

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 33024

DOCKET NO. MW-34068

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employees

NAME OF CARRIER: (National Railroad Passenger Corporation (Amtrak)

This matter has been returned to the Board on the request of the Organization for an Interpretation. In Award 33024 we found that the Agreement was violated by the manner in which the Carrier dismissed the Claimant. We ordered that the Claimant be reinstated to service, with seniority and benefits unimpaired, and that he be compensated for all wage loss suffered. The Organization seeks this Interpretation because it contends that the Claimant has not been compensated for all wage loss suffered. The request for Interpretation raises three issues concerning the calculation of backpay. We shall address them in the order in which they were presented.

The first issue concerns whether the Carrier may deduct the Claimant's outside earnings from the overall compensation. The Organization objects to such a deduction on the ground that the Carrier never raised the issue during handling of the claim on the property and that the Agreement does not expressly provide for deductions of outside earnings.

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. There also is no consensus concerning whether outside earnings may be deducted in the absence of an express provision of the Agreement authorizing such deduction. These are certainly issues over which reasonable minds can differ and over which reasonable Referees do differ.

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

The second issue concerns the proper employee against whom to compare the Claimant for purposes of determining what overtime the Claimant would have worked had he not been wrongfully discharged. The Carrier compared the Claimant to the next junior employee at Hunter Yard in Newark, New Jersey, because that was his headquarters at the time of his dismissal and, upon reinstatement, the Claimant exercised seniority to Hunter Yard. The Organization maintains, however, that the Carrier should have compared the Claimant to three other employees: the next junior employee at Adams Maintenance of Way Base in Newark, New Jersey; the next junior employee at Penn Station, New York; and the next junior employee at Sunnyside Yard. The Organization contends that throughout his history the Claimant worked at various locations within his seniority district. The Organization maintains that the Claimant sought to maximize his overtime opportunities. The three junior employees suggested by the Organization, in its view, better capture the Claimant's real likely loss of overtime than does comparing him to the next junior employee at Hunter Yard.

We are not persuaded by the Organization's argument. We refuse to speculate as to how often and where the Claimant would have moved had he worked during the period that he was dismissed. The one undisputed objective fact apparent from the record is that at the time of his dismissal, the Claimant was headquartered at Hunter Yard and, upon his reinstatement, the Claimant exercised seniority to Hunter Yard. Under these circumstances, the Carrier acted properly in basing overtime on the record of the next junior employee headquartered at Hunter Yard.

The final issue arises because the Carrier reduced the Claimant's backpay compensation by 19 percent. According to the Carrier, the reduction was justified because of the Claimant's absenteeism during the three years prior to his dismissal. The Carrier cites several Awards that allow reductions in compensation based on a claimant's attendance record.

The purpose of an Award of compensation for lost wages is to place the Claimant in the economic position he would have occupied had he not been wrongfully dismissed. Thus, under appropriate circumstances, a claimant's absenteeism record, if left unexplained, can support a conclusion that the backpay award should be reduced to avoid giving the claimant a windfall.

In the instant case, however, during consideration on the property, the Organization asserted that the Claimant's absenteeism was due to a kidney ailment and to carpal tunnel syndrome. The Organization backed this assertion by pointing to the fact that the Carrier never initiated disciplinary action for chronic absenteeism during this period. Finally, the Organization asserted that the Claimant had been treated successfully for these medical conditions prior to his dismissal. Thus, in the Organization's view, consideration of the Claimant's prior attendance record distorts the picture of the earnings he would have had if he had not been dismissed.

The Organization's assertions concerning the Claimant's medical conditions were not disputed during handling on the property. Accepting these assertions as true, which on the record presented we must do, leads inevitably to the conclusion that the Claimant's attendance record for the three years prior to his dismissal cannot serve as a basis for reducing his compensation. Accordingly, we hold that the Carrier acted improperly in reducing the Claimant's backpay by 19 percent.

Referee Martin H. Malin who sat with the Division as a neutral member when Award 33024 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 20th day of December, 2000.