The Major-Minor Distinction: Where Things Stand

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A Brief Review

- Major Disputes: Disagreements about changes to existing CBAs
- Minor Disputes: Disagreements about whether existing CBAs have been violated
- Common Scenario: RR takes action that union believes so clearly violates existing CBAs that it amounts to a repudiation of those CBAs (a major dispute)

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The *Conrail* Standard

- "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is ***arguably justified*** by the terms of the parties' collective-bargaining agreement"
- "Where, in contrast, the employer's claims are ***frivolous*** or ***obviously insubstantial***, the dispute is major"

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How Low Is The Conrail Bar?

- Supreme Court states RR's burden is "relatively light."
- Lower courts: When in doubt, courts presume a dispute is minor
- Major dispute = strike
- Minor dispute = orderly resolution in arbitration before expert industry arbitrators

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My Analysis of the Major-Minor RLA Standard

- The RLA does not protect carriers
- The RLA does not protect unions
- The RLA protects commerce!!!

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Application of the Conrail Test

The test is so slanted that, in fact, not a single court of appeals decision over the past decade has found a major dispute to exist. E.g., International Bhd. of Teamsters v. United Parcel Serv. Co., 447 F.3d 491 (6th Cir. 2006); Brotherhood of Maint. of Way Employees v. CSX Transp., Inc., 2005 WL 1529586 (11th Cir. June 30, 2005); Airline Professionals Ass'n v. ABX Air, Inc., 400 F.3d 411 (6th Cir. 2005); Air Line Pilots Ass'n v. Guilford Transp. Indus., Inc., 399 F.3d 89 (1st Cir. 2005); CSX Transp., Inc. v. United Transp. Union, 395 F.3d 365 (6th Cir. 2005); Burlington N.&S.F. Ry. Co. v. Brotherhood of Locomotive Eng'rs, 367 F.3d 675 (7th Cir. 2004);

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Application of the Conrail Test

International Ass'n of M.&A.W. v. US Airways, Inc., 358 F.3d 255 (3rd Cir. 2004); CSX Transp., Inc. v. Brotherhood of Maint. of Way Employees, 327 F.3d 1309 (11th Cir. 2003); Association of Flight Attendants v. Horizon Air Indus., Inc., 280 F.3d 901 (9th Cir. 2002); Airline Professionals Ass'n v. ABX Air, Inc., 274 F.3d 1023 (6th Cir. 2001); Airline Professionals Ass'n v. ABX Air, Inc., 2001 WL 1609934 (6th Cir. Dec 13, 2001); Brotherhood of Maint. of Way Employes v. Burlington N.&S.F. R.R., 270 F.3d 637 (8th Cir. 2001); ABX Air, Inc. v. Airline Professionals Ass'n, 266 F.3d 392 (6th Cir. 2001); Brotherhood of Maint. of Way Employes v. Union Pac. R.R. Co., 2000 WL 1867967 (10th Cir. Dec. 21, 2000).

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Wheeling & Lake Erie v. BLET (6th Cir. 2015)

- Train Service CBA provides that:

  (i) The crew consist of all assignments (regular or extra) shall consist of not less than one (1) conductor and one (1) brakeman, except as otherwise provided for under paragraph (ii) hereof. (Exceptions: No conductor or brakeman shall be called for light engines or engine changers.)

  (ii) The Carrier may operate conductor only assignments at its own discretion.

- RR repeatedly operated trains without union conductors, claiming that it lacked available conductors
- Major dispute found: Agreement unambiguously required a conductor on all trains

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No Sea Change

- *Ass'n of Commuter R. Employees v. Metro-North* (S.D.N.Y. 2022)
  - Union objects to adoption of Kronos timekeeping system
  - MOU reached: RR "plans to implement a mobile timekeeping mechanism" for clocking out. Although full Kronos system is currently in development, Union "commits that [it] and its members will fully participate and comply with the program when it is rolled out."
  - RR adopts Kronos before ever implementing mobile timekeeping
  - Union sues, claiming RR abrogated agreement by adopting Kronos before the mobile timekeeping system

