PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

NMB Case No.50
Claim of T. S. Radulski
Dismissal: Theft of Time

STATEMENT OF CLAIM: Claim on behalf T.S. Radulski for reinstatement to service with seniority intact with pay for all time lost including fringe benefits.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on June 14, 2007, at Kansas City, Missouri. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts. The Board makes the following additional findings.

Claimant was employed as an Brakeman and, at the time period at issue, was an Engineer Trainee. His length of service is not stated; insofar as the evidence indicates, he had a satisfactory prior record. At the time of the incident at issue, he was located at San Bernardino and was assigned to the Carrier's San Bernardino Helper job. Helper crews report and wait to be called out to provide additional power at the end of trains operating over Cajon Pass.

The San Bernardino Helper job had become less busy over the years, but a California legislative mandate required helpers to be available to cover certain trains and routes. Nevertheless, the periods of inactivity might be broken by a call for a prompt dispatch of power to assist a train. In an effort by the Carrier to reduce overtime, the San Bernardino Helper assignment had been reduced from 12 hour tours to eight hour tours. Even with the reduction in work and in the hours of the assignment, the Carrier continued to experience overtime claims from crews assigned the job.

In mid-November of 2005, the Carrier received an anonymous "tip" on its corporate hot line that Engineer S. O. Sauers, who was

regularly assigned to the San Bernardino Helper, was falsifying time claims to obtain payments for time to which he was not entitled. The Carrier's Corporate Audit Service Office transmitted the information to then San Bernardino Terminal Superintendent Kevin McReynolds with the instruction to "study the information" and provide it to Corporate Audit for review.

On November 26, 2005, Claimant was called for duty to work as Brakeman on a San Bernardino Helper crew where the Engineer was Mr. Sauers. The crew had a scheduled on-duty time of 0800, with a departure time of 0830 and a scheduled tie-up time of 1600. For reasons not the fault of the crew, Sauers and Claimant were not called by the Dispatcher on that date and the crew never took their engine out of the terminal.

Despite the fact that the crew was to be on duty until the scheduled 1600 tie up time, neither Sauers nor Claimant were found on the property on the 26th at 1445, when Mr. McReynolds attempted to locate them; and Claimant's car was not in the parking lot. Mr. McReynolds had the cell phone numbers of Claimant and Engineer Sauers but, for reasons unexplained in the record, he did not call either of them to ascertain their whereabouts and status.

Claimant claimed compensation for November 26th. He reported an on-duty time of 0800, a departure time of 0830, an arrival time of 1600 and an off-duty time of 1635. He submitted his claim for that time at 1622 that date. On November 27th, the Terminal Superintendent reviewed Claimant's claim and concluded, based on his observations the previous day, that Claimant had not been on the property after 1445, did not tie up at 1635 and was not entitled to overtime for the day. Moreover, as Mr. McReynolds was aware, the crew had never left the terminal that day and thus could not have had a departure and arrival time. Nevertheless, and without inquiring of Claimant or his Engineer as to their explanations, Mr. McReynolds forwarded the information to Corporate Audit, which determined that Claimant's claims were in violation of their pay entitlements.

By notice dated March 6, 2006, Claimant was notified to attend a formal investigation as to his responsibility in connection with the alleged falsification of his time for the date, resulting in payment for time not worked and for which time he was not available for service, in violation of GCOR Rules 1.4 (providing that employees must cooperate and assist in carrying out Rules and instructions. They must promptly report any violations to their proper supervisor . . . and any misconduct which may affect the

interest of the railroad), 1.6 (providing, in part, that employees must not be dishonest) and 1.9 (employees must behave so that the railroad will not be criticized for their actions) and LA and California Division General Notice 132 dated September 9, 2005 (making employees responsible to tie up by computer, completing tickets at the end of their tour of duty responsible for accuracy, completeness and timely processing). The notice of investigation contained a statement that the Carrier first had knowledge of the incident on February 27, 2006.

The investigative hearing was held on March 24, 2006. The hearing addressed both Claimant and Engineer Sauer, each of whom were present and testified. The foregoing and following additional facts were ascertained.

An investigatory hearing was conducted on March 24, 2006. In the hearing, Claimant testified that he talked with the Dispatcher and was told by the dispatcher "that he didn't have anything coming and, you know, that our shift would be over". He apparently did not understand the dispatcher's message to constitute permission to leave the property, as he repeatedly conceded during the hearing that he had "made a poor decision" and should not have claimed pay for tying up at the time stated.

