

for outside earnings during the period of dismissal. More recently, on the other hand, Awards have been issued off of the Third Division of the National Railroad Adjustment Board, involving these same parties, both before and after Award 32565, for example, wherein no deductions were explicitly levied by the National Railroad Adjustment Board when this Carrier was ordered to compensate Grievants' covered by the Maintenance of Way Agreement for "....all wage loss suffered...." when discipline claims were sustained. There appears to be a change in arbitral thinking with respect to this property and this Organization, at least, if one compares the older with the more recent Awards. Absent discussion in the record of the issue of relief Award 32565 was issued with earlier Award 31538 (1996) in mind. The language of the former Award was confirmed shortly after it was issued, by another Award off this property, involving this same Organization. This is Award 32784 (1998).

In the interpretation submissions presented to the Board on Award 32565 there is discussion by both sides with respect to arbitral precedent generally in this industry which deals with back pay Awards, both on this property involving other Organizations and on other properties involving this Organization. It also appears that the Carrier's request for an interpretation of Award 32565 may be motivated, in part at least, by an attempt to go back to the older arbitral precedent with respect to the manner in which back pay Awards had been implemented on this property. To engage in such an attempt is the Carrier's prerogative.

Threshold Issue

In view of the history of this case, however, the Board concludes that it is in no position to rule on the Carrier's request for an interpretation of Award 32565 without addressing a threshold issue. That issue is the following: did the Carrier raise an argument or arguments dealing with the interpretation of Award 32565 which had not been raised on property prior to the Award being issued? The fact pattern of the history of Award 32565 suggests that the Carrier did precisely that.

There is numerous precedent in this industry dealing with the particular characteristics of Section 3 arbitrations under the Railway Labor Act which explicitly states that the Section 3 arbitral process is appellate. New arguments or new information are not permitted into the record after a case has been docketed for arbitration before either the National Railroad Adjustment Board or before other

Section 3 Boards of Adjustment.[3] New information would include any new argument presented to the Board by either party at any stage in the process after a case had been docketed: in the Submissions to the Board; at the point of hearing or panel discussion with a Neutral Member in attendance; and certainly at any point after an Award had been issued. There are many good reasons for this time-honored policy. Certainly not the least of which is that such policy permits finality to be achieved with respect to any given claim.[4]

The Carrier appears to argue that the issue of back pay after issuance of a sustaining Award by the Board is somehow different from other issues which would be covered by Circular No. 1 and the multitude of arbitration Awards in this industry dealing with the impropriety of new information brought forth after a case is docketed for arbitration. The Carrier points to instances, for example, where an arbitrator permitted, upon a Carrier's request for an interpretation, the introduction of new arguments by the Carrier with respect to the back pay question after an Award had been issued. Although such precedent exists, the Board does note that in at least one Special Board of Adjustment case cited, on which the Carrier leans heavily, such

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[3]This principle has been reiterated innumerable times by this Board and by Boards of Adjustment. A common statement of this principle can be found, for example, in Fourth Division Award 4136 wherein the Board states, in that case:

> "As a preliminary point it must be underlined that it is well established that the National Railroad Adjustment Board will not consider material that was not submitted during the handling of a case on property. This firmly entrenched doctrine, which is codified by Circular No. 1, has been articulated in many Awards....The Board will ignore, therefore, information found in either ex parte submission which was not exchanged between the parties on property...."

All the more so, as a matter of simple logic, should the Board ignore information, including new arguments, which are brought before the Board after an Award has been issued.

[4]The benefits, if you will, of the arbitral traditions with respect to finality is that grievances going to arbitration be treated as narrow, short-term disputes for which the parties seek short-term, but definitive and final solutions. This is what arbitration is supposed to provide. If the parties are permitted to come back for a second and third bite, etc. the objective of the final and binding character of arbitration itself is vitiated.

reasoning was reversed by the arbitrator himself when he sat with the National Railroad Adjustment Board and issued an interpretation on back pay.[5] In any other cases which parallel the instant one the Board here will but conclude that the tendency to permit new information in a request for interpretation is but misguided, clear and simple, and is contrary to the lion's share of arbitral precedent dealing with such matters.

