Award No. 12242
Docket No. DC-13914

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Dining Car Steward Albert Moll for reinstatement with seniority and vacation rights unimpaired, for four (4) hours at the steward's rate of pay, for August 7, 1962; and for all dates not permitted to work, August 7, 1962, and subsequent dates of record handled with the Carrier, in accordance with the Time Limit on Claims Agreement.

OPINION OF BOARD: Claimant was dismissed from service primarily on the testimony of a dining car inspector to the effect that a passenger in a lounge car under Claimant's supervision had been served through an oral, rather than written, order which constituted a rules violation. The other charges filed against Claimant related, in most part, to his alleged failure to comply with those rules applicable to the record-making or bookkeeping functions of his job.

The evidence here shows that with regard to the service incident mentioned above, other employes — a waiter and a cook — were directly involved in the transaction. Despite a timely request made by the Organization for their appearance at the hearing, the Carrier's officers refused to call the waiter and cook as witnesses. The Board finds this refusal was substantial and prejudicial error. The testimony of these witnesses on the crucial point of Claimant's responsibility for what occurred was essential to fulfill the requirements of a "fair and impartial investigation" under Rule 18 of the Agreement, particularly in view of the damaging testimony of the only other witness who had been present at the time the incident happened — the dining car inspector.

Having found that this Carrier failed to meet the requirements of Rule 18 and that, therefore, Claimant was not given a fair and impartial trial, the Board will sustain this claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1964.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 12242

Docket No. DC-13914

NAME OF ORGANIZATION: Brotherhood of Railroad Trainmen.

NAME OF CARRIER: Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

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

The requested interpretation stems from the Carrier's deduction of certain earnings by the Claimant in other employment from the amount claimed as "time lost" under this Division's sustaining Award 12242.

No question was raised by either party on the property or before the Board as to the proper measure of damages to be assessed and imposed in the event a rules violation was found. Such omission, however, is no bar to its being considered here. The Agreement alone is controlling on the question of damages and since that Agreement at all times is in evidence before the Board, we retain jurisdiction to consider and interpret all of its provisions absent evidence of waiver by one or the other of the parties thereto. No such evidence has been presented. What is requested is an interpretation of the Agreement and the Agreement itself may not be considered as "new" matter or evidence. (See our Awards 8797, 8857, 8886, 10098, 10494 and 11644). Therefore, the issue is properly before the Board.

What constitutes the proper measure of damages for breach of a contract for personal services is a question of law. The general rule of law is that the proper measure is the difference between what the employe would have earned under the contract and what he may have earned in the exercise of ordinary diligence in some other employment. The rule applies whether or not the contract provides for the payment of "all time lost" as here, or for "wages lost", "earnings lost" or any similar contract language. (See Award 1638, Second Division; Award 15765 First Division, Referee Carter.) The rationale of the courts in requiring mitigation of damages seems to be that the employe who suffers a loss from the breach of the Agreement should be compensated therefor in the amount needed to make him whole, but not to the extent that he would receive a windfall amounting to a penalty payment for such breach.

While the numerous Awards and interpretations of the Board dealing with the issue of deduction of outside earnings are wholly inconsistent, and,

therefore, not persuasive, the courts have consistently applied the aforesaid common law rule of mitigation of damages for breach of contract. The Board may not properly disregard its obligation to observe recognized principles of law and to render decisions in harmony therewith. To hold through this interpretation that the language of the Agreement in evidence here bars the deduction of Claimant's earnings in other employment from the amount claimed, would be to disregard a sound rule of law governing the measure of damages. That we may not do so should be apparent. For to disregard sound and established principles of law would surely result in the issuance of awards rendered unenforceable for failure to meet legal standards and requirements.

In view of the foregoing, the Division finds the Carrier's deduction of Claimant's earnings in other employment during the time he was held out of service was not improper.

Referee William H. Coburn, who sat with the Division, as a neutral member, when Award No. 12242 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of April 1965.

LABOR MEMBER'S DISSENT TO INTERPRETATION NO. 1 TO AWARD 12242 — SERIAL NO. 210

Interpretation No. 1 to Award 12242 is in error.

