Interpretation No. 1
To Awards 1835 and 1836
Dockets 1775 and 1782

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

NAME OF ORGANIZATION:

RAILROAD YARDMASTERS OF AMERICA

NAME OF CARRIER:

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Eastern Lines)

Upon application of the representatives of the Carrier involved in the above Awards that this Division interpret the same in the light of the disputes between the parties as to meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

In Awards 1835 and 1836, this Division found that Carrier had used ineligible employes to perform yardmaster duties on certain specified dates. It also found, on the basis of the records developed by the parties in those cases, that the work involved was not insubstantial. In view of these findings, the claims were sustained without qualification. Accordingly, Award 1835 requires that (1) the senior of the two named claimants be compensated at the appropriate yardmaster rate for each day on which a violation was found to exist, except for those days on which he had worked as yardmaster, and that (2) the junior claimant receive yardmaster pay for said excepted days. Award 1836 prescribes that each of the two claimants named therein be compensated, at the appropriate yardmaster rate, for each day Carrier was found to be in violation of the Yardmasters' Agreement. The Board has reviewed these Awards with care and is satisfied that they are clear and unambiguous. We nevertheless will comment upon the two questions raised by the Carrier in view of the emphasis it has placed upon them.

Carrier's first point questions the Board's findings that "substantial" work was involved in each of the two cases under consideration. Our considerable research of the matter persuades us that "substantial" is not a word of mathematical precision and that courts and administrative agencies, in determining the meaning of the term, rest their decisions on the peculiar facts of each case. In the present cases, unlike those we considered in such Awards as 1156, 1660 and 1663, we concluded, after careful scrutiny of the respective submissions and contentions of the parties, that the disputed work involved major yardmaster duties and was not sporadic, isolated, or insubstantial.

In this Interpretation proceeding, Carrier for the first time makes the contention that an analysis of Petitioner's presentations shows that the work in question amounted to from twenty minutes on some claim dates to no more than one hour and twenty minutes on others. Based on the facts available to us at

the time the present cases were submitted to the Board, we do not agree that Petitioner's presentations are limited in the manner Carrier now suggests. Moreover, no such analysis or information was offered by Carrier at any time during discussion of the claims on the property that ante-dated Awards 1835 and 1836. If Carrier desired to press the point, it should have presented its analysis and argument on the property, when Petitioner would have had fair opportunity to reply and the Board could have obtained the benefit of the information. As the matter now stands, we have made our ruling that substantial yardmaster duties have been performed by non-yardmasters on certain specific dates. This interpretation proceeding is not the time to reargue the merits of that decision or to present new evidence, analysis or argument. See Interpretations No. 1 to Third Division Awards 3563 (Serial No. 70), 4607 (Serial No. 91), 5195 (Serial No. 110) and 4967 (Serial No. 105).

Carrier's second point is a new issue raised for the first time in this Interpretation proceeding and no provision has been made in Awards 1835 and 1836 for deduction of interim earnings of the claimants. These are not disciplinary or similar individual employe situations but cases where the entire Yardmasters' Agreement was affected adversely by serious violations. The Agreement has been breached by the removal from its coverage of compensable work that remained to be performed and thereafter was performed by non-yardmasters. If violations of this nature were not enforced strictly, it would be an easy matter to deprive a collective bargaining agreement of much of its meaning and to avoid compliance with benefit and other contract provisions that attach to work embraced by the agreement. Under the circumstances, payment for work wrongfully removed from the Yardmasters' Agreement must be made, without deduction for interim earnings, to maintain the validity of the Agreement and enforce its provisions. This is a sound principle and, although unanimity on the point is lacking and it is at variance with Awards 1897 and 1898 where the question was not put in issue by the Organization, it is consistent with numerous prior awards (e.g. Third Division Awards 6465, 5243, 4539, 3963, 2920 and 2838) and in furtherance of the national policy expressed in the Railway Labor Act and the Federal legislation to promote stability in labor-management relationships.

The Awards are clear and the payments should be made as indicated.

Referee Harold M. Weston, who sat with the Division as a member, when Awards 1835 and 1836 were adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Patrick V. Pope
Secretary

Dated at Chicago, Illinois, this 15th day of October 1964.

