

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Mortimer Stone, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES**

RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood that:

(a) The agreement governing hours of service and working conditions between the Railway Express Agency, Incorporated, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective October 1, 1940 was violated at the Shreveport, Louisiana Agency in the treatment accorded W. A. Law, as a result of an alleged investigation conducted on August 12, 1946;

(b) His record shall be cleared and his disqualification to hold certain positions shall be rescinded and he shall be restored to his position of Clerk-Driver, as of August 19, 1946; and

(c) He shall now be compensated for wage losses sustained retroactive to and including August 19, 1946.

OPINION OF BOARD: Claimant Law was employed by Carrier in 1921 and held the position of Clerk-Driver in 1946 when he was charged with violation of company instructions as to handling money in valuable shipments, resulting in the loss of a shipment valued at \$1750.00. Following hearing he was suspended from service for a period of ten days and also disqualified to hold any position with the company, the duties of such position requiring him to handle money, valuables, air express or any traffic moving under signature.

After being duly progressed on the property, the claim was referred to Express Board of Adjustment No. 1, which by its Decision E-1581 affirmed the ten-day suspension, but held the disqualification to hold any position with the company involving the duties therein specified was tantamount to dismissal from the service and, in view of his twenty-five years of service, without previous discipline, was arbitrary and unwarranted and exceeded the bounds of reasonable discretion.

Accordingly, the award provided that he should be reinstated to his former position with full seniority rights as of the expiration of the ten-day

suspension period. It further provided, "In making reparations, however, earnings from other employment since that date, as well as the value of air express shipment which was lost as the result of his negligence, should be deducted from compensation due him retroactive to and including August 29, 1946."

Thereafter Claimant was reinstated with rights unimpaired as to the handling of money and valuables, effective April 26, 1948, and the Carrier offered to waive payment of the \$1750.00, which was the amount of its loss, but without payment of any reparation, upon the ground that Claimant could have worked all of the time he was off following his ten-day suspension. That offer was rejected.

It is shown by the record that Claimant had opportunity to accept other employment with the Carrier, as Houseman, at a rate of \$10.00 less per month than his rate as Driver-Clerk, for which he refused to bid, but that he repeatedly called for work in the field of his former employment, which was denied him, as a result of which it appears that he had no compensable employment during the period from his suspension until his reinstatement. The single issue in dispute following the award of Express Adjustment Board No. 1 concerned the provision of the award that "earnings from other employment" should be deducted from the compensation due him, it being the contention of Carrier that they could deduct the amount of earnings which he would have received from the employment as Houseman, which was available to him, but rejected; while the Brotherhood contended that there was no amount properly deductible, as there were no earnings from other employment. As a result of dispute as to that item, the matter was again referred to the Express Board and by it remanded back to the parties in Decision E-1631.

The award of Express Board of Adjustment No. 1 is binding on us. While other considerations have been urged, the claim in fact discussed on the property, and we think properly brought here, is solely that of interpretation and application of the award of said Board. At the time of making its award, that Board was presumably acquainted with the facts as to Claimant's subsequent employment, since the award was not handed down until February 28, 1948. But the award did not order deduction of the amount which he might have earned, but only "earnings from other employment." That term seems to be unambiguous and plain of application here.

Further, the opinion of the Board, as written by the Referee, said: "The evidence, however, does disclose that, if the disqualification in the General Agent's decision was allowed to stand, there was no position at the Shreveport Agency for which Clerk-Driver Law was trained after 25 years of continuous service, and this management knew or should have known. The correspondence in the field reveals his efforts to renew his employment by undertaking to bid in several bulletined positions while this claim was being advanced. Clerk-Driver could not qualify for further employment with the Agency at Shreveport as long as the disciplinary action remained in effect." The declaration in the award that the disqualification by the Carrier left open to Claimant no position at the agency for which he was trained, and that it was equivalent in effect to dismissal, implies a justification of Claimant's attitude in refusing to accept other employment such as was tendered him, and explains, we think, the reasoning of the Board which resulted in its holding that there should be deducted not his potential earnings, but only his earnings actually received, if any, from other employment.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

Carrier has not performed nor tendered payment pursuant to Decision E-1581 of Express Board of Adjustment No. 1.

AWARD

That Claimant be compensated for wage losses from and including August 29, 1946, to date of his reinstatement April 26, 1948, deducting therefrom the value of the express shipment which was lost as a result of his negligence.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 12th day of June, 1953.

DISSENT TO AWARD 6239, DOCKET CLX-6216

This Award compounds error by ignoring evidence that the availability of other positions was not argued in the case covered by Decision E-1581 of Express Board of Adjustment No. 1, and by ignoring the principle well established by Awards of this Division that an employe improperly deprived of employment is obligated to secure other employment in order to mitigate damage.

For the above reasons we dissent.

/s/ W. H. Castle

/s/ R. M. Butler

/s/ E. T. Horsley

/s/ C. P. Dugan

/s/ J. E. Kemp