

**PUBLIC LAW BORAD NO. 3406**

**AWARD NO. 6**

**CASE NO. 6**

**CR 2210-D**

**MN 6/83**

**PARTIES TO DISPUTE;**

**Metro North Commuter Railroad Company**

**and**

**Brotherhood of Railway, Airline and Steamship Clerks**

**STATEMENT OF CLAIM**

- a. The Carrier acted in an arbitrary and capricious manner when it unjustly assessed discipline of dismissal on Clerk M. L. Blowe on November 4, 1982.
- b. Claimant Blowe's record be cleared of the charges brought against him on October 19, 1982.
- c. Claimant Blowe be restored to service with seniority and all other rights unimpaired and be compensated for wage loss sustained in accordance with the provisions of Rule 51 (e).

**OPINION OF THE BOARD**

Claimant was notified of an investigation on a charge of sleeping while on duty. Subsequent to the investigation he was dismissed.

Claimant admits that he was asleep at 5:20 a.m. He stated that he had told the Chief Dispatcher (at 5:05 a.m.) that he had been unable to take his lunch break at the scheduled time and that he would take his break then.

Carrier argues that an individual may eat during his lunch period, but if he chooses not to do so, he must stay at work and may not doze off. We question that such an interpretation is controlling absent some more specific direction in that regard. We will sustain the claim.

**FINDINGS**

The Board, upon consideration of the entire record and all of the evidence finds:


The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due and proper notice of hearing thereon.

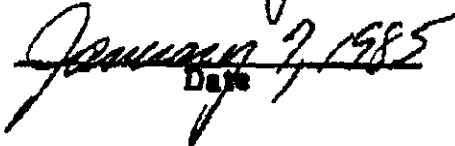
AWARD

1. Claim sustained.
2. Carrier shall comply with this Award within thirty (30) days of the effective date.

  
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Joseph A. Sickles  
Chairman and Neutral Member

  
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J. C. Campbell  
Organization Member

  
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J. W. Folcarelli  
Carrier Member

  
\_\_\_\_\_  
Date

PUBLIC LAW BOARD 3406

METRO NORTH COMMUTER RAILROAD COMPANY	)	
- and -.	)	Award No. 6
	)	
	)	Case No. 6
TRANSPORTATION COMMUNICATIONS UNION	)	CR 2210-D
	)	MN 6/83

INTERPRETATION NO. 2

In early November, 1982 the Carrier dismissed the Claimant (M. L. Blowe) from service and that dispute was ultimately submitted to this Public Law Board as Case No. 6.

On January 7, 1985 this Board sustained the claim and the Claimant was ". . . restored to service with seniority and other rights unimpaired and be compensated for wage loss sustained in accordance with the provisions of Rule 51(e)."

The Carrier computed the backpay award on a "straight-time" basis; it refused to consider the overtime which the Organization argued the Claimant would have worked.

As a result, the matter was resubmitted to this Board for an Interpretation of the issue: "Is overtime properly includable in the computation of back pay due under the sustained claim?"

For reasons fully set forth in the April 28, 1987 Interpretation No. 1, the Board concluded that the sustained claim on January 7, 1985. . . "should include the amounts that the Claimant can demonstrate he would have worked had he not been dismissed from service", as it pertains to inclusion of overtime. In essence, the Board determined that the back pay award should include overtime as long as it is not speculative.

In accordance with the desires of the parties, Interpretation No. 1 did not attempt to calculate the specific dollar amount which should be included as overtime, but rather the Board merely determined that overtime should be included as part of the sustained claim.

Thereafter, the parties entered into various discussions concerning the amount of overtime which should be included. The discussions included offers of settlement made and rejected.

On August 22, 1989 the parties agreed to resubmit the matter to this Board for a decision as to the proper method to determine the amount of overtime compensation which should be paid. Specifically, they agreed that the issue should be: "What is the proper method to calculate the amount of overtime compensation due Claimant Melvin Blowe under Interpretation No. 1, the Carrier's or the Organization's?"

Both parties submitted pre-hearing submissions to the Board and an Oral Hearing was conducted in Philadelphia, PA on February 28, 1990.

The Organization traced the history of this dispute and it demonstrated that the Claimant worked significant amounts of overtime prior to his termination from employment. In addition, the Organization shows that the Claimant has continued to work considerable overtime since his restoration to service by virtue of Award 6 of this Public Law Board, despite the fact that he has been absent due to injury and illness.

The Carrier continues to insist that no overtime compensation should be granted under these circumstances.

However, recognizing that Interpretation No. 1 has included non-speculative overtime as properly includable in the back pay award, it has suggested certain methods for calculating the amounts due. Initially, Carrier suggests identification and calculation concerning overtime worked by employees immediately junior and immediately senior to the Claimant to arrive at an average of actual overtime worked. Secondly, Carrier mentions a method of determining the percentage of overtime worked by the Employee for a period of time prior to the improper discharge related to the actual number of months the Employee was away from work between the dates of discharge and restoration to duty.