Obviously the Board would have guidance on the issue of deductions from back pay in a sustaining Award when there is a mutually negotiated labor Agreement provision clarifying this matter. Such is not the case here.[6] The Board would also have some guidance, or at least some reasonable options, with respect to arbitral precedent

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[5]See Public Law Board 1844, Award 8 (Interpretation)(1978) and compare with NRAB Third Division Interpretation of Award No. 22869 (1982) with the same neutral in attendance. With respect to the 1978 interpretation the Neutral states, in pertinent part: "it is well known that an interpretation request is not a vehicle for a sub rosa reargumentation of a decided claim....(but) ....it is not improper or violative of the general prohibition against raising anew evidence and arguments at the appellate level to present such question to the Board in a petition for interpretation. Typical of such questions is the instant debate about whether the Award we rendered contemplates the deduction of outside earnings or not....". When sitting with the Third Division of the NRAB in 1982, however, this same Neutral states, on the other hand, that: "....with respect to the request for an interpretation respecting damages payable (in a sustaining Award)....we can well understand Carrier's desire to present the question of offsets and compensatory damages. This Board and particularly this Referee has not been reluctant to credit such arguments when they have been raised and joined in a timely fashion on the record. Despite ample opportunity in handling on the property and before the Board, however, these questions were never raised until after the Award was finalized." This Award then cites a variety of prior Third Division Awards with interpretations consonant with that provided in Award 22869. Obviously, if an Agreement expressly states that outside earnings should be deducted, that is another matter. See same arbitrator: Third Division Award 27835 (1991) Interpretation. The Carrier also cites a number of other cases which the Board had re-studied and which are either not on point with the instant case and/or which appear to avoid the issue of new information introduced into the record in favor of a ruling on the issue of damages itself.

[6]Rule 40(G) of the parties' labor Agreement is simply silent on the matter of deduction of outside earnings.

on the issue of damages if that issue were raised during the handling of a claim on property. That also is not the case here.[7]

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.

Claimant Hernandez shall be compensated for all wage loss suffered after his dismissal on June 25, 1996 without deduction of any outside earnings.

Referee Edward L. Suntrup who sat with the Division as a neutral member when Award 32565 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 23rd day of June 1999.

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[7]This Carrier not only has some experience in raising such issues during on-property handling, but in given instances in the past has even requested, and obtained, from representatives of the Organization involved in this case written agreement to subtract outside earnings from a back pay Award. See, for example, the July 6, 1990 agreement between the Carrier and the Organization dealing with implementation of Award 42 of PLB 4104. Why the Carrier did not attempt to adopt a similar approach and/or at least argue its position on deductions of back pay in the on-property handling of the case involving Third Division Award 32565 is unknown.

Carrier Members' Dissent
to Interpretation No. 1 Award 32565
(Referee Suntrup)

The decision in this matter is wrong for two basic reasons. First, it ignores the precedent, including that on this Carrier and results in the Claimant receiving a possible windfall. Second, it relies on the Organization's representations to the Referee that were outside of the record, had no support, and were contrary to the facts.

After this Board issued Award 32565, the Carrier requested the Claimant to produce evidence to verify any outside earnings. Instead of cooperating, the Organization refused contending that the Award made no provision for such action. But the purpose of a "make whole" Award is to put the individual in the position he would be in but for the disciplinary action—it is not a vehicle for Claimant's windfall enrichment or to assert a penalty against the Carrier.

The Majority has based its decision on the erroneous presumptions that the deduction of outside earnings cannot be granted because it is "new argument," and that there has been a "change n arbitral thinking with respect to this property." But the Majority cannot support either premise.

With respect to the Majority's "new argument" notion, the Carrier showed that such an offset deduction is mandated in legal principles espoused by the courts and pursuant to on-property arbitration precedent; and the deduction is therefore presumptively a part of any award on this property—it need not be asserted during claims handling on the property.[1] Indeed, certain expedited boards on this property do not even allow for the parties' claims handling correspondence, nor argument, instead the Referee considers only the transcript of the Investigation before issuing Awards; so there would be no opportunity for the Carrier to raise the deduction issue on the record.

In the instant case, the Majority requires that the Carrier's right of deduction must be argued during claims handling for every claim, despite the manifest impossibility of doing so—at least with respect to expedited boards. And the Majority reached that unreasonable conclusion even though the Organization itself admitted that other deductions from awarded damages (e.g., tax deductions) may be deducted without the need for the Carrier to plead such deductions during claims handling.