No Sea Change

- Court finds dispute to be minor. Language stating that union commits to compliance with Kronos makes RR's position non-frivolous
- Lesson: Still need incredibly clear CBA language to create major dispute

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Anti-Union Animus & Minor Disputes

- Sections 2, Third/Fourth prohibit RRs from interfering in employee choice of representatives
- Example: Carrier discharges union organizer due to anti-union animus
- Employees/Unions can sue in federal court to enforce
- *TWA v. IFFA* (Supreme Court) – Section 2, Fourth, primarily addresses employer conduct before a union is certified
- After certification, courts have jurisdiction only in exceptional circumstances where carrier's action is for the purpose of weakening or destroying the union (*i.e.*, almost never)

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BLET v. Union Pacific (5th Cir. 2022)

- Before local union meeting, fight breaks out between a local union leader and member
- RR brings disciplinary charges against the union leader involved in the fight & 4 other local officials
- Union sues, alleging anti-union animus

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BLET v. Union Pacific (5th Cir. 2022)

- Isn't that a minor dispute? Whether discipline is appropriate always gets arbitrated
- Court holds animus exception applicable – exceptional circumstances exist
  - All active local union leaders suspended, four of whom were not involved in the fight at all
  - Employee who fought union leader not charged
  - No requirement that RR was undermining BLET as a whole; enough that it was undermining one local unit

Sea Change?

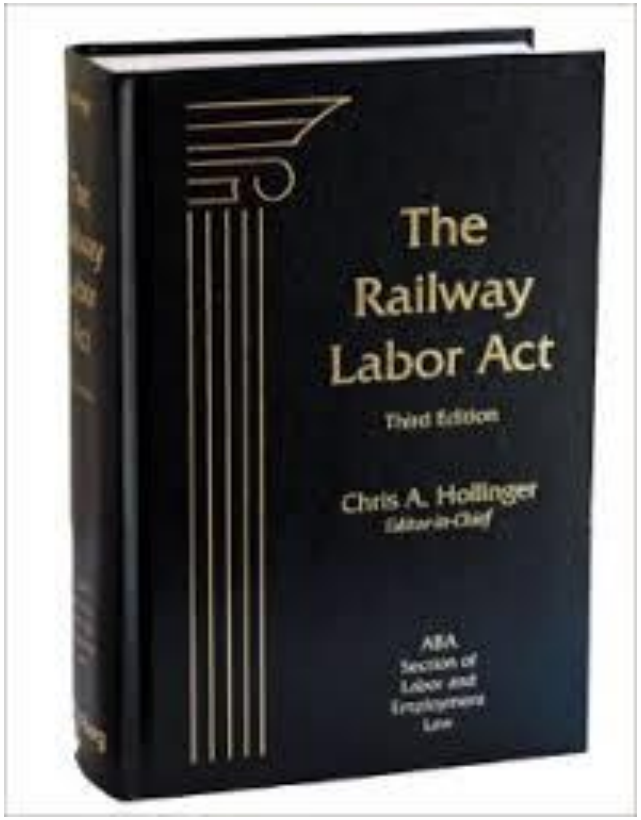
- *SWAPA v. Southwest Airlines* (N.D. Tex. 2022)
  - 2014: Pilot Roebling is selected by airline to act as "check airman"
  - April 2019: Airline rescinds policy prohibiting check airmen from serving as union officers
  - June 2019 – December 2020: Roebling serves as co-chair of a SWAPA committee
  - February 2021: Roebling and another check airman involved in inappropriate text exchange
  - March 2021: Roebling removed from check airman job

Sea Change?