The Board has reviewed the prior Award in this case as well as Interpretation No. 1 and has considered the conflicting contentions of the parties as to how non-speculative overtime should be awarded to the Employee.

Initially, the Board has considered the Carrier's assertions concerning payment of any overtime under its rules. Be that is it may, and without reference to what the Carrier's current rules may or may not require, the fact remains that this Employee was actually dismissed under Conrail rules and was restored to service under the Metro North corporate structure, since Metro North assumed the Conrail contract and rules.

This Interpretation does not seek to expand or restrict this matter beyond the issue as presented specifically to the Board concerning this Claimant in Public Law Board 3406, Case No. 6.

Moreover, the undersigned is compelled to note that any offers of settlement discussed while the matter was under

consideration on the property, and prior to resubmission to the Board for this Interpretation are in no manner binding upon the Carrier once those offers have been rejected. This dispute is considered without reference to any prior offers of settlement.

It should be noted that this Interpretation is issued in contemplation of the Board's basic view which prompted its decision in Interpretation No. 1. Once a decision has been made that a Company acted improperly when it took disciplinary action against an Employee, a remedy should be fashioned which, to the extent possible, restores the Claimant to the status and/or economic structure that the Employee would have achieved but for the improper disciplinary action.

In essence, it may be that the parties should attempt to "reset" the clock, and by "turning back the clock" compute the amount of pay and benefits due, but for the improper action. But in doing so, it is necessary to utilize a reasonable procedure so as to avoid cavalier speculation having no reasonable basis in objective fact.

The Organization has put considerable stress upon the amount of overtime worked by this Claimant subsequent to restoration to service. The Board tends to agree with the Carrier that said reliance may be misplaced in this case since there can be numerous reasons which compel an individual to work overtime, not the least of which being a recognition that a claim for overtime compensation is pending. The undersigned is of the view that it is much more appropriate to consider the Employee's established propensity to work overtime prior to the dismissal, when such

evidence is reasonably available, as well as a showing that there continued to be overtime opportunities available to the Employee during the period of the suspension.

The payroll records available to this Carrier indicate that the Employee earned approximately seventeen percent (17%) of his entire gross earnings for the year 1980 by working overtime and achieved thirty-one percent (31%) of his entire gross earnings in 1981 by a similar device.

The calculation of a percentage of straight time to overtime in an earlier, but comparable, time period is preferable to an attempt to compare the overtime earnings of immediately junior and senior employees during the applicable period since there are numerous intangible elements to such a calculation, including the propensity of those employees to work overtime as contrasted to the Claimant's known propensity.

The parties have not requested this Board to determine the exact dollar figure to which the Claimant is entitled, but rather to ascertain the proper method to calculate the amount of overtime compensation due to the Claimant as a result of Interpretation No. 1.

The Board views the Organization's suggested method, including consideration of post-reinstatement earnings, to be too speculative for the purposes of this Interpretation, whereas we feel that the carrier's suggested percentage of straight time to overtime compensation method to be a more valid method of determining the amount that the Claimant would have received in a much less speculative manner.

The Board determines that the parties shall compute the amount of overtime due the Claimant for each month during the period of suspension on a basis of twenty five percent (25%) of straight time earnings. The computations shall be made based upon the gross amount the Employee would have earned at straight time during the period of suspension without the deduction of the \$6,349.15 for outside earnings.

#### FINDINGS

The Board, upon consideration of the entire record and all of the evidence, finds:

The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

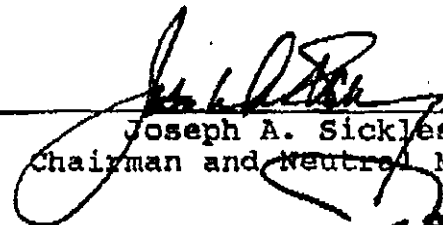
The parties to said dispute were given due and proper notice of hearing thereon.

#### AWARD

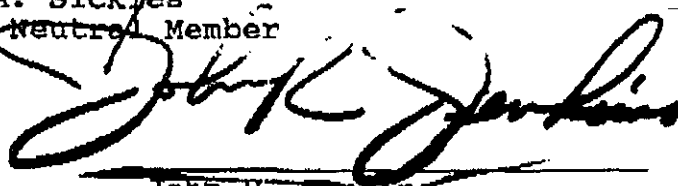
1. The Carrier shall compute overtime due and payable to the Claimant pursuant to the percentage method described.



2. Carrier shall comply with this Award within thirty days of the effective date.

  
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Joseph A. Sickles  
Chairman and Neutral Member

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Margaret Connor  
Carrier Member

  
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John R. Jenkins  
Organization Member

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March 7, 1990

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