

BEFORE THE SPECIAL BOARD OF ADJUSTMENT

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In the Matter of the Minor Dispute between

**BNSF RAILWAY COMPANY, CSX
TRANSPORTATION, INC., NORFOLK SOUTHERN
RAILWAY COMPANY, and UNION PACIFIC
RAILROAD COMPANY,**
Carriers,

JS Case No. 3750

**OPINION
AND AWARD
ON REMEDY**

and

**AMERICAN TRAIN DISPATCHERS ASSOCIATION,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND TRAINMEN, BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES,
BROTHERHOOD OF RAILROAD SIGNALMEN,
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, NATIONAL
CONFERENCE OF FIREMEN AND OILERS, SHEET
METAL WORKERS INTERNATIONAL
ASSOCIATION, TRANSPORT WORKERS UNION,
TRANSPORTATION COMMUNICATIONS
INTERNATIONAL UNION, UNITED SUPERVISORS
COUNCIL OF AMERICA, and UNITED
TRANSPORTATION UNION,**
Railway Labor Organizations,

Re: Substitution of Paid Contractual Leave for Unpaid
Family and Medical Leave Act Leave.

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Before the Special Board of Adjustment:

**JOHN E. SANDS, Chairman and Member
WILLIAM H. HOLLEY, JR., Member
JEROME H. ROSS, Member**

OPINION

On June 4, 2008, the parties entered a Supplement to Arbitration Agreement (“Supplemental Agreement”) that provided, in relevant part,

1. In the event the Special Board of Adjustment decides that all or part of the carriers’ policies regarding substitution of paid vacation and/or paid personal leave for FMLA leave violate the requirements of the national vacation and/or national personal leave agreements, then upon the effective date of the Board’s award,

- (a) the carriers will immediately discontinue the invalidated provisions of such policies, and
- (b) the arbitration panel will consider the following question: “What is the appropriate remedy for employees who were required to use paid leave for FMLA leave in violation of the national vacation and/or national personal leave agreements?”

[Joint Appendix (“JA”), pp. 5-6.]

On December 2, 2008, we issued our Opinion and Award holding,

The carriers’ policies requiring employees to substitute paid vacation and/or paid personal leave for unpaid FMLA leave do violate the requirements of the national vacation and/or national personal leave agreements.

Having so decided, we now turn to the remedial issue submitted to us by subparagraph (b) of the parties’ Supplemental Agreement.

In accordance with that authority, we received the parties’ opening and reply submissions regarding remedy. We conducted a hearing in Washington,

D.C. on April 21, 2009 at which counsel had full opportunity to make additional arguments and to respond to each other's points. We met in person both before and following the hearing on April 21st, and we met by telephone conference calls as well. Each of us prepared an initial draft of separate portions of this Opinion, and we all contributed to and endorse this final document. Neither party has raised any objection to the fairness of this proceeding.

The parties raise the following arguments in support of their respective positions.

UNIONS' ARGUMENTS

The unions' position is that each employee who was forced to use paid leave for FMLA leave should receive a day's pay for each day the vacation or personal leave agreement was violated. Affected employees were denied their contractual right to determine when and how to use their vacation time and personal leave, and employees lost the ability to take time off for family and social events as they had planned. This lost time cannot be recreated. A day's pay remedy is consistent with arbitral precedent within the railroad industry and is the traditional means within the industry to compensate injuries that cannot easily be quantified, such as the lost opportunity which resulted here from the deprivation of employees' chosen leave times. This remedy will also ensure effective

enforcement of the agreements. The requested remedy is supported by the provisions of the 1941 and ATDA NVAs, under which employees have been awarded compensation at even higher rates in analogous circumstances.

The unions argue that the award of a day's pay for each day that a carrier has violated an agreement is a "traditional" remedy in the railroad industry. In *Brotherhood of Locomotive Engineers and The Long Island Railroad Company*, PLB No. 1656, (Robert M. O'Brien, 1984), the Board stated:

Despite the very able and erudite arguments advanced by the Carrier to support its claim that a day's pay in the instant case would be an excessive penalty, this Board simply may not disregard the fact that a basic day's pay is a traditional penalty both on this property, and in the railroad industry generally, for violations of collective bargaining agreements involving operating crafts. The reason why such a penalty has evolved is quite clear. It serves to assure compliance with the parties' duly negotiated collective bargaining agreement, and to discourage violations of those agreements.

As well, in *BLE and National Railroad Passenger Corporation*, Special Board of Adjustment No. 928, John J. Mikrut, Jr. (1995), the Board recognized the general application of the award of one day's pay per claim:

. . . [W]e also believe that a penalty rate of one day's pay per claim day is the appropriate remedy which is to be applied herein under these circumstances since it is generally recognized within the railroad industry that such violations of operating work rules are compensable at a penalty rate of a day's pay.

The unions argue that such awards are appropriate whether or not the agreement specifies such a remedy for a contractual breach. The Board recognized this principle in *BLE and Union Pacific Railroad Company*, PLB No. 2627, when (Jacob Seidenberg) wrote:

. . . While it is true that numerous awards have held that penalties are not to be awarded in the absence of a contract provision to that effect, there are also equally numerous awards that have held that when an employee has been required to work off his seniority district, especially in a non-emergency situation, that the appropriate compensation is a 100 mile pay.

In *UTU and CSX Transp., Inc.*, PLB 4837, Award No. 18, (Herbert Marx), the Board stated that a day's pay is generally accepted as an appropriate remedy, except when another remedy is specifically provided for in agreement. Further, in *UTU and L.A. Junction Ry. Co.*, NRAB, First Division, Award No. 21835, (Francis X. Quinn), the Board wrote that a day's pay remedy need not be specified in the agreement. Thus, as a general principle, the basic day's pay has become the default remedy for contract violations in the railroad industry.

Arbitrators have applied this default remedy to violations of the NVA's including violations analogous to those found in this case. In *UTU and Norfolk and Western Railway Company*, PLB No. 2851, Award No. 3 (Ritter, 1981), the carrier tried to force an employee to use his vacation days during a period of time when it improperly held him out of service pending a medical

examination after he fell from a rail car. He had originally been scheduled to take vacation during that period but requested that his vacation be changed to a later date. The carrier argued that it did not have to pay the employee damages because he was originally scheduled for vacation during this time. The Board found that he “ha[d] a contractual right to reschedule his vacation” and that “[t]he contention of the carrier to the effect that [he] could have taken his vacation with pay is of no avail.” The Board awarded him a day’s pay for each day he was wrongly forced to use vacation leave.

Likewise in *BMWE and Union Pac. R.R. Co.*, NRAB, Third Division, Award. No. 38029 (Wallin, 2006), the carrier improperly advanced an employee’s vacation time; and the employee was awarded basic day’s pay for each day of violation. In *BRAC and Chesapeake & Ohio Railway Co.*, NRAB, Third Division, Award No. 23450 (LaRocco, 1981), the employee was awarded the basic day’s pay as a remedy for breach of the vacation rules. In that case, a holiday fell within the vacation periods of the 44 claimants. The arbitrator held that the carrier improperly counted these holidays as a vacation days in violation of the contract. An additional day of pay was awarded for each holiday improperly designated as a vacation day.

The unions argue that arbitrators have also awarded a basic day's pay as a remedy in cases that involve violation of provisions of the 1941 NVA governing the use of relief employees. Under Section 10(b) of the agreement, the work of a vacationing employee can be divided among two or more employees, provided that not more than 25% of the workload of the vacationing employee is distributed in this manner. If redistribution of the vacationing employee's work would equal more than 25%, however, then the carrier cannot redistribute the work and must hire a relief worker. When a carrier has violated the 25% rule, arbitrators have awarded pay based on the basic day to employees forced to perform the improperly redistributed work. *BRS and Chic. & Northwestern Transp. Co.*, NRAB, Third Division, Award No. 31250 (Wallin, 1995); *BMW and Burlington N. R.R. Co.*, NRAB, Third Division, Award No. 18433 (Ritter, 1971); *BRAC and Gulf, Mobile & Ohio R.R. Co.*, NRAB, Third Division, Award No. 17843 (Devine, 1970).