- *SWAPA v. Southwest Airlines* (N.D. Tex. 2022)
  - Union sues claiming anti-union animus
  - Case dismissed: question of whether Southwest needed or had just cause to remove Roebling is a minor dispute that has to be arbitrated
  - No exceptional circumstances
    - Roebling remained check airman throughout tenure on union committee
    - Old policy against check airmen serving as union officials had been rescinded
    - No overall threat to union

ARBITRATION ENFORCEMENT

§153. National Railroad Adjustment Board



Petition to Enforce

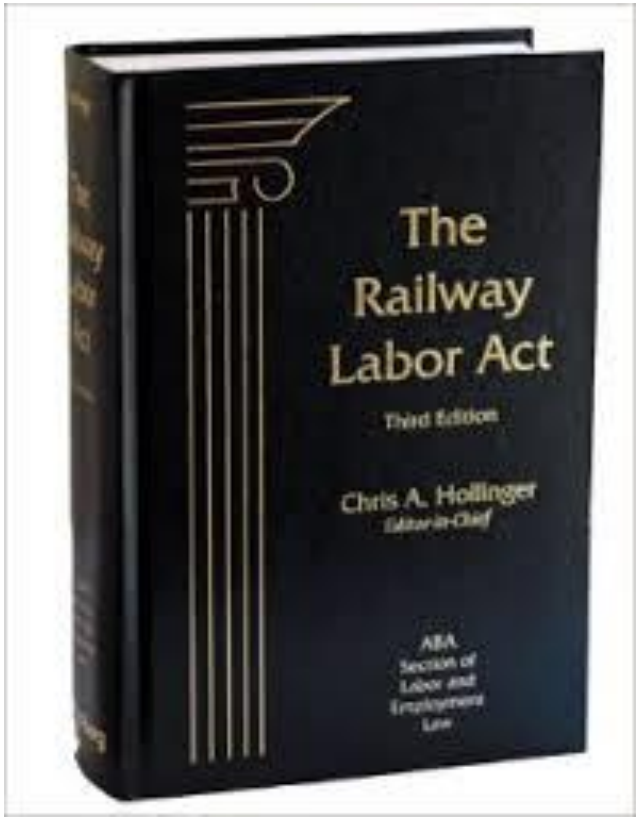
45 U.S.C. Section 153(p)

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. . . ."

PETITION FOR REVIEW

45 U.S.C. Section 153(q)

If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. . . .



Diamond v. Terminal Railway Alabama State Docks, 421 F.2d 228 (1970)

"[T]he scope of judicial review of Adjustment Board decisions is "among the narrowest known to the law."

BROAD AUTHORITY - REMEDY

[t]his is especially true when formulating remedies") citing United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1991); see also United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987)("where it is contemplated that the arbitrator will determine remedies… courts have no authority to disagree with his honest judgment in that respect"); THI of New Mexico at Vida Encantada, LLC v. Lovato, 864 F.3d 1080, 1087 (10th Cir. 2017)("courts favor the arbitrator's broad discretion in fashioning remedies").

"As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award—whether the award is made under the Railway Labor Act, the Taft-Hartley Act, or the United States Arbitration Act—is not whether the arbitrator or arbitrators erred in interpreting the contract**;** it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract."

Hill v. Norfolk Western Ry. Co.,
814 F.2d 1192 (7th Cir. 1987)

STANDARD TO OVERTURN ARBITRATION AWARD

Judicial review of Adjustment Board orders is limited to three specific grounds:

(1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act;

(2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and

(3) fraud or corruption. 45 U.S.C. § 153 First (q).

ONLY upon one or more of these bases may a court set aside an order of the Adjustment Board.

Union Pacific Ry. Co. v. Sheehan, 439 U.S. 89, 91 (1978)
Major League Baseball Players Ass'n v. Garvey, 121 S.Ct. 1724 (2004)

ARBITRATOR FAILED TO COMPLY WITH RLA REQUIREMENTS

BNSF Railway Company v. Brotherhood of Locomotive Engineers & Trainmen, No. 4:09-cv-00602-A (July 14, 2010), *aff'd*, 436 Fed. Appx. 373 (5th Cir. 2011)

Vacating and remanding award reinstating engineer as conductor where union representing conductors was not given notice and opportunity to participate in violation of RLA Sec. 3 First (j).

UTU and William C. Miller v. IL Central, 2010 WL 996463 (N.D.Ill.)

(PLB No. 6985, Award No. 31)

Claimant was convicted and sent to prison for 2 years, and pursuant to a rule, notified the railroad by sending a fax. Although railroad claims it never received the fax, claimant produced information that it was sent and received. Neutral issued draft on July 27 reinstating Claimant with deduction for outside earnings. Draft circulated to the partisan members who each disagreed with different portions of the draft and requested separate executive sessions.

