Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41708
Docket No. MW-41759
13-3-NRAB-00003-110390

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (removed and withheld from service by letter dated July 9, 2010 and subsequent dismissal by letter dated August 9, 2010) imposed upon Mr. J. House for the alleged violation of Maintenance of Way Operating Rules (MOWOR) 1.13 and MOWOR 1.6 following charges of alleged theft and dishonesty in connection with the entry of eight (8) hours straight time and four (4) hours overtime for June 25, 2010 was arbitrary, capricious, unwarranted and in violation of the Agreement (System File T-D-3764-W/11-10-0383 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. House shall now '. . . be immediately returned to service, he must be paid for his lost time, including any and all overtime paid to the position he was assigned to, any overtime on any position where the claimant could hold, or the work performed by any junior employe in the absence of the claimant, and any expenses lost and we also request that Mr. House be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the notice received by the

Organization on August 10, 2010 in an August 9, 2010 letter from David Douglas, Division Engineer.'"

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At the time of his dismissal, the Claimant had worked for the Carrier for some 38 years. At the time of the event that led to his dismissal, the Claimant was assigned as the Assistant Foreman on the Zone 4 Maintenance Gang. The Claimant entered the time worked on June 25 by the Zone 4 Maintenance Gang.

On Friday, June 25, 2010, the Claimant took his annual physical required by the U.S. Department of Transportation in order to retain his Commercial Driver's License. The parties agree that accepted practice was to consider the physical (including travel to and from the site of the examination) the equivalent of an eight hour workday.

On Friday, June 25, 2010, the other members of the Zone 4 Maintenance Gang worked four overtime hours. When the Claimant entered the time worked by the Zone 4 Maintenance Gang into the computer system the following week, he reported that all members of the group had worked eight straight time hours and four overtime hours. The computer entry in question most likely took place on Tuesday, June 29. The computer entry was witnessed by a fellow member of the work group. Later that day, the co-worker reported to the supervising Roadmaster (Greg Mackley) that the Claimant had entered hours of work for himself for June 25, 2010 that were incorrect.

Roadmaster Mackley checked the computer time roll on July 1 and by letter dated July 9, 2010, the Claimant was informed that he was being withheld from service pending an Investigation of an allegation of ". . . theft and dishonesty when you falsified your time for June 25, 2010, when you entered 8 hours straight time and 4 hours overtime."

The formal Investigation was conducted on July 15, 2010. The Conducting Officer was the Jamestown Roadmaster. Thereafter, by letter dated August 9, 2010, the Claimant was notified: "As a result of investigation held on Thursday, July 15, 2010 . . . you are hereby dismissed effective immediately from employment with the BNSF Railway Company for theft and dishonesty when you falsified your time for June 25, 2010, when you entered 8 hours straight time and 4 hours overtime." The letter was signed by the Division Engineer.

By letter dated August 20, 2010, the Organization filed its appeal alleging that the dismissal was unfair and without just cause. The letter stated: "By reference, but not limited thereto, Rules 1, 2, 24, 25, 29, 40, 42, and 80 are made part of this letter." The letter alleged that (1) neither the Hearing Officer nor the Investigation was fair and impartial, (2) the Carrier's decision had been made before the Investigation and (3) the Claimant's entry was an error made when the Claimant was rushed.

By letter dated September 1, 2010, the Carrier denied the appeal, asserting in relevant part:

> "The principal's culpability was evident throughout the transcript. His claim for four hours overtime on June 25, 2010 was outright theft of BNSF monies. The testimony offered by two of his coworkers established the fact that Mr. House did not perform any service other than the four to five hours required to undergo a physical examination . . . ."

By letter dated September 28, 2010, the Organization further appealed the matter and made explicit its view that the Carrier had violated Rule 40:

> "The Carrier witness that initially 'informed' it of the allegation established by testimony that the Carrier had knowledge of the incident on June 29, 2010. * * * That fact, in and of itself, requires any

hearing to be held not later than fifteen (15) days from June 29th or by July 14th."

The appeal was processed by the parties according to Rule 42 without resolution and was ultimately progressed to the Third Division of the Board.