DISSENT TO INTERPRETATION NO. 1 to AWARDS 1835 and 1836

The "Interpretation" to Awards 1835 and 1836 is so completely at variance with the principles established by numerous awards of this and other Divisions of this Board and the courts to guide us in our disposition of disputes that we are required to dissent to the "Interpretation" and to state fully our reasons therefor.

One of those principles is that we have no legal right to impose a penalty where none is provided in the agreement. Another equally well-established principle is that an employe damaged by a breach of his employment contract is only entitled to be made whole. Both of these fundamental principles have been endorsed by Referee Weston in prior awards on this and other Divisions. For example, Referee Weston in denying the claim of a regularly assigned clerk for time and half when not permitted to fill a vacancy on his rest day said in Third Division **Award 8527:**

> "* * * there is manifestly no substance to Sheehe's claim, except as a penalty for violation of the Agreement. No penalty clause for the violation is contained in the Agreement."

Then, in **Awards 1897** and **1898** involving the same parties, the same agreement and "substantially similar" facts as **Awards 1835** and **1836,** Referee Weston said:

> "The pattern and circumstances of the instant case are substantially similar to those considered in Award 1835. We have re-examined that Award and find it eminently sound and fair. **The principles expressed in Award 1835 are applicable to both the substantive and procedural issues of the present case,** and we are satisfied that a substantial amount of yardmaster duties were performed by ineligible employes * * *.
>
> Accordingly, the claim will be sustained for the dates mentioned subject to deductions for earnings received by Claimants for work performed on those days.
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> * * * * *
>
> We have found that Carrier has engaged in violations by its use of ineligible employes to perform yardmaster work on certain specified dates in 1961. As theretofore mentioned, the claim will be sustained as to those dates subject to deductions for earnings received by Claimants for work performed on those days."

Awards 1835 and **1836** were adopted July 24, 1963, while **Awards 1897** and **1898** were adopted January 29, 1964. That it was not Referee Weston's intent in **Award 1835** to penalize the Carrier by giving the claimants two days' pay for one day's work is clear. There, Referee Weston after finding that the Carrier had used ineligible employes to perform yardmaster work in violation of the agreement, said:

> "* * * There is no question but that Carrier violated the Yardmasters' Agreement by using non-yardmasters to perform yardmaster work on those dates. See Award 1343. * * *.
>
> * * * The matter of determining which of the Claimants is eligible for compensation on claim dates is simply an item of routine detail that may be readily ascertained by checking the records. See Third Division Awards 10871 and 11372."

Award 1343 held "* * * the claim should be sustained, **but to the extent only that the requested payment shall not exceed Claimant's actual loss as mitigated by other earnings."** and **Award 10871** required the Carrier "* * * to make redress in form of pay for the position of Clerk-Operator at Johnson City, Tennessee, **only on those days on which a senior idle employe was available,** to

be determined by a joint check of the Carrier's record." Thus, until the "Interpretation" to **Awards 1835 and 1836** was issued Referee Weston consistently recognized and followed the principles that (1) a penalty will not be awarded unless the agreement so provides, and (2) if the agreement is violated the employe damaged thereby is only entitled to be made whole. Referee Weston's excuse for departing from these well-established principles — "to maintain the vitality of the Agreement and enforce its provisions" is not only inane but is contrary to numerous well-reasoned awards of every Division of this Board and to the decisions of the courts.

Chief Jusice Hughes, in **Republic Steel Corporation** v. **National Labor Relations Board,** 331 U. S. 7, in holding that the Board had no right under the statute to impose a penalty on an employer in order to "effectuate the policies of the Act", said

> "* * * it is not enough to justify the Board requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to such end."

Neither, is it proper for us, in order to "maintain the vitality of the Agreement" to penalize the Carrier by awarding claimants any sum other than what they have actually lost by reason of the violation.

The "rule of law", or more accurately the measure of damages, applicable when a collective bargaining agreement has been breached is clearly and simply stated in **Blair, et al.,** v. **Gregory-Hogan, et al.,** 150 F. 2d 676, where Judge Reddick said:

> "The fundamental basis for an award of damages for breach of contract is just compensation for losses necessarily flowing from the breach. Michelson, Inc. v. Nebraska Tire & Rubber Co., 8 Cir., 63 F. 2d 597, 601; Williston on Contracts, Rev. Ed. ¶1338; Restatement of the Law of Contracts, ¶329. And while the breach of contract gives rise to a right of action, it is nevertheless possible for a breach to occur without causing damage. Restatement of the Law of Contracts, ¶329 a. As pointed out in the original opinion, a party whose contract has been breached is not entitled to be placed in a better position because of the breach than he would have been in had the contract been performed. * * *"

Hanson, et al. v. Chesapeake & Ohio Railway Company, 198 F. Supp. 325, was an action brought to enforce Referee Weston's Third Division **Award 9193.** District Judge Watkins in upholding the award carefully pointed out that the "make whole" principle must be applied because

> "Just as in any other civil case, the plaintiffs here will have to prove that they are within the class of persons entitled to recover and that they have sustained damages. And, just as in any other civil case, if their proof fails, so will they.
>
> * * * And, of course, the ordinary concepts relating to mitigation of damages will apply as each individual is heard, so that final computation of damages may be accomplished in the same manner as it is in the ordinary damage suit. * * *"

There should not be any question that in carrying out our duty to interpret and apply a collective bargaining agreement we are bound to use the

same rules of law as the courts do in interpreting and applying the provisions of "other written contracts". First Division **Award 5080**, E. v. TRRA, Referee Royal A Stone. This is true because a dispute as to the interpretation and application of such an agreement is "analogous to a civil action in law **ex contractu.** * * * The words 'interpretation or application of agreements' are persuasively convincing that the law of contracts governs the Board's adjudication of a dispute." Third Division **Award 10963**, MW v. Reading, Referee Dorsey. Thus, we are required to base our decisions upon legal principles. Such principles **are not** —

> "* * * 'mere technicalities'; they are the product of the best minds of lawyers, scholars, and judges through generations. When parties would substitute the so-called 'common sense' of an arbitrator for the accumulated wisdom of many men through many years, they in fact urge the rule of men as against the rule of law. **There is no safe guide to the construction of labor contracts,** any more than of commercial contracts, **except the law.** When the arbitrator is unversed in the law, and renders a 'common sense' decision, it will appear to be common sense only to the winning party. When the losing party, who quite naturally thinks that it is lacking in common sense, discovers afterwards that it is opposed to well recognized principles of law, he will have just cause for indignation. And the process of arbitration as a means of settling labor disputes will have suffered." Updegraff and McCoy, ARBITRATION OF LABOR DISPUTES, Chapter VI, pages 136-137.

We are further bound by such legal principles because, as Referee Roll said in First Division **Award 16558**, EF v. SP, "* * * When parties enter into a contract they contemplate that the interpretation and application of its provisions will be in accord with existing law. * * * So the existing law becomes a part of every contract of employment."

If, in applying the principles of contract law to a dispute, we find that the agreement has been breached, we are then required to place the claimant in the same position he would have been in except for the violation — no better, no worse. This is "simple justice." **Award 5080**, supra. It, too, is a legal principle which has been tested and proved "through generations." It is a principle we must apply since "The general purpose of the Congress" in enacting the Railway Labor Act, First Division **Award 5862**, T. v. FEC, Referee Fox, was —

> "* * * to promote just and amicable relations between employer and employe, and to safeguard the rights of both, as well as to provide for the public interest, which is the third party in every dispute where the activities involved are touched with a public interest, as in the case before us. **Such purpose is best served by applying to such disputes as may arise the rules of law evolved through the experience of the ages,** and these considerations should outweigh any advantage to individual employes which might develop through the application of a different rule."

These principles, or "rules of law", have been consistently applied by every Division of this Board. One of the best statements of the principles we are obliged to follow is found in First Division **Award 5862**, supra. There the Organization admitted that money received while working for the Carrier "should be deducted" but vigorously contended "* * * they should not be required to deduct from their demands money earned by them from other sources * * *". In holding that earnings **from all sources** must be deducted, Referee Fox said:

" Unquestionably if these cases were pending in a court of law, the claimants would, under proper limitations, be required to account for any money earned in other employment. This seems to be conceded by all the referees who have considered the question, and citation of authority of courts on the subject is not considered necessary. **This established rule applies to every character of case when the breach of a contract involving personal service is involved.** There may have been the grossest of violation, attended by circumstances justifying punitive damages, and yet, whatever the ground for the damages assessed, there must be credited, as against compensatory damages, any money received by the plaintiff from other employments during the period covered by the breach and for which damages are allowed. The reason back of this rule is not difficult to find. It rests on the proposition that if there had been no breach of the contract the plaintiff would have earned a certain sum. If by reason of the breach he is deprived of any part of that sum, he is entitled to have the same paid as damages so that he might be made whole; but if, during that period, he earns money from other sources a less sum is required to make his whole, and his damage is lessened to that extent. A rule such as this, resting in justice and sound common sense, and evolved through the centuries required in the development of our system of laws, should not be disregarded unless the plain language of the agreement so requires.

"We are unable to see why this legal principle should not be applied to the case before us. It may be said that we have here a plain provision of the contract providing for payment, in a certain way, for a specified violation, and that no mention is made of any deduction. This is not different from the ordinary contract of employment. Such a contract may or may not be for a specified time, but the compensation is either fixed by the contract or an agreement to pay a reasonable wage or salary is implied by law. Rarely is anything said about a breach, because none is contemplated; and rare indeed would be the instance where the parties discuss the minutia of the methods to be employed in compensating one party in cases of a breach. **When the breach occurs the law steps in and prescribes the method of compensation in damages.** Here we have a contract between the carrier and the employe. Under it the carrier undertakes to protect the employe in his right to work under certain rules of seniority. The carrier violates that agreement, the employe is not permitted to work at times when he had the right to do so and he suffered damage thereby to the extent of the days lost, or the payments provided to be made. That is his claim for damage and so far he is on solid ground; but then comes the law which says to him: your right to damage is clear, but when your contract was breached by the carrier it became your obligation to secure other employment, and if you did so, and received compensation therefor, you must credit the amount received on your claim, because you are not damaged beyond the difference between what you would have received from the carrier and what you actually received from other sources during the same period. You are not entitled to receive compensation from two sources for the same day, unless the wage you actually received is less than you were entitled to receive from the carrier. We see nothing unsound in this position. Under it the carrier is made to comply with the monetary terms of his agreement, the employe is saved from loss, and exact justice is meted out to the parties concerned. * * * **when an employe actually receives wages for work performed on the same dates he should have been permitted to work for the carrier, he is only entitled to**

the difference between the wages he should have received and those actually received.* * *

* * * * *

We are therefore of the opinion that the employes involved in this controversy should be paid any amount due them on account of their admitted grievance, less any earnings received by them from other sources during the time they should have been permitted to work for the carrier, had their seniority rights remained unimpaired."

It should be noted that the dispute involved in **Award 5862** was not a discipline case*, but involved claims for runarounds when the carrier improperly removed the claimants' names from the seniority roster; in other words, the dispute in **Award 5862,** like the dispute here, resulted from the carrier's violation of the claimants' contractual rights.

In Third Division **Award 10963,** supra, it was also said:

"* * * The law of contracts limits a monetary award to proven damages actually incurred due to violation of the contract by one of the parties thereto. * * *

* * * * *

In contract law a party claiming violation of a contract and seeking damages must prove: (1) the violation; and (2) the amount of the damages incurred. **A finding of a violation does not of itself entitle an aggrieved party to monetary damages.**

In the instant case Petitioner has proven the violation. It has not met its burden of proving monetary damages. There is no evidence in the record that any Employe in the MW collective bargaining unit suffered any loss of pay because of Carrier's violation of the contract. The inference from the record, if any can be drawn, is that the MW employes were steadily employed by Carrier during the period of the project. Therefore, for this Board to make an Award as prayed for in Parts (2) and (3) of the Claim would be imposing a penalty on the Carrier and giving the MW Employes a windfall — neither of such results is provided for or contemplated by the terms of the contract. To make such an Award, we find, would be beyond the jurisdiction of this Board."

In Third Division **ward 10574,** MW v. EJ&E, Referee Carey, it is said:

"* * * It is unquestioned that at all of the times involved, these Claimants were performing other work for the Carrier. The generally accepted rule is that the true measure of damages for breach of contract is the direct loss shown to have been sustained as the proximate result thereof. * * *"

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* See First Division Award 16408, applying the principle of mitigation of damages in a discipline case. The Petitioner here agrees that in a **discipline** case if the employe has been found to have been unjustly dismissed, he will be "paid for all wages lost, **less amount earned in any other employment.**" Article III, Section 1-f, of Agreement between the Santa Fe and R.Y.A.

In Third Division **Award 11089**, CL v. SAL, Referee Boyd, it was contended that the claimants were each entitled to 33 hours at time and half in addition to their regular earnings because the carrier failed to provide a relief worker during the Station Accountant's vacation, as required by the agreement. Referee Boyd held the carrier violated the agreement but denied the claims for overtime since —

> "* * * The Claimants here were fully employed and compensated for their time. Furthermore, we can find nothing in the record to prove the basis for the claim of '33 hours each at punitive rate of the Station accountant.' There being nothing in the record to support the item (c) as stated in the claim, the Board has no recourse but to deny this item."

In Third Division **Award 11099**, TE v. SP&S, Referee McMahon, although finding the carrier violated the agreement, held:

> "* * * the only compensation to which the employes could be entitled to, would be for the difference in pay for what each employe has earned on the position he was engaged, and what he would have earned on the position to which he was awarded, had Carrier transferred them properly in accordance with the rule. * * *"

The situation with reference to compensation demanded by the claimant in Third Division **Award 7309**, CL v. PRR, Referee Rader, is similar to the situation here. There, as a result of an incorrect seniority date, which claimant protested several times, carrier assigned a bulletined position to a clerk junior to claimant. After correction of the seniority date, the carrier made the claimant whole for his loss of earnings by paying him the difference between what he earned and what he would have earned if properly assigned. He was not satisfied with such payment and claimed an additional eight hours at time and half each day the violation existed. Referee Rader in denying the claim for the additional day said:

> "There is no question here but that there was a contract rule violation and Carrier did not comply with the provisions of Rule 3-D-1 (f) in fixing the seniority date of Employe Kernan, however, in view of this violation can it be said that a penalty should be assessed against Carrier? In considering previous awards of this Division, several of which are listed above, it would seem that the proper method of compensation is the one used by the Carrier here. That is, making the Claimant whole for any wage loss sustained. While inconvenience may have resulted from the mistake made, on this record such matters can only be speculative, and we do not believe a penalty against Carrier is warranted. The assessing of the penalty claimed would be an extremely drastic measure to be invoked and one of doubtful legality under the rules of the Agreement as no specific rule can be used as a basis for such an award. The measure of compensation used in similar cases in awards of this Division of the Board, under rules as here before us has been on the theory of making the injured employe whole and as this has been done we conclude (b) of the claim must be denied."

In Third Division **Award 8674**, Clerks v. C&O, Referee Vokoun found that the carrier in abolishing a clerk's position and turning the work of that position over to other employes violated the agreement. But in spite of the violation, Referee Vokoun still limited the recovery to the "specific net losses" the claimant might establish, saying:

"As to the claim for compensation for Mrs. Grace Hammar, the occupant of the clerical position when it was abolished, the Board rules as it has on innumerable occasions that an employe adversely affected by the violation of a rule must be made whole for whatever monetary loss was suffered because of such violation. Punitive damages are not ordinarily approved by the Board. Accordingly, the Board rules that Mrs. Grace Hammar is entitled to compensation for only those specific net losses which she is able to establish."

In **Award 11368**, MW v. KO&G-MV, Referee Dorsey sustained the Employes' contention that seven section foremen positions had been abolished in violation of the terms of the agreement but that "* * * the prayer 'that employes (other than the foremen) who were adversely affected by the elimination of the seven foremen's positions' be reimbursed, is too vague, indefinite and uncertain. As to them, we dismiss the claim. * * *" The Employes requested the Division to interpret this finding. In Interpretation No 1 to **Award 11368**, Referee Dorsey said:

"1. The make whole provision of the Award is limited to the holders of the seven section foremen's positions at the time of the violation of the Agreement and extends to no other employes;

2. The said section foremen shall each be made whole for the loss of wages suffered because of the violation. The loss is the difference between what each of them would have earned absent the violation, less what each actually earned. The Award does not provide for any other monetary damages. Should, as to any of said section foremen, the amount actually earned exceed what would have been earned, the Award provides for no monetary award in such instances; * * *"

In recent (October 9, 1964) Third Division **Award 12962**, Clerks v. PRR, Referee Hall, it is said:

"Coming now to the question of a penalty being allowed Petitioner for the alleged infraction of the rules of the agreement by the Carrier, there is no provision for any penalty in the agreement nor do we have any right nor power to read any penalty provision into the agreement. If any loss had been shown, Petitioner would have been allowed compensatory damages. Under other circumstances, if there had been a wilful and deliberate violation of the agreement this Board might have allowed nominal damages. There is nothing of this sort indicated in the record nor is there anything denoting Carrier benefited in any respect by the procedure followed in the instant case."

In Second Division **Award 4254**, MA v. CMStP&P, Referee Shake, it was claimed that the Machinists' Agreement was violated when a foreman repaired three locomotives which had been set out at a point 63 miles from the nearest point where machinists were employed. Referee Shake held that such action violated the Agreement but denied the claim of the named claimant for 16 hours at the machinists' rate because —

"The Employes have not, however, shown that the Claimant, Waldo, suffered any monetary loss **or that there is any contractual liability for an arbitrary penalty.** See Award 3967."

Second Division **Award 3967**, CM v. D&RGW, Referee Howard A. Johnson, is particularly interesting in connection with the "interpretation" here. In that dispute the carrier changed the starting time, without conference, of the second

shift carmen. Two carmen filed claims for three hours at time and half for five days, and two for three hours at time and half for one day each, in addition to the eight hours straight time paid for working their shifts as changed. Referee Johnson denied the claims although —

> "The Carrier admittedly violated Rule 2 (b) in starting the second shift three hours later than 8:00 p.m. on December 9, 1958, without first attempting to reach an agreement with the Local Chairman * * *"

because

> "No pecuniary loss or damage to Claimants is shown, and the Agreement does not provide for any arbitrary or penalty for this violation."

In setting out the reasons for his decision, Referee Johnson further said:

> "It is a well settled rule or statutory construction that a penalty is not to be readily implied, and that a person or corporation is not to be subjected to a penalty unless the words of a statute plainly impose it. Tiffany v. National Bank of Missouri, 85 U. S. 409; Keppel v. Tiffin Savings Bank, 197 U. S. 356.
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> The rule is equally applicable to the construction of contracts; for the parties can readily agree upon penalty provisions if they so intend, and the absence of such provisions negatives that intent.
>
> The Supreme Court of the United States said in L. P. Steuart & Bro. v. Bowles, 322 U. S. 398, that to construe a statute as imposing a penalty where none is expressed would be to amend the Act and create a penalty by judicial action; that it would further necessitate judicial legislation to prescribe the nature and size of the penalty to be imposed.
>
> Similarly, for this Board to construe an agreement as imposing a penalty where none is expressed, would be to amend the contract, first, by authorizing a penalty, and second, by deciding how severe it shall be. Not only are the parties in better position than the Board to decide these matters; they are the only ones entitled to decide them. Consequently there have been many awards refusing to impose penalties not provided in the agreements. Among them are: Awards 1638, 2722 and 3672 of this Division; Awards 6758, 8251 and 15865 of the First Division and 7212 and 8527 of the Third Division."

See First Division **Awards 14099, 15865, 16137, 15080, 18625, 18923.**

In Fourth Division **Award 28**, RYNA v. Detroit Terminal, a furloughed yardmaster was not permitted to bid on a vacancy for yardmaster and the vacancy awarded to a switchman who had not established seniority as a yardmaster. The Division, without a referee, found that the carrier's action violated the agreement but held that the claimant, who also held seniority as a clerk, was only "entitled to compensation at the rate of the position from September 14, 1938, less amounts earned in other employment since that date."

In Fourth Division **Award 386**, T. v. I-GN, it was contended that the carrier violated the agreement when it used a yard clerk as a yardmaster instead of the senior unassigned yardmaster. Again, the Division, without a referee, held —

"* * * the claim is sustained in behalf of the 'senior unassigned yardmaster' for the position of an Assistant Yardmaster at South San Antonio Yard from April 17, 1940 to April 10, 1942, less earnings made in other employment during this period."

In Fourth Division **Award 1343**, RYA v. MP, Referee Coburn, the carrier admittedly had the General Yardmaster and other officers perform the duties of an abolished yardmaster position. The former occupant of the abolished position filed a claim for "one day's pay. at the appropriate yardmaster rate * * * until the condition is corrected." Referee Coburn sustained the claim "but to the extent only that the requested payment shall not exceed Claimant's actual loss as mitigated by other earnings."

In Fourth Division **Award 1388**, ARSA v. Ann Arbor, Referee Coburn found that the abolishment of the night yardmaster position permitting the yard clerk to relay instructions from supervisory officers to the yard crew violated the Yardmasters' Agreement. However, the Labor Members again agreed with Referee Coburn that the claim should be sustained "to the extent only that compensation shall not exceed Claimant's actual loss, **as mitigated by other earnings.**" In that case, as in this, the claimant was employed as yard foreman or yard helper subsequent to the abolishment of his yardmaster position and sought a day's pay at the yardmaster rate in addition to a day's pay at the yard foreman or yard helper's rate.

In Fourth Division **Award 1585**, ARSA v. Pullman, Referee Burch, a furloughed supervisor claimed he should have been permitted to work the two rest days each week of the regularly assigned supervisor instead of a craftsman. Referee Burch held the agreement was violated. The Carrier and the Association could not agree as to the intent of the award. The Association requested the Division to interpret its holding "Claim sustained". In Interpretation No. 1 to **Award 1585**, Referee Burch said:

"Employe's representatives * * * contend that the Award requires that the Claimant be paid for two days per week from July 20, 1959 forward to March 2, 1962, inclusive, a total of 270 days, **without regard to whether Claimant was actually available for work or whether Claimant received pay for other work done on those days.**

It appears that a resolution of the foregoing dispute over interpretation of the foregoing Award depends on the meaning of the language in the claim 'and he shall be compensated for the two days per week commencing with the week of July 20, 1959 and every week thereafter until the violation is corrected.' **In other words, what is the measure of Claimant's damage?**

* * * * *

* * * the Claimant herein is entitled only to be placed in a position, so far as that can be done by the payment of money, as though Carrier had not violated the contract.

* * * * *

* * * the intent of the award in this case was to 'compensate' the Claimant for his losses resulting from the breach by the Carrier of the governing contract. **Compensation should be determined by payment to Claimant of his net loss resulting from such breach.**"

In Award 1778, ARSA v. NYC, Referee Weston recognized the principle that the claimants were only entitled to be made whole in spite of the admitted violation of the agreement by the Carrier, saying:

> "* * * The claim will be sustained and the three Claimants specifically named therein shall be compensated for the actual monetary loss suffered by reason of the Carrier's violation of the Supervisors' Agreement; the claim will not be sustained as to 'others who have suffered monetary loss' since they are not readily identifiable. See Awards 1393 and 1435."

In Interpretation No. 1 to Award 1839, RYA v. CGW, Referee Weston again recognized the "make whole" principle when he said:

> "* * * Any amounts heretofore received by Claimant from Carrier because of his employment during the claim period will, of course, be deducted from the money payments due under Award 1839."

And as stated above, Referee Weston in Awards 1897 and 1898, involving the same parties, the same agreement and "substantially similar facts" as the awards involved in this "Interpretation", said:

> "We have found that Carrier has engaged in violations by its use of ineligible employes to perform yardmaster work on certain specified dates in 1961. As heretofore mentioned, the claim will be sustained as to those dates subject to deductions for earnings received by Claimants for work performed on those dates."

The Claimants in Awards 1835 and 1836 were on duty and under pay as engine foremen on each of the specified dates Referee Weston found the Carrier violated the agreement. Under the "ordinary concepts relating to the mitigation of damages" they were entitled to the difference between their earnings as engine foremen and what they would have earned as yardmasters except for the violations. Applying such concepts "exact justice" will be meted out both to claimants and carrier. This is particularly true when, as the claimants have here, "an employe actually receives wages for work performed on the same dates he should have been permitted to work for the carrier, **he is only entitled to the difference between the wages he should have received and those actually received.** * * *" First Division Award 5862, and other awards cited above.

CARRIER MEMBERS

A. H. Deane

J. R. Mathieu

C. A. Conway

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