On August 10, the railroad sends a letter to Claimant to return to work per the Award. Claimant was still in prison at the time. He was released on November 6. On November 30, union board member signed the draft. On December 13, railroad member signed the Award. December 27, railroad sent Claimant a letter that he was terminated since he did not report within 15 days of the August 10 letter.

Union filed petition to enforce the award seeking reinstatement. Railroad, *inter alia*, asserts when Neutral signed Award on July 27, that imposed obligations on them and in response sent the August 10 letter. Union argued no binding award until second signature, so railroad could not act or force Claimant back until Award was final. Court agreed noting that since the Act itself requires two signatures, no final and binding award existed until November 30 when the union member signed. The July draft was indeed only a draft.

ARBITRATOR FAILED TO CONFORM OR CONFINE AN ORDER TO MATTERS WITHIN THE SCOPE OF ARBITRATOR'S JURISDICTION

Union Pacific R.R. v. Intl. Assn. of SMART, 423 F.Supp.3d 740 (D.Neb. 2019), *aff'd* 988 F.3d 1014 (8th Cir. 2021)

Union Pacific claims the Board's decision should be set aside under the second provision because the Board failed to confine itself to matters within its jurisdiction by "crafting a new remedy despite finding just cause for Lebsack's and by creating new prerequisites to discipline not found in the cba."

An arbitration board exceeds its jurisdiction if ''the award is 'without foundation in reason or fact.' '' *Sullivan v. Endeavor Air., Inc.,* 856 F.3d 533 (8th Cir. 2017) (quoting Int'l Ass'n of Machinists, 858 F.2d at 430). ''To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement." Id. (quoting *Bhd. of Ry., Airline & S.S. Clerks v. Kan. City Terminal Ry. Co*., 587 F.2d 903, 906 (8th Cir. 1978)).

FRAUD OR CORRUPTION BY A MEMBER OF THE PANEL MAKING THE ORDER

Pacific & Arctic Ry. & Nav. Co., 952 F.2d 1144, 1148 (9th Cir. 1991)

BACKPAY ISSUES

Carrier's requested offsets:

- Interim Earnings
- Insurance benefits, i.e. (D/IPP)
- Failure to mitigate damages (by not finding alternate employment)

Bhd. of Ry. Airline & Steamship Clerks v. St. Louis Southwestern Ry., 676 F.2d 132, 136-37 (5th Cir. 1982)

"the Railroad concedes that a Board award is generally conclusive on all issues, including damages. 45 U.S.C. § 153 First(q); *Denver & Rio Grande Western Railroad v. Blackett*, 538 F.2d 291, 293-94 (10th Cir. 1976). Moreover, we have established that a district court may compute the actual dollars and cents to which an employee is entitled under the Board's award. *Sweeney v. Florida East Coast Railway*, 389 F.2d 113, 115 (5th Cir. 1968)."

BACKPAY NRAB Award 26788

The Carrier cites to Awards where backpay was offset and the Organization cites to Awards where the offset was denied. The Organization also contrasts the language of Rule 34(4) of the instant Agreement, that a reinstated employee “shall be reinstated with pay for all time lost with seniority and other rights unimpaired” with another Agreement that specifically addresses the deduction of outside earnings. These opposing Rules suggest that the backpay offset – a position favored by some Carriers on some properties, and pay for COBRA-style healthcare, deferred compensation and other payments – a position favored by some Organizations on some properties, are items for bargaining. None of the Awards cited in the parties’ Submissions address outside earnings offset under the instant Agreement. There is no cited applicable Agreement Rule, Award, or practice in support of the Carrier’s argument that any outside earnings offset should be applied.

INTERIM EARNINGS PLB 5125, Award 17

Claim of Trainmen _____for the reinstatement to the service of the Chicago and Northwestern Transportation Company with vacation and seniority rights unimpaired in addition to the payment of any and all health and welfare benefits until reinstated and that he be compensated for any and all lost time including attending investigation.

"Claim Sustained. Claimant is to be reinstated to service and compensated for all time lost less interim earnings."