The Carrier's Submission summarized its position as follows:

"Joseph House, an Assistant Section Foreman, had to get his annual DOT physical, required to retain his CDL license. This took, by his own account, four (4) hours on a Friday morning. When he put in the payroll on the computer the next Tuesday morning, he claimed, for himself, not just 8 hours straight time, not just 1 hour as per diem, but also 4 hours overtime. He did this even though, and in spite of the fact that a member of his own crew questioned him about this as he was making the data entries."

The Submission presented the Issue as: Did the Company present substantial evidence of the Claimant's charged offense?

The standard to be applied in this case is "substantial evidence." As the Carrier's November 18, 2010 letter to the Organization states:

"The 'substantial evidence rule" has been set forth by the Supreme Court of the United States as:

'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

Involuntary loss of employment is a most serious matter and it is more serious still when that loss is triggered by a charge that includes matters – such as dishonesty – that could bring opprobrium to an employee. Such a consideration places the evidence that is required to support a termination based on a charge of dishonesty on the upper levels of the substantial evidence continuum.

The Organization challenges the Carrier's action on both procedural and substantive grounds. Among the procedural objections are that the Carrier failed

to schedule and hold a timely Investigation, and that the Claimant was improperly withheld from service.

Rule 40 of the Agreement between the parties states:

> "A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the company (excluding employes of the Security Department) and except as provided in Section B of this rule.
>
> B. In the case of an employe who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefore."

Procedural Concerns

The Carrier contends that the actions it took after learning of the alleged wrongdoing were because of the seriousness of the charge. The Board agrees that theft is a most serious transgression; however, two procedural concerns arise.

1. The suspension pending the Investigation. The Organization's argument that the Claimant's suspension was not justified because the Claimant's admitted action was a mere mistake, not theft, is not persuasive. One would not have a basis for determining whether the action was error or theft until a full and fair Investigation had been completed and a justified conclusion drawn. According to the Roadmaster's stated understanding of what was reported to him, the allegation concerned an action that — if proven — indicates that theft had taken place. Theft would be a "serious infraction of Rules" and could justify dismissal. Suspension pending an Investigation of a charge of theft would be a valid action.

2. In his September 1, 2010 response to the filing of the claim, the General Manager of the Twin Cities Division wrote: "Mr. House was withheld from service pending investigation due to the serious nature of the allegation." (Emphasis added)

However, depending on which version of the report one employs, one is forced to consider that the Carrier waited eight or ten days – the period from the date of notice (June 29 or July 1) until July 9 – to remove the Claimant from service. Although the allegation of theft would justify suspension pending Investigation, the fact that the Carrier waited more than a week before withholding the Claimant from service undermines its argument that such action was justified.

3. The timing of the investigation. The letter instructing the Claimant to attend the Investigation and the dismissal letter both state: "Carrier's date of first knowledge of this theft and dishonesty is July 1, 2010." The implication of these assertions by the Carrier is that the notice clock provided in Rule 40 (A) did not start ticking until the Roadmaster checked the computer on July 1. This assertion is contrary to what is stated in the Carrier's Submission to the Board:

> "On the morning of Tuesday, June 29, Mr. House entered his crew's time on the computer. For Friday, June 25, for himself, he showed 8 hours straight time, 1 hour per diem and 4 hours overtime. As he was doing this, another member of the crew, Kevin Gustafson, was sitting nearby, watching Mr. House as he did the input. That afternoon, after work, Kevin Gustafson called the Roadmaster, Greg Mackley, alleging that Mr. House had put in four hours overtime for the previous Friday that he wasn't entitled to." (Emphasis added)

The Carrier's argument that the "offense wasn't established until . . . [the Roadmaster] reviewed the timeroll entries, for that was when 'information was obtained by an officer of the company' and that occurred two days later on July 1," is without merit. To accept this approach is to modify Rule 40 (A) to mean that the time limit in Rule 40 (A) – which is, after all, a limit on management – may be unilaterally extended by the Carrier merely by having an Officer of the Company do nothing for several days after receiving an allegation of wrongdoing and then, at a time of that person's choosing, review official records.

The Investigation was held on July 15, 2010. That date is 16 days from June 29; the date information was obtained by an Officer of the Carrier. Rule 40 (A) requires that the Investigation be held ". . . not later than fifteen (15) days . . . from the date information is obtained by an officer of the Company . . . and except as provided in Section B of this rule."

The clear implication of Section B of the Rule is that in cases where an employee is held out of service, an interval of fewer days is allowed before the Investigation must be held. Holding off suspension for more than a week after Rule 40 (A) notification does not provide more days before the Investigation is held.