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[1]It is fallacious for the Majority to recite in the Award the Carrier's reason for not raising the offset issue on-property as "unknown," since the Carrier's position was known since 1984 by this majority.

Although the Majority asserts that the Carrier "has some experience in raising such issues during on-property handling," nowhere does the Majority really support that allegation. The only thing that the Majority cites for that proposition, is the July 5, 1990 special settlement between the parties. But that agreement occurred after an award (Award #42 of Public Law Board No. 4104, not during claims handling prior to arbitration; so there is no support at all for the Majority's conclusion. Furthermore, that special settlement was based on a set of peculiar, leniency circumstances.

There is absolutely nothing on the record in this case to show that the Carrier has ever raised the issue of the deduction during pre-arbitration handling concerning any case. Yet the record here does show that Boards have been recognizing that right to the Carrier for many years, notwithstanding the Carrier's failure to formally plead it on the record. This telling fact convincingly supports the Carrier's arguments that it need not specifically plead the right during claims handling.

Besides the impracticality of the Majority's holding, it is completely at odds with the established precedent on this property. In SBA 925, Award No. 1, Referee Kasher made clear that outside earnings were to be deducted, even though the Carrier did not raise that issue on the property in the case, either. After Award No.1 on that Board, the Referee did not see a need to explicitly provide for the deduction in subsequent awards, evidently on the basis that Award No. 1 of SBA 925 settled the issue. And that res judicata presumption is also why the Carrier did not raise the issue on the property in the instant claim: it had been a settled issue on this Carrier's property. But now the Majority seeks to punish the Carrier for relying on precedent on its property and arbitral custom.

Ironically, the Referee for the instant case has himself also previously held that this Carrier need not raise the outside-earnings deduction argument during on-property handling. In PLB No. 4161, Award No. 1, this Referee stated:

> The Carrier also raises two additional procedural objections in its submission which would normally be dismissed under the de novo doctrine held by the National Railroad Adjustment Board in the Awards cited in the immediate foregoing *inter alia*. These issues are, however, of such practical importance with respect to how this Board must deal with awarding claims which might be sustained that they must be herein considered *whether they were raised by the Carrier or not.* The Board will present the general

> principles to be followed throughout the cases considered by this Board in this first Award with respect to issues. The first issue deals with the quantity of compensation to be awarded to a Claimant upon a sustaining Award. Since the Board has dismissed the Carrier's two-year laches argument, sustaining Awards which have compensation accompanying them will be for the full time-frame from date of discharge to date of Award, with the following qualification: payment for all time lost will be paid minus any earnings by the Claimant during the time-frame in question. [Emphasis added]

That Award was certainly consistent with Referee Kasher's decisi cited earlier; and it represents an arbitral pattern: establishing the recognition of Carrier's right to deduction in that Board's first Award and then issuing succeeding Awards without the need of further rulings on this essentially administrative matter.

The inherent bankruptcy of the Majority's "new argument" rationale is further revealed in the fact that they have applied this exclusion to the Carrier while, conversely, basing their Award on matters introduced by the Organization that are truly new evidence and new argument. Specifically, the Majority accepted the Organization's new argument and new "evidence" with respect to two instances in which the Carrier, according to the Organization, did not attempt to deduct outside earnings from Awards. One of those incidents is absolutely false (the Carrier had asked the Claimant for outside earnings, but he responded in a letter that he had received none; so nothing was deducted). But in any event, an isolated instance of non-deduction cannot be construed as a waiver of the Carrier's rights permanently.

Other new evidence offered by the Organization that the Majority improperly admitted was a letter dated October 8, 1998. That date is subsequent to when this dispute was submitted to the Board, and thus outside of the record.[2] The Organization used this letter in rebuttal to evidence that the Carrier had placed in the record. Even more importantly, that letter was used to represent to this Board that the Carrier had not deducted outside earnings in a more recent case on this property decided by the Third Division: Award 31538. Consequently, the Majority declared: "Award 32565 was issued with earlier Award 31538 in mind." In other words, the Majority has admitted

[2] The Carrier reports that it cannot find any record of ever receiving this letter.

that the principal basis for its Award lies in unsubstantiated allegations that the Organization made in an exhibit that should never have been admitted into evidence, according to the exclusionary rule that the Majority now unfairly invokes against the Carrier.