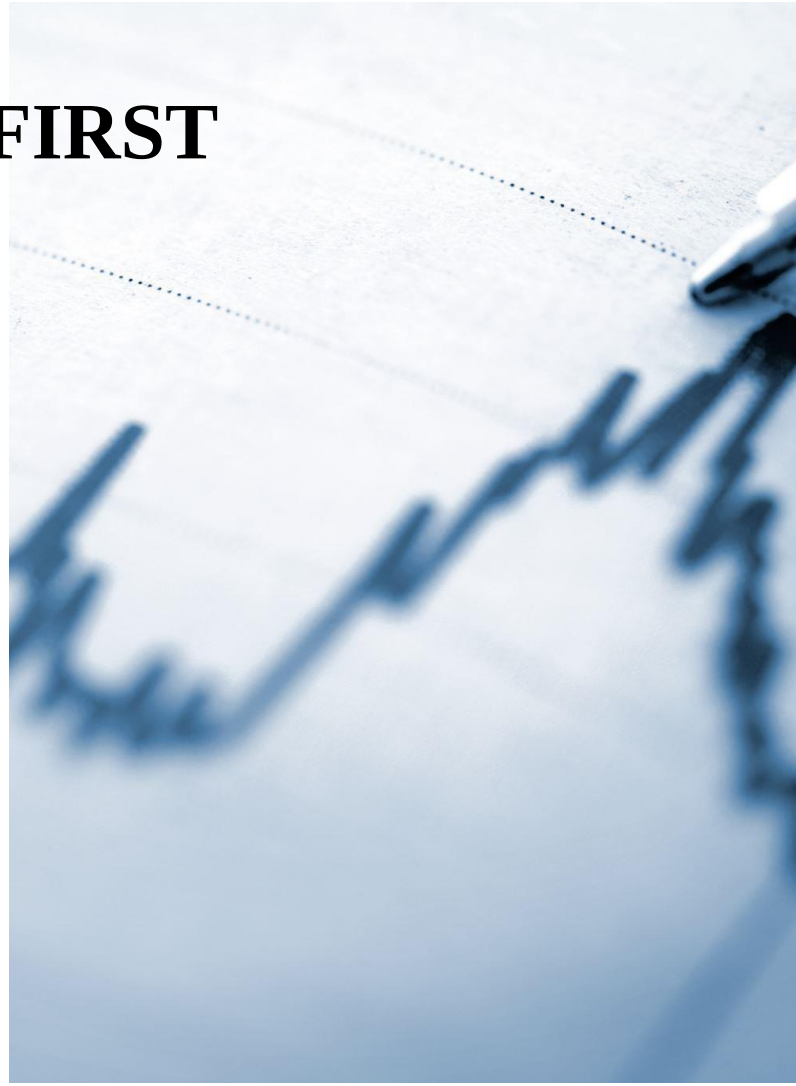
INSURANCE PREMIUMS – NRAB Award 30349

Statement of Claim: for reinstatement to service with all rights unimpaired, removal of all notations of this discipline from his personal record, and restoration of his disciplinary record to the status at which it stood prior to the instant case, with compensation for any lost time and benefits as a result of this matter, including but not limited to time lost if held out of service prior to the investigation, time lost while attending the investigation, and all wage equivalents to which entitled (including vacation benefits, all insurance benefits and monetary loss for such coverage) while improperly disciplined.

Claim Sustained

FAILURE TO MITIGATE FIRST DIVISION AWARD 27276

“Whether or not Claimant was obligated to mitigate his damages, we find that he did make a reasonable effort to obtain income during the period of his wrongful dismissal. When there is a duty to mitigate damages, arbitrators have not required that the employee find work yielding income equivalent to the job from which he was fired. The employee is not even required to be successful at finding work. All that is required is that the employee not sit idly by waiting for his back pay award.”



D/IPP PLB 7239 Award 135

STATEMENT OF CLAIM: Can the Carrier reduce back pay owed to Claimant by deducting payments received from Income Protection Plans (private job insurance).