The unions claim that the same principle applies under the Personal Leave Agreements. In *BRS and Long Island R.R.*, NRAB, Third Division, Award No. 22301 (Franden, 1979), the Board wrote that the agreement stated that “[s]ubject to the limitations set forth herein,” the carrier was to grant each employee personal leave “without loss of pay, not to exceed three (3) days per

calendar year.” When the carrier denied an employee’s request for personal leave on the grounds that it had a policy of “grant[ing] only one leave day on each work day tour per subdivision” and had already granted leave to another employee in that subdivision for that tour, the employee filed a claim for the difference between his hourly rate and the double-time and one-half rate for each day he was not permitted to take personal leave. The Board held that the carrier wrongly attempted to add a limitation not set forth in the rule. The Board explained:

The language of the rule itself along with the interpretation following creates a right in the employee. The carrier has infringed on that right by limiting the time when an employee can take his personal leave beyond those limitations set out in the rule. This is a violation of the agreement. The carrier deprived claimant of a right bargained for and granted under the agreement. He is entitled to be compensated for the loss of that right. The damages prayed for are not unreasonable. *BRS and Long Island RR*, p. 3.

Also, in *Brotherhood of Railway Carmen Division and Grand Trunk Western Railroad*, NRAB, Second Division, Award No. 13481 (Conway, 2000), an employee who was wrongly denied a day of paid personal leave was awarded a day’s pay as the remedy for the carrier’s contract violation. As a result, the unions here are requesting that this Board direct that every employee who has filed a valid claim for violation of his/her agreement rights because he/she was forced to use paid leave as FMLA leave be awarded a day’s pay for each day his/her contractual

rights were violated. This request is supported by the cases cited and is a traditional remedy for rail industry contract violations of this nature.

The unions contend that a day's pay is the appropriate remedy for damages that are not readily measurable. In *UTU and Chic. & N.W. Transp. Co.*, PLB 3985, Award No. 99 (Quinn, 1987), the Board ruled:

The payment of a day's pay is proper for the violation of the rule not as a penalty, but compensatory damages which will deter the Carrier from complete disregard to its obligation.

Arbitrators in the railroad industry have consistently applied the day's pay as a compensatory remedy where damages resulting from a contract violation were not susceptible to ready measurement. For example, the day's pay remedy has been applied in situations, such as vacation scheduling, failure to provide sanitary facilities, *UTC and Soo Line, R.R. Co.*, NRAB, First Division, Award No. 24770 (Meyers, 1997), violation of seniority rights, *BLE and Union Pac. R.R. Co.*, PLB 2627, Award No. 16 (Seidenberg, 1981), and various work rules violations, e.g., failure to furnish radios, *UTU and CSX Transp., Inc.*, PLB 4837, Award No. 18 (Marx, undated), working without an assistant, *UTU and Nat'l Rail Passenger Serv. Corp. (AMTRAK)*, PLB 6312, Award No. 155-A (Rinaldo, 2006), and working with short crew, *UTU and Chesapeake & Ohio Ry. Co.*, PLB 3510, Award No. 1 (Marx, 1984).

In the present matter, the contractual violation involves a largely intangible infringement upon employees' rights wherein employees were denied the opportunity to take vacations and personal leave at the times of their own choosing because of the carriers' violations. Those leave dates cannot be recovered. Employees were unable to take time off with their families as they had planned for occasions like recreation, family gatherings, social events, and children's school and athletic programs. Those events and opportunities have been lost and cannot be recreated. A day's pay is at best an unsatisfactory substitute, but, in light of considerable railroad industry practice and in a genuine attempt to put this dispute behind the parties, the remedy sought by the unions is reasonable and appropriate for the violation.

Because the requested remedy is intended to compensate injuries that cannot be quantified easily, referees in the railroad industry have regularly held that a basic day's pay is appropriate regardless of whether the claimant was required to perform additional duties or suffered actual monetary harm. In *BLE v. Nat'l R.R. Passenger Corp.*, SBA 928, Award No. 87 (Mikrut, 1995), the Board awarded a basic day's pay for the carrier's impermissible work assignment despite the fact that disputed work duties may have taken only a matter of minutes to perform on each of the claim days. Many Boards have awarded a basic day's pay

without even discussing whether the claimant suffered any actual monetary harm. For example, when a carrier violates an agreement by failing to assign bargaining unit work to individuals in the unit or to assign the work to the proper individual within the bargaining unit, the Third Division of the NRAB has repeatedly held that the claimant is entitled to a monetary award even if the claimant was fully occupied at the time of the violation. In *BMWE and Terminal R.R. Ass'n of St.*

Louis, NRAB, Third Division, Award No. 23928 (Sickles, 1982), the Board ruled:

. . . We are of the opinion that it would serve a better purpose in the long run to make a decision which clearly provides a guideline for the parties in the future and with that in mind, we have reviewed the awards on both sides of the issue of the requirement of actual losses prior to the awarding of damages. We have concluded that there is no prohibition from awarding damages when there were not actual losses of pay. We also find, that in order to provide for enforcement of the agreement and in particular this provision that the only way it can be effectively enforced is if a claimant or claimants be awarded damages even though there are no actual losses in an instant matter. To do otherwise would authorize the ignoring of this provision by the Carrier. [*Id.* at p. 2.]

Because the primary object of the day's pay remedy is compensation, the carriers' motive for the violation is immaterial. The Board in *BMWE and Terminal Railroad Association of St. Louis* stated that "[a]ttempting to determine motivation or intent on the part of the Carrier . . . is a torturous subjective consideration . . . [that] only adds a new element of uncertainty in the relationship of the parties." The Board in *ATDA and St. Louis Southwestern Railway Co.*,

NRAB, Third Division, Award No. 26593 (Goldstein, 1987), explained that such a determination “require[s] the Board to rest on that somewhat slippery slope of subjective considerations.” The Board concluded:

We are of the view that a better purpose is served in the long run which clearly provides a guideline for the parties in the future. With that in mind, we have concluded that there is no prohibition from awarding damages where there is no actual loss of pay. That finding is based on our belief that in order to provide for the enforcement of this agreement, the only way it can be effectively enforced is if a Claimant or Claimants be awarded damages even though there are no actual losses. [*Id. at p. 4.*]

The unions claim that a monetary remedy is necessary in order to enforce the agreements. Railroad arbitrators have imposed the day’s pay remedy as a means to ensure that collective bargaining obligations are enforced. In *TCU and Burlington N. R.R.*, NRAB, Third Division, Award No. 33044 (Fletcher, 1999), the Board stated it “has frequently held that no useful purpose would be served if we were to find that the Agreement was violated and no remedy was offered.” In *TCU and Nat’l R.R. Passenger Corp. (AMTRAK)*, NRAB, Third Division, Award No. 31583 (Conway, 1996), the Board wrote at p. 3, “Simply put, if the integrity of collective bargaining is to be fostered, negotiated Rules must be enforced and penalties assessed for violations when established.” In the words of referee Robert Richter: “. . . We are persuaded that the circumstances exist which make a damage award appropriate. Refusing to make a monetary award would, in

effect, condone the Carrier's violation." *BMWE and S. Pac. Transp. Co. (E. Lines)*, NRAB, Third Division, Award No. 31658 (Richter, 1996).

The unions argue that, without the application of the traditional day's pay remedy, the agreements at issue cannot be effectively enforced. Without some monetary compensation for those employees deprived of their chosen leave times, there simply would be no reason for the carriers not to commit further violations similar to those found by this Board. The carriers could, as they have done here, continue to violate their agreements system-wide and suffer no consequence unless the traditional compensatory remedy is applied.

The unions claim that the remedy they seek is consistent with the 1941 and ATDA NVAs and awards issued under those agreements. The 1941 NVA provides that employees who are not permitted to take their vacation periods are entitled to payment in lieu thereof. The 1941 NVA states, "If a carrier finds that it cannot release an employee for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation. . . ." J.A. at 9. An amendment to the 1941 NVA, dated August 21, 1954, further provides, "Such employee shall be paid time and one-half rate for work performed during his vacation period in addition to his regular vacation pay." Union Exhibit No. 55. The ATDA NVA has a near-identical provision. Thus,

when an employee works all or part of his scheduled vacation time, he is entitled to additional pay for that time at the rate of time and one-half.