Following the hearing and based on evidence adduced therein, the Carrier dismissed Claimant from all service for violation of the cited rules.

The Organization filed a timely claim on Claimant's behalf, which was progressed on the property in the usual manner, but without resolution. The dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES

The Carrier argues that it met its burden to prove, by substantial credible evidence, that Claimant is guilty of theft of time. It asserts that the evidence establishes that Claimant improperly claimed time, and regular and overtime pay to which he was not entitled. BNSF points out that the Organization never really asserted Claimant's innocence, but acknowledged in its statements at the hearing and through Claimant's own testimony, that he was guilty of violations and accepted responsibility for his actions.

Indeed, points out the Carrier, in Claimant's testimony at the hearing, he acknowledged that he left work early, on the basis of

the dispatcher's statement that "nothing was coming" for the crew. It asserts that Claimant was not, under any circumstances, entitled to pay for time after he left work, rendering inappropriate Claimant's submission of a request for pay for the two hours or so that he claimed, including the overtime. BNSF points out that Claimant put in for pay for that time, notwithstanding the fact that, by his own admission, he was not even on the property after 2:45 p.m., and, the Carrier contends, based on the Terminal Manager's unsuccessful attempt on November 26th to locate Claimant, some unknown time prior to that.

As to the Organization's argument that Claimant was only engaging in a long-standing practice of claiming one-half hour of overtime at the end of his day based on not taking a meal period, the Carrier points out that there is no evidence in the record to establish such a practice, let alone to establish Management's acquiescence to such a practice, which the Carrier contends, in any event, reduces to an improper claim for time not worked.

As to whether Claimant received overtime pay, the Carrier maintains that the evidence establishes that Claimant was paid for time over and above his daily rate, but contends, in any event, that whether Claimant received overtime pay to which he was not entitled or whether he merely claimed it is a false issue, as the charges relate to his false claim for overtime, not his receipt of payment.

The Carrier argues that abundant precedent establishes that theft of time is a dismissable offense, since the employee's actions have betrayed the trust to which the employer is entitled. Under such circumstances, it argues, Claimant' prior service and other potentially mitigating factors not available to the claimant.

In response to the Organization's argument that the claim must be sustained based on the Carrier's failure to meet the time limits to conduct the investigation, BNSF argues that it did not have knowledge of the violation sufficient to trigger the Article 13 time limits until Central Audit had reviewed the information and reached a conclusion that a violation had occurred. To hold otherwise would, in the Carrier's view, require it to bring charges against employees which would not yet be substantiated.

The Carrier also argues that due process requires reasonable fairness, not a perfect procedure. It points out that Claimant admitted his misconduct and argues that any time limit violation was without prejudice to his position or that of the Organization.

The Carrier argues that it has put in place safeguards to eliminate excessive penalties, and it contends that disciplinary decisions which do survive the review process are reserved for clear cases and should be respected and upheld. The Carrier urges that the Claim be denied as without merit.

The Carrier argues that, if Claimant were to be reinstated, any back wages awarded should be reduced by the time period the hearing would have been timely and that such wages should be further offset by Claimant's outside earnings, if any, during the period Claimant was dismissed. It argues that reductions for outside earnings are consistent with the contractual "make-whole" purpose of the arbitration process and maintains that failure to take such outside earnings into account would constitute a windfall for Claimant. It points to prior awards to establish that such offsets have been imposed by arbitrators.

The Organization argues that the Claim must be sustained and Claimant reinstated and made whole because the Carrier violated the requirement set forth in Article 13 of the governing Agreement by failing to hold the investigation within 30 days from the date the Carrier "first has knowledge of the occurrence of the incident to be investigated".

UTU asserts that the evidence establishes that the Carrier was aware of Claimant's times of arrival and departure on November 26th and became aware of the time for which Claimant had claimed the next day, but that it did not hold the investigation until March 24th, almost four months later. The Organization argues that the Carrier's assertions that it did not have knowledge of Claimant's alleged conduct until February 27, 2006 is contrary to the record and self-serving. It maintains that Corporate Audit added no knowledge about the incident, but merely determined, after many days, that the conduct of which the Carrier was already aware was a violation.

