

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
) Case No. 24
and)
) Award No. 23
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Interpretation No. 1

This Board sustained the Organization's claim that Claimant's dismissal violated the Agreement. Carrier requested that Claimant provide records of any outside earnings that he had during the period he was dismissed. The Organization contended that Carrier may not offset outside earnings against lost wages. The parties have returned to the Board for an interpretation of the award.

This matter presents two issues. First, the Organization contends that Carrier may not raise the issue of offsets for outside earnings because it failed to raise the issue during handling of the initial claim on the property. Carrier responds that it may properly raise the issue in a request for interpretation of the award. Second, the parties disagree over whether the Agreement allows for such an offset.

A review of the cited awards shows that there is no consensus among referees concerning whether a Carrier must raise the outside earnings issue during handling of the initial claim in order to preserve it for consideration in the event of a sustaining award. This is certainly an issue over which reasonable minds can differ and over which reasonable referees do differ. We need not join the abstract debate, however, to resolve the dispute presented.

The claim that we sustained provided:

1. The discipline (withheld from service and subsequent Level 5 dismissal) imposed upon Mr. D. R. Paxton for alleged violation of Union Pacific Rule 1.6 while working as track patrol foreman on May 16, 1999, in connection with reporting an incident regarding Company Vehicle No. 191560334 near Edgar, Nebraska, was without just and sufficient cause, on the basis of unproven charges and in

violation of the Agreement (System File W-9948-162/1209029).

2. As a consequence of the violation referred to in Part (1) above, Mr. D. R. Paxton shall now have the discipline removed from his personal record, be immediately returned to service and appropriately compensated for the full time he has been unjustly withheld from service beginning May 22, 1999 and continuing.

The claim thus demanded that Claimant be "appropriately compensated" for lost wages. "Appropriate" compensation would be compensation as provided for under the Agreement. Carrier's position, of course, is that "appropriate" compensation includes an offset for outside earnings. There was no reason for Carrier to raise the issue of offset for outside earnings at the time the claim was handled on the property and adjudicated before this Board. Certainly, Carrier could reasonably regard the claim as seeking compensation in accordance with the Agreement.

The claim we sustained is in marked contrast, for example, with the claim sustained in Third Division Award No. 21372, one of the awards on which the Organization relies. The claim in that case demanded:

Trackmen J. R. Johnson and C. T. Lawson shall each be allowed eight (8) hours' pay for each regular workday and each holiday beginning May 20, 1974 and continuing until they are reinstated to service with seniority, pass and vacation rights unimpaired.

In Interpretation No. 1 to Award 21372, the board held that the carrier was barred from raising post-award an offset for the claimants' outside earnings because the carrier failed to raise it during handling of the initial claim on the property. Regardless of whether we would follow Interpretation No. 1 to Award No. 21372 and similar authority in the abstract, we note that the claim before the board in that case was very specific as to how the remedy was to be calculated, i.e. "eight (8) hours' pay for each regular workday and each holiday beginning May 20, 1974 and continuing until they are reinstated to service. . ." The claim in the instant case merely asked that Claimant be "appropriately compensated." Clearly, what is meant by "appropriately compensated" is a matter that Carrier may raise in a post-award request for interpretation.

In offsetting outside earnings, Carrier relies on Rule 48(h) which provides:

If the charge(s) against the employee is not sustained the record of the employee will be cleared and if suspended or dismissed, the employee will be returned to former position and compensated for net wage loss, if any, which may have been incurred by the employee.

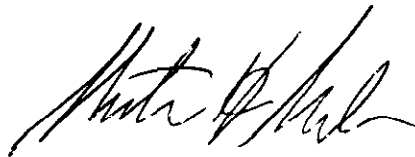
Carrier relies on Interpretation No. 1 to Third Division Award No. 31140 which held that Rule 48(h)'s provision for compensation for "net wage loss" authorizes an offset for outside earnings. The Organization agrees that this was the holding of Interpretation No. 1 to Third Division Award No. 31140, but urges this Board not to follow it. The Organization argues:

A review of Interpretation No. 1 to NRAB Third Division Award 31140 reveals a classic "split the baby" decision where, once the Carrier complained (written dissent), the neutral looked for a way to reduce the Carrier's liability and did so by combining the four (4) separate issues presented by the Organization into two (2). It is the Organization's position that the interpretation does not stand as precedent.

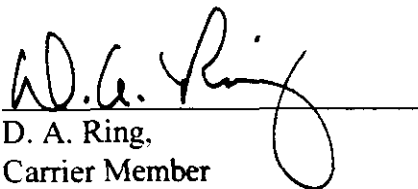
We are not persuaded by the Organization's gratuitous attack on the integrity of the referee in Third Division Award No. 31140. Essentially, the Organization maintains that because the carrier members of the board dissented and the referee agreed with the Carrier's position in the request for interpretation, the referee must have been trying to curry favor with Carrier by "splitting the baby." Under this view, a referee could never agree with a carrier's position in a request for interpretation following a sustaining award from which a carrier board member dissented without having the referee's decision characterized as splitting the baby and not standing as precedent. The Organization's position is untenable.

We find Interpretation No. 1 to Third Division Award No. 31140 to be a reasonable interpretation of Rule 48(h). We further find it controlling in the instant case and, accordingly, we will follow it.

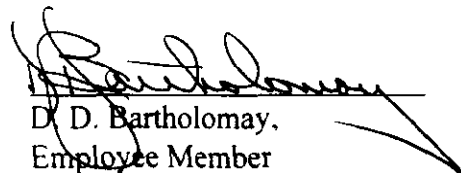
Accordingly, we find that the issue of offset for outside earnings is properly before us. We further find that Carrier may offset outside earnings.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, March 20, 2002.