In First Division Award 11670, among many others, the functions and limitations of the National Railroad Adjustment Board were clearly defined as follows:

> "The National Railroad Adjustment Board, with its four divisions, was created under the Railway Labor Act which states that its purpose is:
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> '. . . to provide for the prompt and orderly settlement of all disputes **concerning rates of pay, rules, or working conditions**; to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the **interpretation or application of agreements covering rates of pay, rules, or working conditions.**' (Emphasis ours.) Sec. 2.
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> and which provides that:
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> 'In case of a dispute between a carrier or carriers and its or their employes, arising out of grievances or out of the **interpretation or application of agreements concerning rates of pay, rules, or working conditions,** it shall be the duty of the designated representative or representatives of such

carrier or carriers and of such employes, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held.' Sixth. (Emphasis ours.)

and that:

'The disputes between an employe or group of employes and a carrier or carriers growing out of **grievances** or out of the **interpretation or application of agreements** concerning **rates of pay, rules, or working conditions**, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board **with a full statement of the facts** and all supporting data bearing upon the disputes.' Section 3 (i). (Emphasis ours.)

It is obvious from the foregoing that this Board was not intended to function as a civil court and that its jurisdiction does not extend beyond grievances involving rates of pay, rules, or working conditions and interpretations of agreements covering the same. Presumably, Congress, in enacting this legislation, contemplated that disputes involving such matters could be readily settled by reference to custom or practice on the property or to other undisputed facts within the knowledge of both the employe and the carrier involved, and by reference to the governing schedules. That the Board's functions are limited to such issues is indicated by the fact that it does not possess the power to subpoena witnesses; to require their testimony under oath; or to subject them to cross-examination in connection therewith; and by the further fact that there are no provisions in the Act for formal pleadings, for court rules of practice and procedure, for the elimination of hearsay and other secondary evidence, or for the determination of disputed fact issues by a fact-finding tribunal.

The report of the Attorney General's Committee on Administrative Procedure and Government Agencies with reference to this Board, dated January 22,1941, summarized these limitations as follows:

'*Whether the Board is engaged in "adjudication" or in* adjustment, or arbitration, is a controverted question because of its special characteristics.' (Page 185.)

'The existing hearing method of the Board presupposes that facts will not be found on the basis of direct testimony. Indeed the Board has no power to subpoena witnesses and has developed no machinery whereby they might be had. . . .' (Page 187.)

'In any event it is generally agreed that fully ninety-five percent of the cases involve no pivotal issues of fact which cannot be easily resolved without the formal taking of evidence.' (Page 187.)

From the foregoing it follows that this Board does not possess the jurisdiction or machinery to determine **general issues of damages** involving matters **outside the property,** proof of which ordinarily would require testimony of witnesses, or other formal evidence not available on the property, and the presence of a fact-finding tribunal to ultimately determine such issues upon evidence submitted in accordance with the strict rules applicable in civil litigation.

In civil actions for breach of employment contracts, the injured employe's measure of damages is **not** limited to his **loss of wages only.** Under modern doctrines, in addition thereto he may plead, prove and recover **special** damages arising from the breach of such a contract.

These general principles are expressed in 35 Am. Jur., Master and Servant, Sec. 54, p. 486, as follows:

> '. . . in view of the numerous matters which are to be taken into consideration by way of mitigation of damages, a disposition to repudiate "the contract price" as a formal rule of damages has made itself manifest, and would seem to be gaining in force. **It is, perhaps, more accurate to say that the measure of damages recoverable for breach of a contract of employment is the actual loss or damage sustained on account of the breach.** This takes into consideration wages which the employe has, or by the exercise of reasonable diligence could have, earned in other employment subsequent to his discharge. The employe is entitled to recover the amount of the stipulated salary or wages for the period during which he has served and prior to the termination of the employment, **and in addition thereto the loss sustained by being prevented from completing his contract, which consists of the loss of the value of the contract. He is entitled to full damages for the loss incident to the breach of his contract. . . .'** (Emphasis ours.)
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> 'Ultimately, in most cases, the amount of the damages is a question for the jury's determination with a view to all the facts and circumstances of the case.'

In **Id.** Sec. 55, p. 487, it is stated:

> **'In addition to the contract price or wages,** an employe suing for breach of a contract of employment may recover **special elements of damages,** where he properly pleads and proves such elements of damages and shows them to be within the contemplation of the parties at the time of making the contract of employment. . . .'
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> 'It is generally held that an employe wrongfully discharged is entitled to recover **the necessary and reasonable expenses incurred by him in seeking or in obtaining other employment. . . .'**
>
> **'Interest may be allowed in some circumstances in addition** to the amount of the plaintiff's salary or wages.' (Emphasis ours.)

