

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Form 1

Award No. 24215
Docket No. 43875
93-1-92-1-U-1685

The First Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Can the Carrier unilaterally offset Claimant G.D. Redinger's back pay by an alleged Claimant 'availability factor,' unilaterally calculated for an arbitrarily determined time period?"

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

Claimant was dismissed from service on August 25, 1988, and reinstated on January 18, 1989. Rather than progress a claim to arbitration, the Carrier and the Organization agreed to dispose of the matter in the same manner as the claims of Claimant's Conductor and Brakeman, which were then pending before Public Law Board No. 4656. On February 12, 1991, that Board issued Award 9, sustaining the claim and directing Carrier to pay back wages to the claimants therein.

By letter dated April 24, 1991, the Carrier notified the Organization that the discipline will be expunged from Claimant's record and he will be paid for lost wages. Claimant's payment, however, was calculated by Carrier based on his availability for service during the calendar year prior to this dismissal. According to Carrier, Claimant was available for work 75.68% of the time, and his gross earnings of \$21,115.32 were therefore reduced by \$5,135.25. Carrier avers it has used availability factors to reduce back pay awards in the past with other crafts, but acknowledges this might be the first instance with

Engineers. In support of its position, Carrier has offered Award 19 of Public Law Board No. 3534 (United Transportation Union-Trainmen and Union Pacific), which directed that compensation for time lost be calculated on the basis of the claimant's availability for work, and the Interpretation of Awards 1 and 2 of Public Law Board No. 2434 (United Transportation Union-Enginemen and Union Pacific), which found Carrier's method of computation of time lost to be fair and reasonable. In the latter cases, Carrier had taken the claimant's earnings during an equivalent period of time prior to his dismissal, and paid him that amount, increased by COLA and general wage increases.

The parties have presented no Rule that prescribes how backpay is to be computed. Our analysis, therefore, is directed at the meaning of the phrase "pay for time lost." The concept of paying for time lost involves making an employee whole after it is found he was improperly withheld from service. This means putting the employee in the same position he would have been in had Carrier not disciplined him, neither better off nor worse.

In its Interpretation of Awards 1 and 2, Public Law Board No. 2434 referred to Award 182 of Special Board of Adjustment No. 356, where the carrier involved therein had computed time lost based upon the claimant's work record. The Board upheld the carrier's computation, and the United Transportation Union sought to set aside the Award. The United States District Court for the District of Minnesota, appointed the Neutral Member of Special Board of Adjustment No. 356, to serve as Special Master. His report to the court contained the following:

"Petitioner's second objection is not well founded and must be rejected. An employee's attendance record at his regular job, or, in the case of an employee like Kmecik who is not regularly assigned, the extent to which he customarily utilizes work opportunities available to him by virtue of his seniority, is a relevant and significant factor in the determination of his earnings. If his performance customarily is significantly less than the expected norm or the performance of similar situated employees, it is reasonable and fair to take that factor into account along with other factors in attempting to compute what his earnings would have been during the period in which he was deprived of the opportunity to work. This is a generally accepted concept, and it has been accepted as applicable in several cases by the parties."

The District Court ordered the adoption of the Special Master's Report and Recommendations, finding:

". . . The Special Master determined that the intent of the Board in the case at bar was to consider customary work performance in the computation of the pay for time lost . . .

The record demonstrated that Kmecik, prior to his dismissal, voluntarily refused a substantial portion of the work assignments which he was entitled to by virtue of his seniority. If the intent of the Board was to place Kmecik in the same position he would have enjoyed had he been reinstated after 90 days, then to ignore Kmecik's work performance in computing an award would lead to a windfall for the employee wholly unrelated to the reality of his measured work performance."

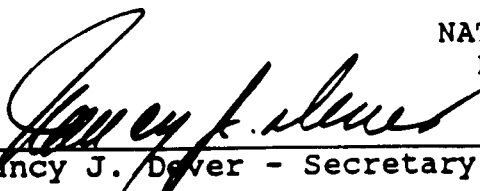
We find the above decision to be well reasoned. If Claimant made himself available for work substantially less frequently than other Engineers prior to his dismissal, he should not receive backpay as if he had reported for work every day. While the Board understands there is no precise way to accurately determine how much Claimant would have actually worked during the time in question, we find that his past performance is likely to be the best measure. Accordingly, we find the Carrier's use of an availability factor to be a fair and reasonable method of determining pay for time lost.

In computing Claimant's availability, however, Carrier should only consider the time Claimant made himself unavailable for service. In computing Claimant's availability to be 75.68%, Carrier apparently included a 63 day suspension. Although it was Claimant's actions which might have caused the suspension, it was the Carrier that determined its length. Additionally, to include these 63 days into the equation would have the effect of imposing an additional suspension upon Claimant. Therefore, we direct Carrier to recompute the availability factors, giving Claimant credit for the time he was out of service due to the suspension.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: 
Nancy J. Dever - Secretary to the Board

Dated at Chicago, Illinois, this 7th day of May 1993.