The Board finds that the Investigation was untimely. Rule 40 (J) specifically states:

> "If an investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employe shall be considered as having been dismissed."

Accordingly, the charges against Claimant J. House shall be considered as having been dismissed.

The Substantive Concern

Given the opprobrium contained in the charge of theft, dismissal of the charges because of a procedural shortcoming is not sufficient redress for the Claimant if the charge of theft lacks substantiation. It is for this reason that we proceed to discuss the charge itself.

The remaining question is whether the Claimant's computer entry that he had worked eight straight time and four overtime hours on June 25, 2010 was done purposefully or in error.

In his September 1, 2010 response on behalf of the Carrier to the filing of the appeal, the General Manager of the Twin Cities Division wrote:

> "The principal's culpability was evident throughout the transcript. His claim for four hours overtime on June 23, 2010 was outright

> theft of BNSF monies. The testimony offered by two of his coworkers established the fact that Mr. House did not perform any service other than the four to five hours required to undergo a physical examination that began at 9:00 am on the date in question; including one and one-half hours travel time to and from the clinic.
>
> Theft is among the most egregious offenses an employee may perpetrate against his employer and dismissal for such is supported by numerous awards."

Material from the Carrier conflates two separate aspects of what took place on Friday, June 25, 2010: the claim for eight hours' straight time pay and the claim for four hours of overtime. The record establishes that it was accepted practice to consider the physical examination at issue in this case as a full eight-hour day of work regardless of the actual time involved. Thus, the sole question in this case is the entry, admitted by the Claimant, which reported that he, like the other members of his crew, had worked four hours of overtime on June 25, 2010.

Although the following passage from the Carrier's Submission assumes the Claimant's guilt, it is helpful in that it states the two ways that the incorrect entry could have been made:

> "So there were two ways that he could have input his attempt to secure 4 hours overtime for himself for June 25: he could have put that in his own entry, with a starting time and a reason code; or he could have called up the pre-population of the field with the four crew members, put in the starting time, and the ending time, and the reason code for one of those four, and then chosen to click the 'select all' box . . . ."

In his responses at the Investigation, the Claimant offered the following explanation. Because he had been at the physical on June 25, he entered the time worked into the computer on either Monday or Tuesday. He asked a fellow worker what he got for overtime on June 25 and was told four hours. He put that number in and clicked. The co-worker who reported the matter to the Roadmaster confirmed the Claimant's description of his method of entry, "Cause he did it in just one shot." In short, the record indicates that the Claimant included all members of the work crew when he, with one click, entered the data into the computer. Such a

method of data entry is consistent with the Claimant's assertion that he had made an error.

The conflation by the Carrier of straight time and overtime hours shows up most significantly in the Roadmaster's testimony that the reporting worker: "[A]lleged that Mr. House had put in four hours overtime for the preceding Friday that he felt he wasn't entitled to. * * * [T]he employee also stated that, he called Mr. House on it, that he didn't think he was entitled to the time. Mr. House just shrugged his shoulders and continued on with what he was doing."

Those assertions were not confirmed by the employee.

Under questioning by the Conducting Officer, Kevin W. Gustafson, the co-worker who reported the entry explained his exchange with the Claimant when the entry was made:

> "I guess I just asked him if he had anything special that he had to put in for being gone, and he said, nope, and, okay, cause I guess I didn't know for sure. Cause I don't . . . ." (Emphasis added)

The Vice General Chairman asked the reporting employee:

> "Do you remember talking to Mr. House about this issue? Did you say anything to him about how come you put in eight straight and four overtime, or you just questioned whether it should have been a, a vacation day or getting paid?"

The co-worker's response to this question made clear what his concern was:

> A: "[W]hen we were, when I was driving him back on Thursday . . . we were talking about it, and I told him, I think, I said, that's when I thought, I didn't know for sure what the company policy was on it, so I thought he should have to take a vacation day to have the day off. But, and then when he was putting the time in, in the morning, I just asked him if he had to put in anything special for having the whole day off." (Emphasis added)

According to the Roadmaster's hearsay account, the Claimant was directly challenged on the erroneous overtime entry and had shrugged the matter off. If this were an accurate description of what had happened, it would have indicated that the overtime entry was purposeful and would have justified the Carrier's conclusion that theft had taken place. However, the direct evidence is that the only question raised with the Claimant at the time of data entry was about putting in eight hours of straight time for the physical rather than taking vacation time. (The co-worker's assumption that vacation time should have been used was not correct.)