The unions also argue that arbitrators have not limited the time and one-half contractual remedy to instances where employees were deprived of their vacations entirely and instead have applied this provision in cases where a carrier has unilaterally changed the timing of the employees' vacations. In *BRAC and Belt Railway Company of Chicago*, NRAB, Third Division, Award No. 19659 (Blackwell, 1973), the organization and carrier together had established a vacation schedule for janitors. Thereafter, the carrier unilaterally altered the established vacation periods of two of the janitors, which required them to take their vacation leave at times other than those they had chosen. Claims were filed seeking additional pay at the time and one-half rate for those days employees were forced to use vacation leave over their objection, as well as for the days on which they were forced to work instead of being allowed to take their vacations as set forth in the agreed schedule. The Board rejected the carrier's defense that it changed the agreed schedule in order to create a continuous vacation relief schedule and that its actions were permissible because it had previously had difficulty obtaining vacation relief for janitors due to the low rate of janitorial pay. Thus, the carrier

was required to pay the employees at time and one-half for each day their established schedules were violated.

In *TCU and Terminal Railroad Association of St. Louis*, NRAB, Third Division, Award No. 14752 (House, 1966), the carrier advanced an employee's vacation period by several months without giving 30 days' notice as required under Section 5 of the 1941 NVA. The employee took vacation at the advanced time designated by the carrier but filed a claim for time and one-half pay for each day during his scheduled vacation time when he was required to work. The arbitrator found that "the originally assigned vacation time remained Claimant's designated vacation dates" and that, because claimant had worked on those designated dates, he was entitled to the contractual time and one-half remedy, regardless of the fact that he had taken vacation time earlier in the year.

In *BMWE and Boston and Maine Railroad Co.*, NRAB, Third Division, Award No. 10553 (Daly, 1962), the union filed claims for 31 employees who were not permitted to take their vacations in accordance with the agreed vacation schedules. Their claims sought eight hours of pay at a time and one-half rate for each vacation day the carrier varied from the jointly-established schedule. Each employee had chosen a vacation period that began on the Tuesday after a holiday. The carrier unilaterally "changed the agreed-to 1955 vacation schedules

and assigned one of the three designated holidays as the first day of the Claimants' vacation schedules." The Board sustained the claims for eight hours' pay at the contractually prescribed rate and ruled that the carrier violated the NVA each time it assigned a holiday as a day of vacation when the employee had not chosen that date as a part of his vacation.

In *The Order of Railroad Telegraphers and Gulf, Colorado & Santa Fe Railway Co.*, NRAB, Third Division, Award No. 12424 (Dorsey, 1964), the carrier forced two employees to work days of their scheduled vacation when the agreement rule provided for vacations of "consecutive work days." The carrier paid each employee straight time plus time and one-half for the hours worked during the assigned vacation period and straight time for the days of his vacation period that he did not work. Each employee claimed that the carrier's violation of the "consecutive work days" vacation requirement entitled him to straight time plus time and one-half pay for every day of his scheduled vacation, whether he worked or not, because he had been denied the contractual guarantee of a continuous vacation schedule. The Board ruled,

When Carrier caused Claimants to work during their assigned vacation periods, without deferring in the manner prescribed in Article 5 of the Vacation Agreement, it abrogated the assigned vacations since it had no contractual right to deviate from the mandate of Article 1, as amended, that Claimants were entitled to their earned vacations in "consecutive work

days.” Therefore, the assigned vacations having been abrogated, Claimants had the right to work their positions during what had been their respective assigned vacation period; and, to be paid at the rate of pay prescribed in Article 5, as amended. We will sustain the claim. [*Id.* at p. 99.]

The unions assert that the time and one-half pay provision of the 1941 and ATDA NVAs has been applied in cases analogous to the present matter, where employees have been forced to use vacation leave at times different from their scheduled vacation periods or otherwise in a manner contrary to the agreement provisions. Therefore, the award of such additional pay demonstrates the reasonableness and appropriateness of the relief sought here.

These are the unions’ responses to the carriers’ positions. The carriers first argue that no damages should be awarded to employees. This argument is ill-founded and unfair because the traditional day’s pay remedy is appropriate under the circumstances of this matter, and the authorities relied upon by the carriers do not support a contrary conclusion. The carriers acknowledge that a basic day’s pay is a traditional remedy within the railroad industry for contract violations and that its application is commonplace. *UTU and Burlington N. R.R. Co.*, NRAB, First Division, Award No. 24137 (Zusman, 1992); *BRT v. Cent. of Ga. Ry. Co.*, 415 F.2d 403, 415 and n.22 (5th Cir. 1969). The day’s pay award is designed to compensate employees for injuries that are not easily

quantified. *BLE and Union Pac. R.R. Co.*, PLB 2627, Award No. 16 (Seidenberg, 1981). It is appropriate regardless of whether a grievant performed additional duties or incurred monetary harm. *BRS and Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, NRAB, Third Division, Award No. 9811 (Fleming, 1961). Railroad arbitrators view this remedy as necessary to preserve “the integrity of collective bargaining” by insuring that “negotiated rules must be enforced.” *TCU and Nat’l R.R. Passenger Corp. (AMTRAK)*, NRAB, Third Division, Award No. 31583 (Conway, 1996).

Numerous awards have granted a basic day’s pay for violations of the NVAs and PLAs. Although the carriers have cited a few awards under the NVAs where arbitrators have declined to issue monetary relief, the unions respond that these decisions are readily distinguished from this case and in fact support their position. The carriers cite a line of cases that arose where carriers deferred employees’ scheduled vacation time without sufficient notice as required under the NVAs. As these cases explained, when the carrier improperly defers a vacation, this is tantamount to cancelling the vacation:

This puts the employee to an election. He can decline any other vacation period, work during his cancelled assigned vacation period and qualify for the premium rate of pay “in lieu of vacation;” or, he may elect to be assigned a future vacation period with pay. [*TCU and Atchison, Topeka & Santa Fe Ry. Co.*, PLB 132, Award No. 12 (Harr, 1968).]

In the cases relied upon by the carriers, the employees were able to and did choose a future vacation period so the arbitrators held that they were ineligible for the premium payment of time and one-half provided under the 1941 NVA.

In the present case, the carriers did not permit employees to make any such election. Here, employees experienced an FMLA-qualifying event—serious illness of their own or a close relative, or birth or adoption of a child—and the carriers forced these employees to use up their later-scheduled vacation time in conjunction with the FMLA leave to which they were statutorily entitled. Employees could not choose a different time for vacation, nor, according to the carriers, were they entitled to premium pay for time worked during their originally scheduled vacation period. Under the reasoning of the carriers' preferred line of cases, employees should not receive compensation because they were not permitted to elect an alternative vacation period. Instead, they were simply denied their chosen vacation time.

The carriers cite a number of out-of-industry awards in support of their contention that employees are not entitled to damages. The unions respond that out-of-industry awards offer little, if any, guidance in deciding the question before the Board. As the carriers set forth in their opening submission on the merits, labor relations in the railroad industry are unique in many respects. The

day's pay as a default remedy is one of these unique features. In *BLE and Nat'l R.R. Passenger Corp.*, SBA 928, Award No. 87 (Mikrut, 1995), the Board described a day's pay remedy as "generally recognized within the railroad industry." In awarding the day's pay remedy, railroad arbitrators have not looked to out-of-industry practice. The out-of-industry awards cited by the carriers involved FMLA substitution policies and are not on point. There is discussion in those awards of the traditional method for remedying violations under the agreements at issue in those cases. And in two of those awards, the unions only sought declaratory relief.

In *Grand Haven Stamped Products Co. and Paperworkers Local Union 7278*, 107 LA 131 (Daniel, 1996), the union requested that the grievance be granted and that an appropriate award be entered directing the Company to comply with the terms of the contract. The carriers maintain that the award "expressly rejected money damages." No discussion appears in the award about a request for monetary damages, however; nor is there any indication that either side addressed the issue. The arbitrator's statement relied on by the carriers, that the grievants were "not entitled to any economic remedy," is therefore pure *dictum*.

In *Association of Flight Attendants and American Eagle Airlines, Inc.*, (Denenberg, 2005), the System Board of Adjustment wrote that the only

relief sought from the arbitrator was declaratory in nature. The award's provision enjoining future application of the policy found to have violated the contract was merely a logical extension of that finding. There was no discussion of the propriety of a make-whole remedy because the union had sought none. The arbitrator did not limit the remedy as the carriers suggest; the arbitrator merely granted the limited relief sought.

The arbitrator in the third FMLA decision the carriers cite declined to order monetary relief because the FMLA substitution policy at issue had been in place for many years before the union grieved the issue. *SCAN Am. and USW, Local 241 L-03*, 119 LA 1797, 1803 (Cohen, 2004). In the arbitrator's view, the union had failed to make a reasonable effort to minimize the damage caused by the violation and, therefore, was not entitled to monetary relief. By contrast, the carriers here do not contend that the unions failed to protest their policies on a timely basis.

The carriers contend that the explicit time and one-half penalty provisions in the 1941 and ATDA NVAs preclude the relief sought here. The unions respond that this position is incorrect for two reasons. First, numerous awards hold that the day's pay remedy is appropriate even if not specified in the collective bargaining agreement. The fact that the parties' collective bargaining

agreement contract contains specific penalties for certain violations does not mean that the basic day's pay remedy is inappropriate for other violations. Second, arbitrators have in fact applied the NVA's time and one-half remedy in circumstances analogous to this case and have limited this remedy to "when paid leave is denied outright." They have awarded that contractual remedy where, as in this case, the carrier has unilaterally altered the timing of employees' vacations. In *TCU and Terminal Railroad Ass'n of St. Louis*, NRAB, Third Division, Award No. 14752 (House, 1966), the carrier impermissibly advanced the employee's vacation without proper notice. The employee had been denied his chosen vacation time and forced to work during that time period. The arbitrator awarded him time and one-half in addition to regular pay for working during the originally scheduled vacation period despite the fact that he had received paid vacation time earlier in the year. Essentially, the same violation occurred here. When the carriers advanced employees' vacations in order to coincide with FMLA leave, they required them to work later in the year during what would have been their vacation period. Thus, the 1941 and ATDA NVAs provide support for the remedy sought here.

In the place of monetary damages, the carriers assert that this Board should issue declaratory relief only. The unions respond that such relief is

inappropriate because the parties' Supplement to Arbitration Agreement required the carriers to "immediately discontinue" the policies at issue following an award for employees on the merits. Accordingly, "the carriers have already changed their policies." Thus, the carriers' argument suggests a useless exercise, that this Board merely direct them to do what they were contractually committed to do and have already done.

The unions contend that the carriers' inconsistent application of their FMLA substitution policies strongly militates in favor of the requested relief. The carriers admit that they treated employees inconsistently under their FMLA policies. They originally asserted that "stacking" paid leave on top of unpaid FMLA leave placed an unacceptable burden on operations that justified their substitution policies. Yet, in implementing those policies, they permitted some employees to take their scheduled vacation time, albeit unpaid, following the forced use of paid vacation time during FMLA leave. *BNSF Railway Co. and ATDA* (Ollie Wick), January 26, 2009); *BNSF Railway Co. and ATDA* (Robert Lokery), January 29, 2009); *BNSF Railway Co., and ATDA* (Frank A. Tamisiea), January 28, 2009. The carriers do not explain how they determined whether a particular employee would be permitted to take time off during his originally scheduled vacation period. No evidence suggests that they ever communicated the

availability of this unpaid compensating leave to employees. They appear simply to have made exceptions on an *ad hoc* basis. The carriers' inconsistent application of their FMLA policies has accordingly resulted in unfair disparate treatment of employees, and the traditional day's pay remedy is eminently fair compensation.

The unions also argue that the carriers falsely equate the award of monetary relief with punitive damages. Claimants here seek compensation for a substantial injury, the loss of their important contractual right to determine the timing of their paid leave; they are *not* seeking to punish the carriers. The carriers' characterization of employees' losses as mere "inconvenience" is grossly inappropriate in this matter's FMLA context. Claimants took FMLA leave because of their own serious health conditions, to care for close family members suffering a serious illness, or to meet the demands of newborn or adopted children. Because they took such leave, the carriers' policies wrongly denied them the ability to take their paid leave later in the year and deprived them of time for recreation, rest, or, if needed, additional time beyond the 12 weeks granted under the FMLA to recover from illness or care for loved ones. As the Seventh Circuit correctly observed, the ability to time one's leave is a "hard-won right of railroad workers," which they "cherish." Although an important contract right for all railroad employees, it has added significance for those employees who work on-

call and otherwise have limited control over their work schedules. The carriers' contract violations have caused substantial injury well beyond the level of "inconvenience."

The unions contend that the loss of contractual rights constitutes an actual injury because employees were required to work and were not able to use their time off as they had planned. They reject as incorrect the carriers' position that actual injury is limited to monetary losses. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Sys. Fed. No. 26 and Cent. of Ga. Ry. Co.*, NRAB, Second Division, Award No. 5135 (Weston, 1967). Although the time lost here cannot be recovered, it can nevertheless be compensated. In cases where the injury is "beyond measure," railroad arbitrators have used the basic day's pay as the preferred way to compensate an injury that resulted from the violation of contractual rights. *BLE and Union Pac. R.R. Co.*, PLB 2627, Award No. 16 (Seindenberg, 1981). Although some awards describe the day's pay remedy as a "penalty," Arbitrator Quinn called this a misnomer. Arbitrator Quinn wrote that the "payment of a day's pay is proper for the violation of the rule not as a penalty, but compensatory damages which will deter the Carrier from complete disregard to its obligation." *UTU and Chi. & Nw. Transp. Co.*, PLB 3985, Award No. 99 (Quinn, 1987), p. 2.

Damages intended to compensate differ substantively from punitive damages. Punitive damages are “[d]amages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit.” *Black’s Law Dictionary*, at 396 (7th ed. 1999). They are “damages awarded to punish” and “[b]y definition . . . are based upon the degree of the defendant’s culpability.” *Molzof v. United States*, 502 U.S. 301, 307 (1992).

By contrast, railroad arbitrators generally award a day’s pay as a remedy without regard to the carrier’s motive or intent. *BMWE and Terminal R.R. Ass’n of St. Louis*, NRAB, Third Division, Award No. 23928 (Sickles, 1982); *ATDA and St. Louis Sw. Ry. Co.*, NRAB, Third Division, Award No. 26593 (Goldstein, 1987). The Board explained, in *BLE and Northeast Illinois Regional Commuter Railroad Corp.*, NRAB, First Division, Award No. 25399 (Kenis, 2003), that the majority view of railroad arbitrators is to apply the basic day as the usual and customary measure of damages without regard to such factors as good or bad faith. In that case, the carrier had urged Arbitrator Kenis to adopt the minority view of a few arbitration awards that balance various factors, including good faith, in order to determine whether to award monetary relief for a contract violation. She rejected this approach because it results in a “slippery analytical slope,” as opposed to the certainty of the traditional day’s pay remedy.

The unions argue further that, even were one to follow the minority view, the carriers in this case cannot sustain a “good faith” defense. First, they simply have not acted in good faith. Prior to implementing their forced substitution policies, they did not consult with the unions to address the operational problems they believed the FMLA to have caused. Instead, they acted unilaterally despite the RLA’s mandate and Congress’s decision to delay the FMLA’s effective date for unionized workforces to permit negotiations over the statute’s impact. The carriers concede that, in the vast majority of cases, employees’ use of FMLA leave gives them little heartburn and that their “issues” arise only with certain employees in certain locales; yet they never sought a narrow solution. To date, they have not explained why an “all-craft, all-location, blunderbuss” policy change was necessary. The carriers simply chose to seize upon an arbitration award that involved one carrier and one union to effect a dramatic alteration in the NVA and PLA landscape.

The carriers did so in the face of Department of Labor interpretations that directly contradicted their view of the law. Not one of their legal justifications was accepted by the federal district and appellate courts, which were particularly critical of the carriers’ reasoning. Even after the court decisions rejected the foundation of the award on which they claim to have relied, they

plunged on and added two more years to the dispute. Notably, not one of their contractual justifications was accepted by this Panel. Now the carriers concede that they applied their FMLA policies selectively. That inconsistent application undermines their claim that the policies were necessary and demonstrates recognition, at least on the part of some carriers officers, of the unfairness of applying an across-the-board policy instead of the type of case-by-case analysis that the NVAs and PLAs mandate. This behavior is hardly consistent with the carriers' claim of good faith.

Second, the unions assert that the carriers either misread or misapplied the authorities that they cite in favor of their "good faith" argument. The carriers principally rely on *Los Angeles County Metropolitan Transportation Authority and UTU*, 1999 WL 555837 (Gentile, 1999), an award arising out of circumstances so unique as to hardly deserve consideration. That case involved the Authority's erroneous application of a contractually-mandated business formula that resulted in millions of dollars in savings to the Authority, which UTU claimed should be shared with the employees as a group. The arbitrator denied that monetary claim for important reasons in addition to the "good faith" rationale that the carriers urge. Significantly, Arbitrator Gentile found that UTU's damage claim was "savings-driven" and not based on substantive analysis of identifiable

employees' lost wages and/or benefits. He indicated that, from the record before him, it was impossible to determine which employees had been injured and in what amount. He criticized the union's proposed remedy as not "make-whole" in nature but instead more appropriate to a commercial arbitration estimate or to a labor-management negotiating table demand. By contrast, in this case, individual claimants were injured by the contract violation; and the relief requested directly relates to the contract violation's effect on each of them. No class-type, pooled relief is sought.