Id. Sec. 57, p. 489:

> '. . . **all facts and circumstances** which go to show **a** reduction in the amount necessary to compensate the plaintiff *or account for injuries sustained by the breach of a* contract may be shown in mitigation of damages. . . .' (Emphasis ours.)

If a carrier has the right to present to this Board the issue of mitigation of damages, then under the same legal principles an employe should have the right to present issues involving not only his loss of wages, but, in addition, issues relative to such special damages as were sustained by him because of the breach of his employment contract. It would seem that this Board could not properly authorize mitigation of an employe's damages for breach of his employment contract, unless it first has permitted such an employe to establish all his damages, special and general, arising from such breach. But, as hereinbefore indicated, such general issues cannot be determined without the presentation of testimony, subjected to *cross-examination; without reference to factors and considerations* entirely outside of the property involved and the governing schedules; and without the presence of a fact-finding tribunal to finally determine the same.

As stated before, this Board is not equipped to so function. It is limited to determination of questions arising **on the property**, involving **undisputed facts** relative to rates of pay, rules or working conditions, and the construction of governing schedules with reference thereto. Such questions ordinarily can be determined on the property, or by this Board without the necessity of formal evidence or the testimony of witnesses. Undoubtedly it was established with such limitations to avoid technical rules of legal procedure and to form a medium for quick and final determination of thousands of railway labor controversies involving undisputed facts and established *agreements and practices. Any change from this character* would lead to delays, to technical procedure and rules, and in general would lessen the effectiveness of the Board as now constituted.

It is apparent from the foregoing that this Board's functions in **disciplinary** cases is necessarily limited to determining whether **undisputed** facts establish that an employe has been unjustly or arbitrarily disciplined in violation of his contract, and if so, to what extent such discipline should be modified or set aside. The relief accorded at times may require an employe's full reinstatement after his unwarranted discharge, with or without payment for lost time. The determination of these questions does not depend on factors or evidence outside the property and falls within the functions and powers of this Board under the language creating it.

By the same measure, this Board cannot determine further issues involving special damages sustained by a wrongfully discharged employe, or mitigation thereof, dependent upon facts often in dispute and relating to matters entirely outside the property involved."

In the instant case, the only question to be determined was the interpretation of the phrase "all time lost". That phrase has been interpreted as

contended for by the Employes in at least five interpretations involving discipline cases by this Division of the Board (Serials 10, 61, 77, 91, 93), and in more than two hundred Awards of the First Division of the Board. In addition to that, the First Division, **without the aid of a referee** has likewise decided fifty-five cases, all of which hold that the phrase "pay for all time lost" means that contended for by the Employes; that is, the full amount the employe would have earned had he not been held out of service and that deduction of outside earnings during the period of time the Employe was held out of service was not proper. This holding is contrary to the majority holding in the instant case; that "Awards and interpretations of the Board dealing with the issue . . . are wholly inconsistent. . . ." If such holding were true, it is patently inconsistent to rely on one isolated Award, Second Division 1638, as authoritative precedent to the exclusion of Awards cited by this Member of the Board in opposition.

It is readily apparent that some few referees involved in the question at issue have confused the functions of the National Railroad Adjustment Board with that of a court of law. A careful reading of the Railway Labor Act should remove any such confusion from the minds of those who apply what is commonly referred to as "principles of law", to the interpretation of collectively bargained labor contracts.

The controlling rule in the instant case is clear and unambiguous, reading as follows:

> "In case of suspension, dismissal or record entry is found to be unjust, the steward involved shall have the entry removed from his record and if suspended or dismissed he **shall** be reinstated and **paid for all time lost.**" (Emphasis ours.)

The Majority incorrectly holds that:

> "What constitutes the proper measure of damages for breach of a contract for personal services is a question of law. . . ."

Contrary to this holding, Interpretation No. 1 to Third Division Award 3011 correctly held:

> "The law recognizes that contracting parties may agree upon a different basis for determining their rights and liabilities than will be applied in the absence of such contractual provisions. See 17 Corpus Juris Secundum (Contracts Sect. 458) page 943. In harmony with the action of Courts in such instances, **this Board has likewise applied specific contractual provisions, to the exclusion of the common law rule.** See Award 3035." (Emphasis ours.)

It is well known, or should be, that this Board has no authority to add to, or detract from the clear and unambiguous provisions of a collective bargaining Agreement as was done in the instant case by, in effect, adding language thereto, which allows deduction of outside earnings.

In the light of the authority as set forth above, and other reasons, I most emphatically dissent.

H. C. Kohler
Labor Member