The Awards presented are on point and well reasoned for application to the instant dispute. The consistent application of this dispute, as presented, is that payments received from voluntary participation in the Relief and Compensation Fund cannot be used to offset an Award involving pay for time lost. Claimant in Award 127 of this Board was returned to work on April 20, 2021. The Board concludes that Carrier is not entitled to offset compensation received from Claimant's voluntary participation in the Income Protection Plan while he was out of service.

IMPOSSIBILITY OF PERFORMANCE

MBTA barred employee from its property for two incidents he had already been disciplined, then Keolis charged and terminated employee for complying with the carrier's directive. Although the Arbitrator found the Company did not have just cause to dismiss Claimant, the Arbitrator rescinded Claimant's dismissal but could only restore his employment retroactive to the date of his dismissal.

ATDA and Keolis, PLB 7769 Award No. 4

Remedy Disputes: For Courts or Arbitrators?

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Typical Fact Patterns

- Two most common
  - Employee is ordered reinstated with “back pay,” “lost time,” or some similar phrase
  - “Claim sustained”
- Dispute then arises about what’s intended
  - Offset for outside earnings?
  - Lost overtime (usually non-operating crafts)?
  - Back pay for period where conductor/engineer certificate is revoked?

What's the Statute Say

- Section 3, First (i) makes NRAB awards "final and binding"
- Section 3, Second says any two members of a PLB can make an award, which shall be "final and binding"
- But Section 3, First (m) says that "In case a dispute arises involving an interpretation of the award, the division of the board upon request of either party shall interpret the award in the light of the dispute."

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Typical Fact Pattern

- Union sues to enforce award
- RR argues that arbitrator should issue interpretation of award
- Award provides little or no specificity about the remedy

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Case Law Says the Major-Minor Test Applies

- *Brotherhood of Maint. of Way Employes v. Burlington N.R.R. Co.*, 24 F.3d 937, 939 (7th Cir. 1994):
  - "disagreements about the meaning of an award amount to disagreements about the meaning of the underlying collective bargaining agreement."
  - "Such award-interpretation disagreements are minor disputes, and the federal courts have no jurisdiction to resolve them."
  - Thus, the issue is whether the party seeking interpretation has a non-frivolous argument to support its interpretation of the award.

Case Law Favoring Return to Arbitrator

- *Order of R.R. Conductors & Brakemen v. Erie Lackawanna R.R. Co.* (N.D. Ohio 1969) ("payment for time lost" remanded to the arbitrator to determine if outside earnings offset was proper)
- *BMWED v. BNSF Ry. Co.* (N.D. Ill. June 11, 2012) (claimant to be "made whole for any and all losses incurred"; award arguably allows outside earnings offset)
- *BRS v. Chicago, M., St. P.&P.R. Co.* (N.D. Ill. 1968) (award stating only "claim sustained" required interpretation to determine whether outside earnings offset was intended)

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The Other Side

- *BLET v. BNSF* (10th Cir. 2013) ("claim sustained" unambiguously forbids outside earnings offset where claim itself requested back pay "without deduction for outside earnings.")
- *United Transp. Union v. Union R. Co.* (W.D. Pa. 2014) (award of "pay for time lost in accordance with the parties' agreement" is unambiguous; adopting rule from NLRA cases that outside earnings offset would have been provided for if intended)

My Responses

- If the award says, "Claim sustained," isn't the language of the claim determinative?
  - Does anyone really read all of that?
  - Doesn't that encourage gamesmanship?
- If no offset is mentioned, why would one be intended?
  - Can't you ask the same question in reverse? Isn't an offset standard?
  - Why not ask the arbitrator? What are you afraid of?

A Practical Problem

- These issues are not addressed in any detail in arbitration – RRs argue the discharge should be upheld; the union argues it should be overturned
- In many cases, neither the RR nor the organization know what's happened to the employee
  - Example: Disabled for part of back pay period
  - Example: Enlisted in armed forces during back pay period

Arbitrators Can Help

- Arbitrators should inquire about remedy issues during the hearing unless RR is sure to win
- Awards should clearly express desired remedy
  - Address issues such as outside earnings offset and lost overtime
  - Avoid ambiguous terms such as “pay for lost time” or “full backpay”
  - Never say “Claim sustained”