As for the Majority's contention of a "change in arbitral thinking with respect to this property," we find no basis for the idea. As the Carrier's Award citations show, the only *on-property* arbitration Awards that specifically deal with this issue, support the Carrier's position. The Awards upon which the Majority relies do not even indicate whether or not the Carrier raised the off-set issue on the property; so from the record itself, there is no reason to assume that the absence in those Awards of express authorization for deductions was anything more than those Boards' presumption that the issue was settled—just as in the SBA 925 Awards following Award No. 1. Or, alternatively, it is just as easy to assume that the Organization simply declined to challenge the Carrier's deductions after the Awards in those cases. But the Board Majority in the current case is unjustified in its unwarranted presumption that the other arbitrators were denying the deduction whenever they did not expressly mention it in their Awards.

And the Majority's notion that there has been an evolution away from the outside-earnings deduction on this Carrier's property, flatly is not supported by the two Awards upon which the Board mainly relies. Third Division Award 32748 does not even purport to deal with the issue of deductions, and there is no evidence that the deduction was not made in that case, anyway.

Likewise, Award 31538, which the Majority says that it used as the basis for deciding relief in the instant case, is not dispositive, because it dealt only with a different offset: for the period in which the Organization requested an extension of time limits for claims handling. Unlike the outside-income deduction, which is based on the Carrier's right under law and arbitral precedent, the time-extension offset is by specific agreement of the parties, as part of the time limits extension procedure applicable to all claims so extended. Moreover, the time-extension offset was an issue for which this Board has recognized as correct, see Fourth Division Award 4974, Second Division Award 13093.

And it is significant that the Board in Award 31538 also ruled that the Carrier had the right to deduct that kind of offset deduction, as well. So the Majority's thinking in the

instant case that an offset deduction against award damages is no longer favored "in arbitral thinking with respect to this property" is actually contradicted by the very Award upon which the Majority relies!

The issue is whether Carrier is prohibited from considering outside earnings, and the precedent is that the Carrier can do so. Consider, for example, the following Awards:

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-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 ours 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 he 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 wages 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 considers just compensation under the circumstances." (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 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 No. 1 to Second Division Award 9264, Serial 93 ('84)

"In this case the reason the issue was not raised in Award 9264 was that the issue had theretofore not been raised by either party. In the absence of a reference to any deductions, it does not necessarily follow that the right to deductions was affirmatively denied. In this case the lack of reference simply meant that it was not at issue at the time and thus, it was not necessary or possible to address it. There are many reasons why it may not have been raised because it was a settled issue between the Parties or because one or both Parties believed that it was settled. . . .

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 [3-14162] 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 employee. 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 employee 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.'

* * * *

> **Further, in this view, it is noted that other Boards under the Railway Labor Act have adopted a view opposite to the Dorsey view on 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 32, 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."**

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)**

It is clear from the above excerpts, as well as in the decisions of SBA 925 and PLB 4161, rendered on this property and involving the SAME parties and RULE PROVISION, that well-established precedent has allowed for the procurement of "outside earnings' information and deduction from awarded damages automatically. Nothing has changed Rule 40 (g) from the time of the above noted Awards on this property (see note 6 on page 6). There has been no change in thinking by the parties. The only change is that this Majority has taken NEW argument raised by the Organization as being factual, and has acted as if it were correct.

We did not raise a specific challenge to this new material that was asserted by the Organization, because we presumed that, given the fact that it was OUTSIDE of the record, the Neutral Member would give it the rejection it deserved— it being neither properly before him and, more importantly, being WITHOUT any support. We were wrong in not challenging the assertions then, and the Majority is clearly wrong from relying on the assertions as a "change in thinking" on this matter.

Based on all of the foregoing, it is clear that this decision ignores the long-standing principle in this industry that the Claimant's outside earnings are a valid deduction in any "make whole" remedy. This Award is erroneous in failing to recognize this principle. And this Award is hopelessly flawed in its reliance on the Organization's inaccurate, parol argument that there has been a change in the application of the outside earnings deduction.

Furthermore, it is unjust of the Majority to criticize the Carrier for allegedly injecting new matters into the debate, when the Majority itself was willing to rely on new matters offered by the Organization outside of the record.

The unsoundness and manifest unfairness of this Award cannot serve as precedent on this issue, and particularly not on this property.

We Vigorously Dissent.

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik