

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19871
Docket Number CL-29124

Irwin M. Lieberman, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**

PARTIES TO DISPUTE: (

(Western Weighing and Inspection Bureau

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (**GL-7271**)
that:

(a) The Company violated the Rules Agreement **effective September 1, 1949**, as amended, particularly **Rules 20, 21, 22, 23, 24 and 25**, **when** it assessed discipline of dismissal on Inspector Robert E. Donnelly at Des Moines, Iowa, on May 11, 1971.

(b) Claimant Robert E. Donnelly's record be cleared of the charges brought against him May 11, 1971.

(c) Claimant Robert E. Donnelly be restored to service with seniority and all other rights unimpaired and be compensated for wage loss sustained during the period out of service.

OPINION OF BOARD: Claimant, a Fruit and Vegetable Lose and Damage Inspector for the Company, had two years of service at the time of **the** incident involved in this matter. On April 15, 1971 he was instructed to begin his work day at printing company's office at **8:00 A.M.** (his normal work day was from **8:00 A.M.** to **4:30 P.M.**). He telephoned the office of his supervisor at **9:20 A.M.**, that morning indicating that he was sick; he had been observed reporting to the assigned place of work at **8:45 A.M.** and shortly thereafter leaving. He had been ill for part of the **previous** day.

On May 11th Claimant **was** suspended and charged as follows:

- "1. Failure to protect your assignment, April 15, 1971, between **8:00 A.M.** and **9:20 A.M.**
2. You were absent without authorization on the date and time above.
3. You were charged with insubordination for refusing to **acknowledge** my letters of April 20, 1971 and April **28, 1971.**"

Subsequent to the investigatory hearing Claimant was dismissed from **service.**

Petitioner first raises the issue of the fairness of the investigation, and appropriateness of the hearing officer serving in that capacity. It **must** be noted that these issues were not raised on the property and hence cannot be considered at this stage of the proceeding in accordance with the long **standing** practice of the Board; it should be noted in passing, however, that the record does not support the position taken by Petitioner in any event. An additional argument is made that the Company improperly introduced evidence at the investigation dealing with Claimant's past record. We have held that such information may not be used to determine guilt or innocence but is appropriate in consideration of the discipline to be imposed.

With respect to the charges themselves, we find that the **Company's** conclusion concerning the unauthorized absence **cannot** be challenged. The record indicates that Claimant's defense of illness does not adequately explain the lateness of the call to the office nor are the recollections of the **Company's witnesses** refuted. We conclude that there was substantial evidence in support of the conclusion reached.

On the issue of insubordination, however, we have a much more **ambiguous** situation. Claimant never received the letters in question, **until** May 11, 1971, but the record indicates that he was verbally informed of their contents previously. Whether or not Claimant's failure to pick up the **registered** letters was deliberate is conjectural; it is not conjectural, however, to view his verbal refusal to acknowledge the instructions as insubordinate. At best, his attitude towards supervision left something to be desired. **Therefore** we do find that the Company supported its charges to find a degree of insubordination on the part of Claimant.

As we have said on prior occasions, it is within the Board's province to determine "if the degree of discipline imposed was **reasonably** related to the seriousness of the proved offense" (Award 19797). Without condoning insubordination or unauthorized absences, we do not find that the facts in this case warrant the imposition of **dismissal** from service; the past record of Claimant does not support this **extreme** penalty either. (See Awards **11912**, 11457 and 14348 among others). Accordingly, we conclude that Claimant should be restored **to** service with all rights unimpaired but without back pay.

FINDINGS: 'She 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 ~~Employees~~ involved in this ~~dispute~~ are respectively Carrier and ~~Employees~~ 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 discipline imposed was excessive.

A W A R D

Claimant ~~shall~~ be restored to service with all rights unimpaired but without ~~compensation~~ for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 27th day of July 1973.

CARRIER MEMBERS' DISSENT TO AWARD 19871, DOCKET CL-20124

(Referee Lieberman)

For the **reasons** fully stated in the memorandum which the Carrier Members submitted to the Referee during the panel discussion of this case, the claim is clearly invalid and should have been denied.

We dissent.

G I Maylor

W M Bradwood

A L Carter

W. B. Jones

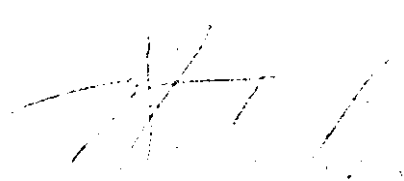
G M Youkin

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT TO AWARD 1987L (DOCKET CL-20124)

Disputes submitted to this Board are adjudicated upon consideration of the facts and evidence in the official record as detailed and explained by the parties to the dispute, not upon Carrier Member Memoranda.

Carrier Member Memoranda, regardless of length or sophistry, are not a substitute for, nor do they change, either the record or the facts.

The "Dissent" has no bearing on the validity of the Award.



J. C. Fletcher,
--Labor Member
8-28-73