Continuing their response to the carriers's good-faith argument, the unions argue that the carriers cited only two other railroad industry awards and, even then, overstated their holdings. Both awards reveal that a carrier's good faith in violating an agreement is not a paramount issue in determining how to remedy contract violations. Indeed, even if it is deemed relevant to consider whether the carriers' conduct was "flagrant, inadvertent, or made in good faith," this is only one factor to be considered. It certainly is not dispositive of the remedy issue and is a far cry from the carriers' broad assertion that good faith alone is enough to dispense with a request for monetary relief. See also, e.g., *BRC v. S. Pac. Co.*, NRAB, Third Division, Award No. 8202 at 186 (Jan. 8, 1958); *BRC v. S. Pac. Co.*, NRAB, Third Division, Award No. 5697 at 1122 (Mar. 26, 1952).

The unions also respond that carriers' awards from other industries are not persuasive support for denying the relief claimants seek here. In *Interlake Companies, Inc.*, Case No. 96/119, 1997 WL 865397 (Goldstein, 1997), contrary to the carriers' representation, Arbitrator Goldstein awarded a monetary remedy. Arbitrator Draznin denied a monetary remedy in *Landmark Hotel Corp.*, 93 LA 180 (Draznin, 1989), primarily because that union offered no proof to support the damages it sought and because of the particular circumstances there, which included a new agreement that the Employer legitimately misunderstood.

Simcala, Inc., Case No. 5-96, 1998 WL 1033435 (Nicholas, 1998) is the lone non-railroad case where the arbitrator relied on the Employer's good faith to reject monetary relief sought. The unions submit that the circumstances of that case, where the arbitrator said "it would be grossly unfair to saddle management with such a penalty," are not even close to those at bar. In that case, the parties were dealing with a three-month temporary subcontracting situation, not, as here, a deliberate unilateral policy in effect for five years.

The unions argue that, if this Board were to look beyond the railroad industry, it should consider *Scovill Mfg. Co.*, 31 LA 646 (Jaffee, 1958), the facts of which are far more apposite to those here. In *Scovill*, the Employer violated the collective bargaining agreement when it shut down its operations for two weeks

rather than one and required employees to use vacation leave during the second week. While recognizing the difficulty of remedying such a situation, Arbitrator Samuel Jaffee concluded it was appropriate to require the employer to provide affected employees with an additional week of paid vacation:

T]here was damage, even if it is difficult to assess its precise amount. What the Company did in violation of the Agreement did cause them inconvenience which may be inferred to be substantial, and presumably some monetary loss as well. One of the difficulties in fixing the precise amount of loss is, of course, the fact that it would undoubtedly vary to some extent from [employee] to [employee]. But although the Company acted in good faith in what it did (and of that I have no doubt), the fact remains that it was its breach which has created the uncertainty. And, as the Supreme Court of the United States has pointed out, the wrong having been proven, the risk of uncertainty as to the scope of damages is on the party who committed the breach, and recovery may be had even if the extent of the damage is only an approximate inference. (*Story Parchment Co. v. Paterson Parchment Paper Co.*, 51 S.Ct. 248.)

The union contends that the carriers' alternative unpaid leave remedy also should be rejected. The carriers suggested that, if a compensatory remedy is awarded, it should be nothing more than "restitution of unpaid leave." But in the current climate of the railroad industry, the carriers' suggested result would fail to provide a true remedy for claimants. When the carriers first implemented their forced substitution policies in 2004, the railroad industry was flying high and was faced with such increases in business that it was having difficulty handling the surge with its existing workforce. Employees were fully employed and often

worked substantial amounts of overtime, making even unpaid periods of leave meaningful. But today, times are harder; and business has declined. Now many claimants are just barely employed, and a significant percentage of the workforce is furloughed. Unpaid leave now is a remedy with little value, even for working and furloughed claimants. For claimants who have retired, are on disability, or have been laid-off, unpaid leave is no remedy at all. The carriers should not be permitted to rely on a changed economic climate to avoid bearing the cost of their contract violations.

The unions also respond that unpaid leave is an unwieldy remedy because employees may not be able to afford to take unpaid leave now. They will need an extended period of time over which to take their compensating leave. It will have to be tracked for that entire period, creating the potential for disputes over record-keeping. Moreover, this remedial unpaid leave must differ from regular unpaid leave under the parties' collective bargaining agreements, which carriers have discretion to decline. Controversies due to confusion will likely arise on the properties as employees seek to exercise these unpaid leave balances and are improperly denied under the usual rules governing unpaid leave, especially years from now when memories have faded. In these circumstances, a monetary remedy represents not only the most equitable, but also the most efficient remedy.

The unions also challenge the authority on which the carriers rely for their proposed unpaid leave remedy. First, they do not cite a single railroad industry decision awarding unpaid leave. Second, there is no “clear implication” to be drawn from *Teamsters Local 676 and General Mills/Progresso* (Brogan, 2007), that the only proper remedy here is unpaid leave. In that case Arbitrator Brogan directed the employer to “make whole any employee adversely affected by the policy since the filing of the grievance” and retained jurisdiction with respect to that remedy “if the parties cannot agree.” Since she issued no subsequent award, it must be presumed that the parties settled the remedy issue. Speculating as to what Arbitrator Brogan would otherwise have done is wholly inappropriate.

Third, *State of California Bd. of Equalization*, 103 LA 887 (Bogue, 1994) also is not the “good example.” That case involved denial of an ill employee’s request to be placed in unpaid leave status after she had exhausted her sick leave. Instead, the State required her to exhaust her vacation leave as a prerequisite to using unpaid leave. Arbitrator Bogue found that this violated a contract provision that gave employees the right to schedule vacation at any time, subject only to the State’s “operational needs,” which it failed to prove. To remedy the violation, Arbitrator Bogue found that restoration of vacation leave or other monetary compensation was not appropriate because the employee had

suffered only “an inconvenience” that carried no monetary loss. Arbitrator Bogue felt that “unless the employer’s action is a deliberate or repeated contract violation, [this was] ‘the better view.’ ”

This case is inapposite. Unlike that single employee’s situation, the carriers here imposed their policies nationwide with a “deliberate [and] repeated contract violation.” Unlike the State of California, which relied on an undisputed record of 20+ years’ consistent past practice evidencing union awareness and acceptance of identical conduct under the agreement, the carriers had no past practice to support their policies and no basis to infer union acceptance.

Thereafter, only the Benn Award supported their position; and the federal courts soundly rejected it. *State of California*’s unpaid leave remedy is inapposite here.

The carriers also rely on *City and County of San Francisco (Fire Department)*, 119 LA 596 (Silver, 2004). Insofar as that award reached a different conclusion from what the unions propose, it is not consistent with the prevailing railroad industry view that the appropriate remedy for a contract violation of this kind is a day’s pay. The carriers’ companion argument that a monetary remedy will result in “a double or windfall recovery” to which the employees are not entitled similarly “has no legs.” The unions are not seeking any such windfall; they are simply requesting a remedy that adequately compensates affected

employees for the carriers' violations. The precedent the carriers cite in a footnote for their "windfall" argument is not convincing either. Many of the RLA cases they cite involve disciplinary situations that are wholly inapposite. This Board has not been called upon to interpret or apply any local agreements. The carriers' "case-by-case" defense argument deserves no consideration.

At the hearing, the unions responded to the carriers' claim that a monetary remedy would impose a crippling financial burden. In terms of the number of claims, the unions' survey revealed under 1,000 claims for between 1,500 to 2,000 days's pay over a five-year period. In fact, some employees, having accepted compensating unpaid leave or the carriers' advancement of vacation days and/or personal paid leave days, did not file valid claims. As a result, those employees would be entitled to no remedy; and the unions seek none for them.

The unions also respond to the carriers argument concerning lack of proof of individual employees' entitlement to relief. The unions characterize this argument as an "interesting notion." The unions state that it would not have been appropriate to "parade 1,000 claimants" before this arbitration panel. Instead, there is a "reasonable belief" how each claimant would have responded; and the parties' arbitration agreement provides for "the most appropriate remedy."