In short, it is clear that the basis for the Claimant's dismissal was the Roadmaster's hearsay version of what he had been told by Gustafson. However, according to what Gustafson stated at the Investigation, he questioned the Claimant about the straight time, not the overtime entry.

Because erroneous hearsay does not amount to substantial evidence, the claim must be sustained to the extent provided in the parties' Agreement.

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 16th day of September 2013.

SERIAL NO. 419

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 41708

DOCKET NO. MW-41759
NRAB-00003-110390 (Old)
NRAB-00003-140096 (New)

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

NAME OF CARRIER: **(BNSF Railway Company**

On September 16, 2013, the Board sustained the follow claim in the above case for the following reason:

> **". . . [I]t is clear that the basis for the Claimant's dismissal [for alleged falsification of an overtime claim] was the Roadmasters' hearsay version of what he had been told by Gustafson. However, according to what Gufstasen stated at the Investigation, he questioned the Claimant about the straight time, not the overtime entry.**
>
> **Because erroneous hearsay does not amount to substantial evidence, the claim must be sustained to the extent provided in the parties' Agreement."**

This determination was based on the following two findings:

Procedural:

The Investigation was untimely in that it was not held within the required time limit. As a result, Rule 40 (J) applied: "If an investigation is not held . . . within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employe shall be considered as having been dismissed."

Substantive:

The Claimant, an Assistant Section Foreman, took a Friday off from work in order to take the annual physical required for renewal of his Commercial Driver's License (CDL). Both Parties agreed that the accepted practice was to consider all time involved in taking the physical as the equivalent of a full shift. After the intervening weekend, he entered into the computer a combined report on behalf of his work group for the day of his absence. A co-worker reported to the Roadmaster that he had questioned the Claimant's act of reporting a full eight hours of work for the time involved in taking the CDL physical and that the Claimant had shrugged off this inquiry. The Roadmaster initiated the Claimant's termination based on his incorrect understanding that the co-worker had reported to him that he had questioned the Claimant's report of having worked four hours of overtime and that the Claimant had shrugged off that inquiry.

Thereafter, a dispute arose between the Parties with respect to implementation of the Award.[1] By the time the Board heard the arguments of the Parties with respect to the Request for Interpretation, the following disputed matters remained:

(1) Shall the Claimant's backpay be offset by outside earnings?

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1 The following was the Organization's request for clarification as of March 25, 2014:

> **"The Organization requests that the Third Division clarify that the order "*** to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties." required that the Claimant be returned to work and be paid the monetary damages owed on or before October 16, 2013, and that the Carrier was liable for damages suffered by the Claimant as a result of its failure to do so. In addition, the Organization requests that the Third Division clarify the monetary remedy ordered in this case as a result of the Claimant having been unjustly dismissed. Finally, the Organization requests that the Board interpret its [A]ward so as to make clear that the Carrier must show the data and methodology used to calculate the monetary payments made to the Claimant pursuant to the [A]ward.**

(2) Shall the Claimant receive pay at the overtime rate for overtime work that was lost to him between his termination and his reinstatement?

(3) Shall the Claimant be reimbursed for out-of-pocket insurance premiums?

Although the answers to these questions must rest upon the Collective Bargaining Agreement between the Parties, the history of their relationship, and the practices of the railroad industry, advice arising from reviews of labor arbitration decisions in a wider range of industries can provide helpful advice. To this end, several authoritative works on labor arbitration have been consulted.

The following advice from Remedies in Arbitration, an older, but still authoritative work on labor arbitration, provides underpinning for the three questions for which interpretation is sought, so it is placed before any of the questions are discussed.

> **"At common law, a basic policy of contract remedial law is to encourage contract formation by protecting the reasonable expectations of the parties. A contract secures the stability of promise, and society is benefited by the specialization that contract making permits. Accordingly, expectancy is reinforced by placing the nonbreaching party in as favorable a position as if the contract had been performed. To this end the general contract rule for determining damages was stated by the Supreme Court as follows:**
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> > **'[W]hen a wrong has been done, and the law gives a remedy, that compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong has not been committed.'"[2]**

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2 Marvin F. Hill, Jr. and Anthony V. Sinicropi. Remedies in Arbitration, 2nd ed., Washington: The Bureau of National Affairs, 1991, pages 180-81. The Supreme Court

(1) DEDUCTION OF OUTSIDE EARNINGS IN CALCULATING WAGES LOST

The quotation from Remedies in Arbitration continues:

> **"Similarly, in the area of labor relations it is uniformly recognized that the purpose of a back-pay award is to indemnify the employee by making him whole for loss of earnings incurred by reason of the employer's contract violation. This loss of earnings is generally measured by the wages that he would have earned during the period they were denied. The amount owed is usually reduced by the income that the employee received from substitute employment, or by the amount that he would have received if a reasonable effort had been made to find interim employment."[3]**

Another work on arbitration states:

> **"While an arbitrator may award full back pay to a dischargee, in many cases such an award may make the employee more than whole because he has been able to collect other monies during the period of his dismissal, such as from outside earnings, unemployment compensation and/or workers' compensation. To award full back pay in addition to such other monies would give the grievant a 'windfall' and place him in a better position than those employees who continued to work. It also would constitute a penalty on the employer not contemplated by the contract. Such a result it is to be avoided, and so arbitrators often order offsets."[4]**

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excerpt is from Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867). Other internal citations omitted.

3 Page 181.

4 Tim Bornstein, Ann Gosline and Marc D. Greenbaum, General Editors. Labor and Employment Arbitration, 2d. ed., Newark: Matthew Bender, Inc.-LexisNexis, 2001; § 39.03[1]b][iii]. Hereinafter referred to as Bornstein.

A third work on arbitration states:

> **"When awarding back pay to an employee, particularly in discharge or discipline cases, arbitrators allow the employer's liability to be reduced by the amount of unemployment compensation or compensation from other employment paid to the employee during the relevant period, provided such income was not a normal part of the grievant's income prior to discharge. Indeed, there is general agreement by courts, arbitrators and the NLRB that outside earnings properly are deducted from back pay. Because the objective is to make the employee whole for loss of wages, failure to take into account such other earnings results in overcompensation."[5]**

A fourth authority states:

> **"Generally, where back pay is awarded, it is reduced by any interim earnings. Interim earnings calculations may include increased expenses the grievant incurred in working for another employer. Deduction of interim earnings prevents grievants from profiting as a result of their discharge. This practice is consistent with the theory behind make whole relief. Make whole relief is not intended to reward or punish either party. Rather, it is intended to allow the parties to resume their employment relationship as if the suspension or discharge had never occurred."[6]**

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5 Kenneth May, Editor-in-Chief, Elkouri & Elkouri, How Arbitration Works, 7th ed., Committee on ADR in Labor & Employment Law, American Bar Association Section of Labor and Employment Law; Bloomberg BNA, Arlington, Virginia, 2012; Ch. 18.3.I; (page 36 of Chapter 18). Hereinafter referred to as Elkouri.

6 Norman Brand and Melissa H. Biren, Editors-in-Chief. Discipline and Discharge in Arbitration, 2d ed., Committee on ADR in Labor and Employment Law Section of Labor and Employment Law, American Bar Association; Washington: The Bureau of National Affairs, 2008; pages 479-80. Hereinafter referred to as Brand.

The above authorities provide support for the Carrier's argument:

> **"BNSF's position is that it need only to make the Claimant 'whole'; the Company is not required to present the Claimant with a windfall profit, nor a double-recovery. BNSF is entitled to offset a reinstated employee's earnings from outside employers against damages payable under the Award. And the Award need not specifically provide such an offset, which is just another factor in calculating damages. The Board has long accepted this 'make whole' principle."[7]**

The Organization cited Interpretation No. 1 to Third Division Award 41041 (Bierig) in support of its argument relating to the question addressed next in this discussion. The Board notes that this cited Interpretation addressed a dispute between the same Parties as involved in the instant matter.