The Organization points out that Article 13 (g) (6) of the governing Agreement requires that when either Party does not meet the timeliness requirements, "the matter shall be considered closed, and settled accordingly". UTU contends that, since the Carrier failed to meet the timeliness requirement to hold the investigatory hearing within 30 days from when it first had "knowledge of the occurrence of the incident to be investigated", - which it contends was on or about November 27th - the terms of the closure and settlement must be to rescind Claimant's dismissal, reinstate him to service and make him whole for wages and benefits lost, as claimed.

The Organization also argues that the evidence establishes that Claimant and other crews working the San Bernadino Helper assignment who have been dismissed were merely engaged in working, or being available to work, through lunch and then claim their meal break as overtime at the conclusion of the day, conduct in which the helper crews had engaged for an extended period of time and of which Carrier officers were fully aware and allowed.

UTU argues that Claimant should not only be reinstated and made whole for wages and benefits lost, but that no deduction should be made for outside earnings. It points out that there is no provision in the Agreement providing for such deductions and argues that, where the Parties intended such offset, they so provided. Absent such provision, the Organization contends that no offset is appropriate. It maintains that the long-standing practice on the property is not to offset interim earnings from back pay.

The Organization also argued in a supplemental brief applicable to a number of cases on the same docket as the instant Case that the Carrier does not have the right to deduct outside earnings when a claimant is returned to service with pay for time lost. It asserts that the principle was settled between the Parties in Award No. 5 of PLB 2591 and the calculations subsequently reduced to an written agreement. It points to numerous awards issued subsequent to that agreement which did not provide for the offset of outside earnings.

The Organization urges that the claim be sustained, that Claimant's dismissal be rescinded and that he be reinstated to employment and made whole for wages and benefits lost, without deduction for any outside earnings.

DISCUSSION AND ANALYSIS

Burdens of Proof

It was the burden of the Carrier to prove, by substantial evidence on the record as a whole, that Claimant is guilty of violating the Rules with which he was charged and that the penalty of dismissal was not arbitrary or excessive. The Carrier was also obligated to establish compliance with the procedural requirements of the governing Agreement when challenged.

The Organization raised the timeliness of the Carrier's investigation as an affirmative defense to the charges. It was the burden of the Organization to establish the Carrier's non-compliance with those requirements. It was then the Carrier's

burden to establish, based both on the merits of the case and its procedural handling of the case, that the penalty of dismissal which it imposed is appropriate and that an offset for outside earnings is appropriate.

The Charge Against Claimant

Claimant is charged with theft of time. The essential elements of the offense are that an employee did not work during time for which the employee claimed pay to which he or she was not entitled. Like any other type of theft, proof of the offense also includes the element of wrongful intent, which the Carrier must establish. That burden can be met by establishing circumstances which warrant an inference of such intent.

The usual consequence of employee theft is that the employer's ability to trust the employee, which is an essential element of the employment relationship, is compromised, and frequently destroyed. An employer is not obligated to maintain in its employ an employee who has stolen from it, has breached the employer's trust, and may steal again. Thus, dismissal is the presumptively appropriate penalty for proven theft, generally without regard to the employee's seniority or record.

Evidence Regarding Claimant's Violation

In the instant case, the evidence establishes that Claimant knowingly claimed pay for time he did not work. It may be that Claimant was simply following a long-established practice, in which Management had acquiesced and which had continued, even in the face of changes in tours (12 hours to eight) and workload (heavy to light) which undercut the original justification, such as it may have been, for the practice. The possibility exists that local managers either explicitly or tacitly allowed a loose process in which such a practice might arise and continue. The circumstances suggest that more was going on in connection with the San Bernardino Helper assignment than either Party might be willing to admit.

It is not necessary for the Board to pass on whether such a practice might override or mitigate the Carrier's pay rules, which would not appear to allow the practice in which Claimant engaged. In its brief, the Organization certainly paints a colorful - and not entirely implausible - picture of such a practice. Unfortunately, there is no evidence whatsoever in the record to support the Organization's statement of "facts"; and the set of unsupported assertions set forth in its brief cannot form a basis

upon which to decide the dispute. Examination of the motives and methodology of those involved is beyond the scope of the record and the Board's knowledge in this dispute.