The unions reject the carriers' argument that this arbitration panel lacks authority to determine "the appropriate remedy." The parties' Supplement to Arbitration Agreement expressly provides such authority, however; and the carriers cannot disclaim that agreement at this stage. The remedial issue that the parties submitted is: "*What is the appropriate remedy* for employees who were required to use paid leave for FMLA leave in violation of the national vacation and/or national personal leave agreements?" (Emphasis added.)

The unions conclude:

The Carriers have come forward with no convincing basis for awarding anything less than a day's pay to every claimant for every day they were affected by the Carriers' violations of the Agreements. For the reasons set forth herein and in our Opening Submission, that is the appropriate remedy that should be awarded in this dispute. [Unions' Reply Brief, p. 20.]

CARRIERS' ARGUMENTS

In broad terms, the carriers assert that the appropriate remedy in this matter is an order to rescind the FMLA leave substitution policies found by this Board to have violated the collective bargaining agreements and a prohibition from requiring employees to use paid vacation or personal leave in FMLA circumstances. They assert that, because all employees received all the paid leave to which they were entitled under the agreements, no monetary remedy is appropriate.

The carriers argue that the remedy they propose is consistent with the national agreements, which allow monetary compensation only when an employee is denied paid leave. Thus, the Board should decline to create a damages remedy not grounded in the agreements. They further rely on prior Adjustment Board decisions that provide no compensation when a carrier wrongfully schedules paid leave and the employee receives a full amount of paid leave. They assert that “[t]he National Vacation Agreement does not provide for compensation damages for inconvenience,” citing *BRC v. Chicago, Burlington & Quincy R.R.*, NRAB Third Division, Award No. 10965 (Dec. 17, 1962), and contend that non-railroad industry awards hold that scheduling violations should be remedied through prospective relief, not damages.

The carriers also assert that they were acting in good faith when they issued the policies in question and, because they have already rescinded those policies, that no risk of future violations exists. Accordingly, an award of monetary damages would not serve as a deterrent to future contract violations. In fact, monetary damages would constitute a form of double recovery, which would constitute punitive damages, a remedy generally rejected by awards in the railroad and other industries.

The carriers note that, to the extent employees lost anything as a result of the policies at issue, they lost the opportunity to take unpaid leave, and that some of the employees did not even lose that, having taken unpaid leave during the time period of their originally-scheduled vacations. Thus, if the Board decides to fashion a remedy beyond a cease and desist order, it should limit relief to the restitution of unpaid leave.

Considering the scope and nature of the Board's remedial powers, the carriers cite numerous cases in support of the proposition that arbitrators in the railroad industry issue remedies that are reasonable and supported by the relevant agreements. Absent specific circumstances, including proof of loss, remedies ordered are not punitive in nature. *BMEW v. Amtrak*, NRAB Third Division, Award No. 28939 (Aug. 29, 1991); *BRAC v. Penn Central Transportation Co.*, NRAB Third division, Award No. 21452 (March 18, 1997).

Focusing first on the language of the agreements, the carriers assert that no provision of the agreement "required or permits" damages for rescheduled leave when the employee receives the full amount of paid leave owed. Thus, Article 5 of the 1941 National Vacation Agreement provides compensation if a "carriers cannot release an employee for a vacation during the calendar year because of the requirements of the service." Similarly, the carriers assert that

Article VI, Section 3(c) of the BLET personal leave agreement provides compensation when personal leave is requested but denied. The carriers argue that, because neither of the agreements provide damages in the circumstances presented here, the Board should not “create and apply such a remedy.”

The carriers’ assertion that the National Vacation Agreement does not support an award of monetary damages centers on the view that there is no monetary damages remedy for mere inconvenience experienced by any employee. They rely on *Chicago, Burlington & Quincy R.R., supra*, which held the carrier had violated Article 5 of the 1941 NVA by deferring an employee’s vacation schedule without providing the requisite notice. That Board found a violation but awarded no monetary damages, noting that the employee may have been inconvenienced but suffered no loss of wages. The Board concluded that the NVA “does not provide for compensatory damages for inconvenience.” The carriers further cite the 1942 Interpretation of the NVA, in which Referee Morse stated “[t]he vacation agreement was not designed . . . [to] provide hidden wage increases. . . .”

The *Chicago, Burlington & Quincy* award was relied on by the Board in *Telegraphers v. Atchison, Topeka & Santa Fe Ry.*, NRAB Third Division, Award No, 12429 (April 23, 1964). There the Board found a violation of the

agreement but denied the claim for monetary damages, noting that the employee whose vacation was improperly deferred took a paid vacation at a later date.

Accord, Telegraphers v. New York Central R.R., NRAB Third Division, Award 12250 (Feb. 27, 1964).

The carriers cite additional railroad cases in which Boards found agreement violations but awarded no monetary advantages for inconvenience (*BRC v. Kansas City Terminal Ry.*, NRAB Third Division, Award No. 13200 [Jan. 13, 1965]) or in the absence of a penalty provision in the agreement. *BRC v. The Pennsylvania R.R.*, NRAB Third Division, Award No. 7309 (April 30, 1956); *Order of Railway Conductors v. Delaware, Lackawanna & Western R.R.*, NRAB First Division, Award No. 14997 (Dec. 4, 1951).

The carriers distinguish awards cited by the unions in which money damages were awarded, commenting that in those cases the employees were denied leave as opposed to situations in which employees' original vacation schedules were changed and the employees did not take paid leave at another date. *UTU v. Norfolk & Western*, PLB No. 2851 Award No. 3 (1981); *BMWE v. Boston & Maine R.R.*, NRAB, Third Division, Award No. 10553 (1962). The carriers also look to awards in other industries, noting that arbitrators in those industries concluded that no monetary damages were appropriate when vacation scheduling

violations occurred but the employees took their paid vacations at a different time. They cite *Morton Salt*, 113 LA 968 (Allen 1999) and *Weise Planning & Engineering, Inc.*, WL 717342 (Harrick, 1992).

The carriers conclude this aspect of their argument by citing Hill & Sinicropi, *Remedies in Arbitration* (2nd ed. 1991), in which the authors observe that, absent special circumstances, the inconvenience of an employee related to rescheduling vacation periods is non-monetary and, in such cases “the better view is not to award monetary damages for the mere inconvenience of employees.” *Id.* at 402.

The carriers direct their attention to several awards involving FMLA substitution cases in other industries relied on by the unions. Although the arbitrators found that the employers’ FMLA substitution policies violated the applicable collective bargaining agreements, remedies in three of the five cases relied on by the unions in the merits phase of this proceeding were limited to prospective relief only. *Grand Haven Stamped Products Co., Association of Flight Attendants*, and *SCA North America*. The carriers note that, in two other cases cited by the unions, one provided an unpaid leave remedy (*City and County of San Francisco Fire Dept*, 119 LA 596 [Silver 2004]), and the other provided “make whole” relief without further clarification (*General Mills/Progresso*,

[Brogan, 2007]). The carriers argue these cases illustrate that a body of precedent exists limiting remedies in the instant circumstances to prospective relief only and that it is within the Board's authority to do so.

The carriers highlight their assertions that they acted in good faith initiating the FMLA policies in question relying on a reasonable interpretation of the language of 29 U.S.C. 2612(d)(2) and note that the Benn award did not alter their view of the relationship between the statute and the collective bargaining agreement. It was not until the 7th Circuit decision that a definitive ruling occurred that the rights contained in the statute must give way to preexisting contract rights. They cite several awards in support of the view that, in circumstances in which an employer's actions are based on a "reasonable, good faith interpretation of the law and relevant agreements," arbitrators have focused exclusively on declaratory relief that will prevent a recurrence of the violation. *Los Angeles County Metropolitan Transp. Auth.*, 1999 WL 555837 (Gentile 1999); *BMEW v. Amtrak*, *supra*.

Finally, the carriers repeat that they have rescinded the offending policies and that, as the Board has concluded that their FMLA substitution policies violated the collective bargaining agreements, monetary damages would not add to the deterrent factor of a cease and desist order but would simply be punitive.

The carriers view the unions' proposed remedy as punitive and dispute their position that "one day's pay for each day of violation" is the "traditional" or "default" remedy in railroad arbitrations. They argue that a monetary remedy to deter further violations is not warranted on this record and that punitive remedies are only appropriate when repeated violations of a collective bargaining agreement are established.