In addition to the passage cited by the Organization, Interpretation No. 1 to Award 41041 includes discussion that provides an appropriate overall summary regarding the question now under discussion:

> **"The Organization contends that the Carrier erred when it deducted outside earnings from the Claimant's backpay calculation. The Organization contends that it is improper to deduct such outside earnings, based on the language of the parties' Agreement and past practice. The Carrier contends that the Claimant should be made whole, but should not get more than what he would have earned with the Carrier had he continued to work. The Board notes that both parties submitted substantial precedent on this point.**
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> **After a review of the arguments and precedent cited by the parties, the Board concludes that the Carrier had the right to deduct outside earnings from the Claimant's backpay. The Claimant was to be made whole . . . . However, the Board notes that the Claimant should not be made more than whole. If the Claimant were to**

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7 Carrier's Submission for Interpretation of Award 41708, Docket MW-41759, page 6.

> **receive both back wages to which he was entitled, and all outside earnings that he received during the period coinciding with his reinstatement, the Claimant would have received a windfall to which the Board finds he is not entitled.**
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> **Therefore, the Carrier was within its rights to deduct outside wages earned during the [relevant] period of time . . . . However, the Board also notes that any outside wages that the Claimant would have earned while still working for the Carrier should not be deducted from his backpay."**

INTERPRETATION:

In the final analysis, the Board finds that the Claimant's backpay shall be offset by outside earnings. The offset shall not include outside earnings that were not from "substitute employment;" that is, as argued by the Organization,

> **". . . [I]t would be unjust to allow the Carrier to deduct outside earnings made by the Claimant that he would have earned even if he had not been unjustly dismissed."[8]**

(2) PAYMENT OF OVERTIME WAGES

Remedies in Arbitration states:

> **"It is generally held that the computation of back pay for an employee who has been improperly discharged may properly be computed to include lost overtime opportunities."[9]**

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8 Organization's Submission for Interpretation of Award 41708, Docket MW-41759, page 27.

9 Page 198

Bornstein states:

> **"Arbitrators, the courts, and the NLRB all have held that mandatory overtime ordinarily worked by an employee is includable in backpay awards or orders, even where the assignment of overtime is within the discretion of management. This is particularly true where the grievant's crew has regularly worked overtime as part of a weekly schedule."[10]**

Elkouri agrees: "Make-whole awards may include recovery of lost overtime . . . ." (Chapter 18.3.A.i; page 16.)

The authorities cited above provide support for the Organization's argument that ". . . the Claimant is entitled to any lost overtime hours at his respective overtime rate of pay." But the key support comes from Interpretation No. 1 to Award 41041 (Bierig):

> **". . . [T]he Claimant was to be made whole for all lost wages. The total determined for lost wages includes a reasonable calculation of lost overtime wages."**

INTERPRETATION:

In the final analysis, the Board finds that the Claimant shall receive pay at the overtime rate for overtime work that was lost to him between his termination and his reinstatement.

(3) WAGE LOSS DUE TO UNREIMBURSED MEDICAL EXPENSES

Remedies in Arbitration states:

> **"A review of Board, court, and arbitral decisions indicates that 'make whole' relief may, but need not, include any of the following:**

10§ 39.03[1][b][C].

*** * ***

Any expense incurred by reason of removal from any insurance benefit program. In this respect, a back-pay award may properly include any hospital or medical expenses incurred at a time that the improperly terminated employee would have been covered by the employer-maintained program."[11]

Bornstein states:

"Benefits as a Part of Backpay. It is fairly well-settled that benefits are a form of wages and should be included in backpay awards as part of a make-whole remedy. This includes pension fund contributions, health and welfare fund contributions and medical benefits."[12]

Brand states:

"While reinstatement and back pay are the most common elements of make whole relief, the arbitrator has broad authority to fashion equitable remedies. To make an aggrieved employee whole, arbitrators will generally award some amount of back pay in addition to reinstatement as well as other rights and privileges of employment including seniority, accrued leaves, medical costs/payments, and insurance coverage . . . ."[13]

The Board returns to Interpretation No. 1 to Award 41041 (Bierig), and adopts, as its own, the following determination from that Interpretation:

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11 From the work cited, pages 203-4.

12 Chapter 39, page 25 [C].

13 Pages 468-69.

> **"After a thorough review of the evidence and arguments, the Board finds that the Claimant should be made whole, but he should not receive a windfall. With that in mind, the Board has determined that the Claimant should not have to pay any more in premiums, deductibles and co-pays than he would have paid had he continued to work . . . ."**

INTERPRETATION:

In the final analysis, the Board finds that the Claimant shall be reimbursed for out-of-pocket insurance premiums.

Referee Burton White who sat with the Division as a neutral member when Award 41708 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of January 2016.