Carrier's Failure to Meet Time Limits

This case turns on time limits. It was, as indicated, the burden of the Carrier to comply with the negotiated time limits for the processing of discipline. One of those time limits is the requirement that the Carrier convene the investigation within 30 days of when it first had "knowledge of the occurrence of the incident to be investigated." It is not disputed that Claimant left earlier on November 26th than the scheduled end of his tour and that his absence, which began at least as early as 1445, was observed by a Carrier Officer on that date. The Carrier official was also made aware that Claimant's crew had not turned a wheel that day. The evidence persuades the Board that Carrier Officer became aware of Claimant's tie-up and, shortly thereafter, became aware that Claimant had put in a time claim which included departure and arrival times which could not have been correct (because the engine did not leave the terminal), a tie up time after he had left the property and a request for pay for on-half hour of overtime for the day. The Board concludes that Claimant's time sheets were naturally false in each of these respects.

The Board also finds that Mr. McReynolds knew as of the 27th of November that Claimant had not worked until the end of his tour, had not worked overtime on the 26th and was not entitled to the pay he was claiming. Indeed, everything the Carrier needed to charge Claimant with submission of a false time claim - which it characterizes as theft of time - a Management official with authority to initiate a request for an investigation possessed as of late November. The Board concludes that the Carrier had "knowledge of the occurrence of the incident to be investigated" at that time.

Consequences of Carrier's Failure to Meet Time Limits

Under the provisions of Article 13 of the governing Agreement, the Carrier had an obligation to hold an investigation promptly, but in any event not later than 30 days from the date it possessed that knowledge. The Carrier has characterized the Terminal Superintendent's actions as mere "information" to be submitted to Corporate Audit, which had to "analyze" the information deliberately and to avoid acting on potentially inaccurate information. After an extended period of time, far exceeding the 30 day requirement of Article 13, Corporate Audit advised the

Division General Manager that "the evidence appeared accurate and that the Claimant claimed, and was compensated for, unearned income". It is clear from the record that each element of that statement, including the inconsistency of the action with Carrier pay rules, was known to the Terminal Superintendent by a time not later than November 27th, except for whether Claimant was actually paid based on his claim. However, as the Carrier itself points out, Claimant was not charged with receiving payment, but with improperly claiming it.

Corporate Audit added nothing from its extended delay to the knowledge the Carrier officer on the scene possessed; and the Board concludes that the Carrier's knowledge, for purposes of triggering the Article 13 time period, was not delayed as a result of the referral to Corporate. Put another way, the Carrier's determination to take disciplinary authority away from local level line managers does not excuse it from compliance with the negotiated time limits. The Board holds that the delay from late November to late March rendered the investigation untimely under the Rule.

The Carrier's inclusion in the notice of investigation that it first had knowledge of the incident in February of 2006 is not only facially incorrect and self-serving, but adds an element of advocacy in what is supposed to be a fair and neutral investigatory process for which there is no place. The Carrier's statement is entitled to no weight and its inclusion implies that the Carrier knew well the defects in its case early on and was attempting to preempt a challenge.

The Carrier argues that, even if a procedural violation were found, it did not prejudice the Organization and should not result in voiding the discipline. At most, it contends, Claimant might be paid for the period of the delay. The Board is not persuaded. Whatever might be the practical consequence of the Carrier's delay on Claimant's ability to mount a defense to the charges, the Parties have in their Agreement specifically prescribed the consequences of failure to comply with the contractual time limits. The governing Agreement provides, as indicated, that when the Carrier does not meet the time deadline, "[t]he matter shall be considered closed, and settled accordingly". The Board concludes that the term "closed" must mean that the discipline imposed cannot stand and that the phrase "settled accordingly" means that the Claimant must be placed in a position where he would have been, but for the imposition of the discipline now overturned for violation of the time limits, as the Organization's claim urges. The Parties are each entitled to the benefit of their bargain, including the quoted consequences of failure to comply with their negotiated time limits. The Award so reflects.

The Issue of Offsets from Back Pay for Outside Earnings

The Parties have joined in the present docket of cases heard in June of 2007 the issue whether the Carrier is entitled to offset and reduce back pay which might be awarded to take into account an employee's outside earnings during the time the employee is out of service. At least one case from a prior docket of cases before this Board (PLB 6721, Case No. 18, Claim of R. D. Doyno) provided for such an offset, although neither Party had briefed the issue in that case.

Review of the Carrier's Arguments

The Carrier argues, in essence, that the purpose of contract remedies is to place reinstated employees where they would have been, but for the Board's finding of a violation. It points out that under principles of contract law, persons injured by breaches of a contract are obligated to mitigate their damages. In this instance, the Carrier urges that Claimant's obligation to mitigate included seeking another job and asserts that it is entitled to offset the amounts Claimant earned or could have earned from employment during the period he was off work. Finally, the Carrier argues that a number of arbitrators in the industry have recognized the appropriateness of such offsets and have explicitly included in their awards carriers' rights to make such offsets.

BNSF cites in support of its position Award 11 from PLB 6204 (BNSF and BMWE, Suntrup, Neutral) ("If the Claimant was receiving some compensation . . .or compensation from any other source because of his injuries . . . such shall be deducted in implementing this Award, from any compensation which the Claimant may have lost because of the suspension he received."); Award No. 207 of PLB 4901 (BNSF Coast Lines and UTU, Wallin, Neutral) (Any back pay [resulting from the unwarranted discipline] may be offset by the amount of earnings from other employment that Claimant could not have earned if he had remained in Carrier's service."); and the interpretation of Award No. 1 of PLB 6717 (KCS and BRS, Conway, Neutral) detailed a formula for calculating back pay, part of which allowed the carrier therein to deduct from back pay compensation received from most types of other employment, subject to certain exemptions.

Review of the Organization's Arguments

The Organization argues that the Carrier is seeking to change a well-established practice on the property of *not* offsetting outside earnings from back pay awards and, therefore, that it is

the burden of the Carrier to prove its case for change. UTU asserts that the issue of excluding any offset for outside earnings was resolved in its favor by Award 5 of PLB 2591 (AT&SF - Coast Lines and UTU, Lieberman, Neutral) and interpretations thereof, which resulted in an agreement. In the Award, the Lieberman Board found a practice to exist on the property of not offsetting outside earnings and instructed the Parties to "make the determination [as to the quantum of pay to make the crew whole] in accordance with the usual practices on this property". The Lieberman Board retained jurisdiction; the Parties were unable to resolve implementation disputes, and that Board issued two Interpretations.

The first interpretation made by the Lieberman Board considered and rejected a deduction from back pay and benefits based on "work habits" and prior layoffs. In the second Interpretation, applicable here, the Lieberman Board considered and concluded, with respect to any offset for outside earnings, that "the only deductions for pay from time lost which are intended would be those deductions required by statute and. . . for such periods of time in which the Claimants were unavailable for duty . . . due to either illness or disability. No other mitigating circumstances are intended." The Lieberman Board indicated that the practice on the property and the determinations of prior Boards supported the proposition and were controlling. The Board directed that any change to that practice should be made in negotiations, not through the Section 3 process.

The Organization asserts, as indicated, that the issues presented in the Award of the Lieberman Board were reduced to a 1984 agreement, which established formulas for the calculation of back pay but was silent on the subject of offsets for outside earnings. It also points out that the Parties have negotiated a number of agreements subsequent to issuance of the Lieberman Board Award, without making any change in the language or in the practice on the property. UTU points to a series of awards on the property and between the Parties which do not provide for offsets; and it maintains that the practice on this property - still binding on the Parties - is that the awards not to make such offsets.

Language and Practice on the Property

The evidence is that the language used on the property appears to include returning employees to service "with pay for time lost" or "making employees whole for wages and benefits lost". To the extent that the focus of such language is on the payments which should have been made by the Carrier - without regard to any employee obligation - the language does not, on its face, *require*

offset for the employee's interim earnings from other employers. That language leaves the treatment of such outside earnings open to interpretation based on the practice of the Parties.

The record documents a consistent practice between the Parties to the governing Agreement that when employees are returned to work with pay to compensate them for time they were denied, and *not* to offset interim earnings from pay for time lost. The Lieberman Board specifically recognized that practice and based its Award thereon. The Parties then entered into an agreement which did not modify the terms of that Award. The Parties have not modified the agreement to provide for the offset of interim earnings, despite several opportunities to do so. There is no assertion that the agreement has been overturned or the practice changed, except in recent cases before the instant Board. The assertion of that practice and the awards cited in support thereof stands unrebutted. The Carrier submitted only the Suntrup and Wallen Awards on the property to contravene the practice. The Board is not persuaded that those Awards, or other Awards of this Board and Neutral issued prior to the Parties having joined the issue, are sufficient to carry the Carrier's burden on the issue.