With respect to the unions' "traditional remedy" contention, the carriers assert that the unions simply ignore the wide range of railroad arbitration awards that refuse to impose punitive remedies. (E.g., *BMEW v. Amtrak, supra.*) They also contend that punitive remedies have a negative impact on continuing labor-management relationships and are generally avoided by arbitrators absent "knowing and repeated" or "willful and flagrant" violations. (Citing, Elkouri & Elkouri, *How Arbitration Works*, p. 1216 (6th ed. 2003).)

The carriers acknowledge the line of arbitration awards in which penalty pay has been ordered. They assert, however, that a past practice of awarding such a remedy is a significant element of such cases. *BLE v. Long Island R.R.*; *UTU v. Long Island R.R.*, PLB No. 3421, Award No 15 (June 2, 1987). They further contend, relying on *Amtrak, supra*, that the "traditional remedy" concept is primarily applicable to violations of operating craft collective

bargaining agreements, thereby weakening any precedent for ordering such penalties in the instant case.

The carriers restate in their reply brief their position that monetary damages are penalty pay and are not needed for the deterrence purpose claimed by the unions. They point to the railroad awards rejecting the deterrence theory as appropriate for penalty pay (*System Federation No. 12 v. Chicago & Northwestern Ry.*, NRAB Second Division, Award No. 1638 [June 30, 1953]) and the conflict between potential deterrence and unjust enrichment (*BRAC v. Norfolk & Western Ry.*, PLB No. 3657, Case No. 40 (Oct.8, 1987)).

The carriers stress that repeated contract violations are the basis often cited for ordering penalty pay, a circumstance not present here. Moreover, the fact that the FMLA substitution policies have been rescinded, when coupled with the absence of local management scheduling discretion, eliminates any need for a deterrent of future violations.

The carriers characterize the unions as asserting that the punitive remedy they seek would be imposed without regard to whether the carriers were acting in good faith. They restate their contention that the carriers' good faith is an appropriate consideration in determining the remedy in this case.

The carriers dispute the unions' view that any losses experienced by employees are not measurable and that a day's pay is accordingly an appropriate approximation of fair compensation. They restate their point that employee inconvenience is not subject to monetary damages absent economic loss (*BMEW v. Consolidated Rail Corp.*, NRAB Third Division, Award No. 26182 [Nov. 24, 1986]) and further assert that, if there is any compensable loss, it was a loss of unpaid leave. That loss is clearly measurable: the number of days of paid leave substituted is the number of unpaid days of leave lost.

The carriers dispute the unions' position that, because Article 5 of the NVA provides for a monetary remedy if an employee is denied leave, it supports their view that penalty pay is consistent with the NVA. This position, the carriers assert, ignores the application of *expressio unius est exclusio alterius*. They contend that, because the agreements expressly provide a penalty for denial of leave, not for rescheduling of leave, the parties did not intend to authorize a monetary remedy in the context of this case.

The carriers contend the unions' reliance on awards they assert support their request for penalty pay is misplaced. One group of awards, the carriers assert, involves denial of paid leave so that the employees suffered a loss in the total amount of paid leave to which they were entitled. (E.g., *BMEW v.*

Boston & Maine R.R. The carriers note that, although the NVA calls for monetary compensation in such situations, no diminution of paid leave occurred in the instant case.

A second group of cases relied on by the unions involved denial of work opportunities. (E.g., *UTU v. Norfolk & Western Ry.*) Again the carriers point out that the elimination of such opportunities deprived employees of paid work, a loss subject to a monetary remedy but distinguishable from the instant case.

The carriers point out that several of the awards cited by the unions do not involve rescheduling of leave at all. (E.g. *BRS v. Chicago & Northwestern Transp. Co.*, NRAB Third Division, Award No. 31250, (Nov 1, 1995).) Those situations, the carriers argue, also involve diminished work opportunities with attendant economic loss to employees.

The carriers argue *BRAC v. Belt Railway Company of Chicago*, NRAB, Third Division, Award No. 19659 (1973) includes a penalty remedy for an apparent rescheduling violation but is not compelling precedent because it contains no analysis of the remedy and simply “sustained” the claim. The carriers view the *Belt Railway* award as standing alone against multiple awards they rely on for the proposition that pure rescheduling violations, with no economic loss to

the employees, do not warrant a monetary remedy under the NVA or the personal leave agreements.

The carriers contend that declaratory relief is a clear resolution of the rights and obligations of the parties under the agreements with respect to FMLA leave substitution. The carriers suggest, however, that, if the Board concludes that some form of damages is appropriate, it should provide restitution of unpaid leave only. To order a monetary remedy would result in double pay for employees who have already been paid for their time off. The carriers cite *City and County of San Francisco, supra*, an FMLA substitution situation in which the arbitrator refused to award monetary damages to an employee who was paid for her vacation. Instead, he directed that the grievant elect between paying back the compensation she had received while on FMLA leave and scheduling a future paid vacation on the one hand or, on the other, taking unpaid vacation time equivalent to the FMLA leave time for which she had been paid. The carriers also rely on *State of California Board of Equalization*, 103 LA 887 (Bogue 1995,) in which the arbitrator refused to provide a monetary remedy in circumstances in which the employer had violated the contract's vacation scheduling provision. These cases, the carriers argue, illustrate the principle followed in numerous railroad and non-railroad awards that employees are not entitled to double or windfall recovery.

See *TCU v. Southern Pacific Co.*, NRAB Third Division, Award No. 17701 (1970).

The carriers contend that, in the event the Board provides a remedy of unpaid leave, that remedy should not be extended to employees who have already taken unpaid leave. They point to claimants' declarations in the record that show some employees required to use paid leave for FMLA leave subsequently requested and received unpaid leave, often for the same time frame of the originally-scheduled vacations. Thus, if the Board awards a remedy of unpaid leave, it should preclude those occasions from such relief. *Conrail v. BRAC*, PLB No. 2263, Award No. 8 (Eischen, May 1, 1987).

Finally, the carriers assert that paragraph 4 of the Memorandum of Understanding between the parties, dated February 17, 2004, preserved available procedural defenses to pending FMLA claims and that, accordingly, if the Board directs a remedy of unpaid leave, it should specify that the carriers may assert available defenses on a case-by-case basis.

RATIONALE

On the entire record before us, including our assessment of the probative value of evidence and our consideration of the parties' citations of arbitral, judicial, and regulatory authority, we find that qualified grievants are

entitled to receive a day's pay at their then-obtaining straight-time rates for each day that the carriers improperly required substitution of FMLA leave for scheduled vacation time or accrued but not-yet-scheduled personal leave days.

We reach that conclusion for the following reasons.

First, the remedy we grant is compensatory, not punitive. What grievants lost was a contract right of significant value. As we wrote at pages 29-30 of our December 2, 2008 Opinion and Award:

These are not insignificant contractual benefits. Arranging family vacations involves advance planning and financial commitments that are not easily changed. Personal leave and individual vacation days for specific purposes like doctors' appointments, legal commitments, and family obligations also address date-specific needs that, once scheduled, cannot lightly be missed. Certainty in scheduling for both vacations and personal leave is therefore an important benefit that unions negotiate with care and commitment to bargaining unit member interests. As the Court of Appeals wrote, "The right to time one's vacation and, to perhaps a lesser degree, personal leave days, is a hard-won right of railroad workers." (JA, p. 262.) Little wonder that court observed, with respect to RLA Section 156 ("Procedure in changing rates of pay, rules, and working conditions"), "Using those procedures, the carriers can bargain for substitution provisions." (JA, p. 261.)

Grievants suffered more than "mere inconvenience" when they lost their contract right to choose when to take paid time off. The carriers' actions deprived them of paid vacation time when they would be free of FMLA-type concerns and paid personal leave days when they needed them to address important personal

obligations. They also lost the benefit of consecutive vacation days that the parties' agreements provide. Our purpose is to provide compensation for those losses, not to punish the carriers for having caused them.

Second, we reject as inapposite the carriers' argument that we cannot provide a remedy without having evidence in the record of the purpose for which individual grievants would have used the vacation and personal leave time that the carriers substituted for FMLA leave. This is a special, industry-wide Board of Adjustment proceeding to which the parties agreed to submit an industry-wide issue. The parties provided us with a stipulated record and created a procedure that precluded testimony from individual grievants. Under these circumstances, we find it reasonably foreseeable and therefore appropriate for a presumption that bargaining unit employees who objected to the policies at issue would have used vacation and personal leave days for purposes other than those of FMLA leave. The testimony of individual grievants is accordingly unnecessary.

Third, granting only declaratory and injunctive relief is not appropriate where, as here, our December 2nd Award has already provided declaratory relief and where, as here, subparagraph (a) of the parties' Supplemental Agreement has already imposed rescission of the offending policies. In addition, requiring the carriers to provide unpaid leave for the lost paid leave

does not adequately compensate grievants' losses. Time off without pay is subject to the employers' discretionary approval. In addition, during the five years' time that carriers substituted FMLA leave for grievants' paid leave, time off without pay was much more valuable than it is now. Then the carriers were operating at full capacity, and bargaining unit employees were working lots of overtime. Now there are layoffs; work is less available, and grievants need pay, not time off without pay.

Fourth, because the value of what grievants lost by reason of the carriers' contract violations is not subject to precise calculation does not mean grievants are entitled to no remedy for their loss. Arbitrators in this industry have repeatedly recognized the appropriateness of a day's pay as the remedy for each day of violation, especially where actual damages cannot be calculated. This has been awarded not only to compensate employees for lost contract benefits but as well to assure compliance with parties' negotiated agreements and to discourage future violations. No less authority than the United States Supreme Court has recognized the appropriateness of that approach. In an analogous context, Mr. Justice Sutherland wrote,

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and

thereby relieve the wrongdoer from making any amend for his acts. . . . The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. [Citations omitted.] . . . [T]he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.

[*Story Parchment Co v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).]

We accordingly find the unions' citations of arbitral precedent far more apposite and persuasive than those of the carriers.

Fifth, lack of contract language authorizing this specific remedy for violation of the provisions at issue does not deprive us of jurisdiction to frame an appropriate remedy. Arbitrators in this industry have provided the day's pay remedy for violations of many other provisions of the parties' agreements that specify no remedy. Moreover, exercising our inherent remedial authority does not add to or modify the parties' contract. To the contrary, the remedy that we provide draws its essence from the parties' agreements (including their "Supplement to Arbitration Agreement") and enforces their relevant mandates.

Sixth, we also reject as inapposite the carriers' argument that, because the parties' agreements specify other damages for violation of other provisions and specify none here, we have no authority to provide any remedy but declaratory relief. In effect the carriers urge us to apply the *expressio unius est exclusio*

alterius canon of contract interpretation. This is not, however, an appropriate case for application of that doctrine. *Expressio unius* addresses ambiguous situations where one can infer from specified provisions that contracting parties intended to exclude all others. No ambiguity exists here, and no such inference can appropriately be drawn. Grievants lost valuable contract benefits; they are entitled to compensation for their loss. And we have determined, as many other arbitrators in this industry have done before, that the appropriate measure of that compensation is a day's pay for each day the carriers violated their contract rights.

Seventh, we reject as unpersuasive the carriers' argument that grievants should receive no remedy because their employers would have granted them unpaid vacation leave when originally scheduled or unpaid personal leave when needed if only they had asked. No carriers had formal policies specifying that right, and, if any did, nothing in the record suggests that employees received notice of their existence. The record is clear, however, that some grievants asked for and did later receive unpaid vacation and personal leave in the same amount as that for which their employers had substituted FMLA leave. For those grievants who so elected, we find that what they suffered was in fact "mere inconvenience" and therefore are not entitled to the remedy we provide for grievants who lost paid vacation and personal leave time by reason of that substitution.

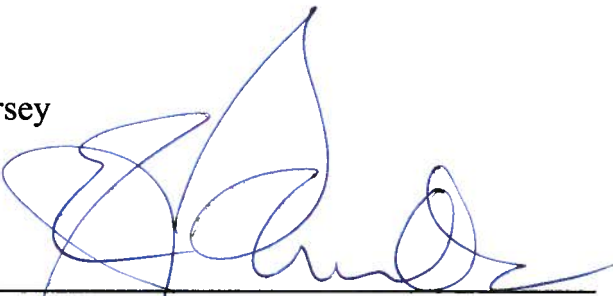
Eighth, we also reject as unpersuasive the carriers' argument that, because they pursued the policies at issue in good faith, believing that FMLA Section 2612(d)(2)(B) authorized them, only declaratory relief is appropriate for the contract violations that we have found. In fact, contract liability is absolute; and motive is irrelevant. Moreover, here the carriers ignored a Department of Labor regulation expressly providing that Section 2612(d)(2) does not trump a contract provision entitling employees to participate in scheduling their vacation and personal leave. 60 Fed. Reg. 2180, 2205 (Jan. 6, 1995). The carriers intentionally adopted and implemented the policies at issue. The Benn Award—which we disagree was a “test case” as the carriers argue—only modified one carrier and two unions' contracts to incorporate Section 2612(d)(2). It affected no other parties' contractual rights and obligations. The carriers also continued their policies at issue for three years after a United States District Court had rejected the Benn Award's basic holding and twenty-one months after the Seventh Circuit's affirmation of that ruling. Over the past five years the carriers have received their policies' intended benefits of “burning” accrued leave balances and avoiding “stacking” time off. And even after this case, they retain those benefits with respect to bargaining unit employees who filed no timely grievances. Under these circumstances the carriers' good faith defense is unpersuasive, and we reject it.

By reason of the foregoing, we issue the following

AWARD ON REMEDY

1. As an appropriate remedy for employees who were required to use paid leave for FMLA leave in violation of the national vacation and/or national personal leave agreements, the carriers shall pay the following sums to bargaining unit employees who filed timely and otherwise procedurally valid claims arising from specific applications of the carriers requiring use of paid vacation or personal leave as FMLA leave: for each day of paid vacation or personal leave that the carriers required to be used as FMLA leave, one day's straight-time pay at the then-obtaining rate of pay for each such employee.
2. Grievants who asked for and did later receive unpaid vacation and personal leave for paid leave days that the carriers who employed them had substituted FMLA leave are not entitled to the remedy provided in the preceding paragraph only for those lost vacation and personal leave days for which they elected to and did receive unpaid leave.

Dated: June 1, 2009
West Orange, New Jersey



JOHN E. SANDS

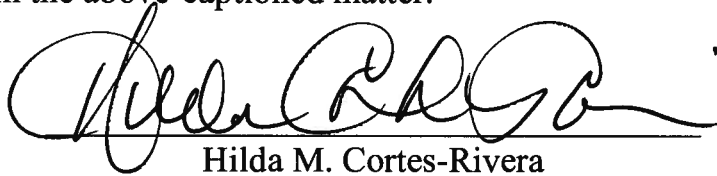
ACKNOWLEDGMENT

STATE OF NEW JERSEY)

>ss.:

COUNTY OF ESSEX)

On June 1, 2009, JOHN E. SANDS, whom I know, came before me and acknowledged that he had executed the foregoing as and for the Special Board of Adjustment's Opinion and Award on Remedy in the above-captioned matter.

A handwritten signature in black ink, appearing to read 'Hilda M. Cortes-Rivera', written over a horizontal line.

Hilda M. Cortes-Rivera

A Notary Public of New Jersey

My Commission expires October 10, 2013

William H. Holley, Jr.

WILLIAM H. HOLLEY, JR.

ACKNOWLEDGMENT

STATE OF ALABAMA)

>ss.:

COUNTY OF LEE)

On June 1, 2009, WILLIAM H. HOLLEY, JR., whom I know, came before me and acknowledged that he had executed the foregoing as and for the Special Board of Adjustment's Opinion and Award on Remedy in the above-captioned matter.

Annette J. White

A Notary Public of Alabama

MY COMMISSION EXPIRES 11/19/11



JEROME H. ROSS

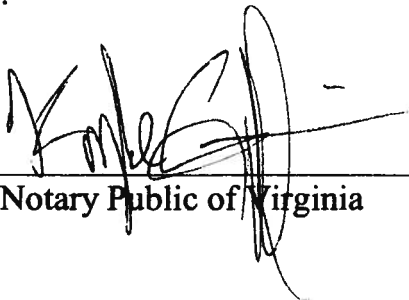
ACKNOWLEDGMENT

COMMONWEALTH OF VIRGINIA)

>ss.:

COUNTY OF FAIRFAX)

On June 1, 2009, JEROME H. ROSS, whom I know, came before me and acknowledged that he had executed the foregoing as and for the Special Board of Adjustment's Opinion and Award on Remedy in the above-captioned matter.



A Notary Public of Virginia