The contrary Awards cited by the Carrier are less persuasive than might first appear. The Award of the Suntrup Board involved an employee off work as a result of injury, and the right to offset back pay was limited to "some compensation . . . in the form of sick leave, other compensation available under the labor Agreement, or unemployment comp, or compensation from any other source *because of his injuries* during the [relevant] period . . . such shall be deducted." Emphasis added. Thus, the offset provision in that Award does not reach income from outside employment, but only compensation received "because of [claimant's] injuries".

The Wallin Board Award involved an employee who was dismissed, rejected an offer reinstatement on a leniency basis and accepted reinstatement with rights to pursue his claim after a 385 day unpaid suspension. It allows the Carrier to offset from back pay due the amount of earnings from other employment that Claimant could not have earned if he had remained continuously in Carrier's service. Jurisdiction was retained to resolve any disputes; there is no record whether there were any such disputes or how they were resolved.

Thus, the Award of the Wallin Board did not provide for offset for earnings the claimant might have received while in the Carrier's employ (e.g, earnings from part-time self employment). Neither did the Award establish any obligation on the part of the

employee to mitigate the losses or any right on the part of the Carrier to reduce back pay in contemplation of failure to mitigate. Moreover, it is not apparent that either Party presented evidence or argument with respect to the practice on the property with respect to offsetting outside earnings or that they cited the Lieberman Award and its interpretations. Indeed, it is not apparent that the Carrier requested an offset, although an employee absent for 385 days might reasonably be expected to have obtained other employment. For all the record indicates, the Wallin Board might have imposed the offset on its own initiative in light of the circumstances of the case.

Finally, the Conway Board Award involved another property and cannot be used to contravene the prior Award of the Lieberman Board and the property or the practice of the Parties.

Policy Considerations

Policy considerations support the positions of both Parties. If the cost of wrongful discipline were measured in the loss of employment and income and the possible real world consequences of unemployment, such as interest charges on credit card bills, damage to credit, losses of residence, domestic and family disruptions and the cost of looking for and obtaining different work, it would be hard to put a dollar figure on the adverse impact on many employees of such wrongful or excessive action; and it would be difficult ever to make an employee truly "whole" for the damage suffered or to begrudge whatever earnings from alternative employment an employee might receive. Indeed, the difficulties faced by employees in the crafts represented by the Organization in obtaining outside employment may be more daunting, as their skills may only be fully utilized by a small number of employers, perhaps far away. And since so much of employment conditions in the railroad industry is a function of seniority, an employee obtaining new employment in the industry is almost guaranteed to be worse off in assignments, benefits and pay than working in his or her rightful job. Such considerations may find their way into contract language which does not focus merely on "make-whole" and/or into the practice of the Parties and the rulings of previous Boards.

On the other hand, the Carrier is responsible under general provision of contract law, only for payment of monies and for placing employees where they would have been in pay and benefits, but for the wrongful action. Employees would not have been able to work multiple full-time jobs and would not have been available to work full-time for other employers if the Carrier had continued their employment. That converts any extra monies earned by an

employee during his or her absence into a windfall for the employee, a result not contemplated in ordinary contract remedies.

The Board concludes that the Parties have resolved those competing policy considerations on the basis of their practice and apparent acceptance by the Parties of the Award of the Lieberman Board.

Conclusion

The Board is persuaded that the practice and prior awards on the property do not allow for the offset of interim earnings and declines to allow the Carrier to deduct such earnings from back pay resulting from disallowed or reduced discipline. Change in that practice should come through the negotiations process, as the Lieberman Board suggested to the Parties 27 years ago. The Award so reflects.

A W A R D

The Claim is sustained. The Carrier failed to comply with the negotiated time limits by failing to conduct the investigation within 30 days from the date the Carrier had "knowledge of the occurrence of the incident to be investigated". The Agreement requires in such situation that the matter be considered "closed" and "settled accordingly". Claimant's dismissal shall be rescinded and he shall be reinstated to service, with seniority unimpaired and made whole for wages and benefits lost in consequence of his dismissal. The Carrier may not deduct Claimant's outside earnings, if any, from the back pay due him. The Carrier shall implement the Award within 30 days of its issuance.

Issued this 14 day of Jan, 2008.

M. David Vaughn, Neutral Member

Gene L. Shire, Carrier Member

Dan L. Young, Employee Member