

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23099
Docket Number MW-23189

A. Robert Lowry, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(Consolidated Bail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of **Trackman J. L. Guarnieri, Jr.** for alleged **insubordination** and fighting **with** a company **employee** was without **just** and sufficient cause, arbitrary, capricious, unwarranted and an abuse of justice and discretion (**System** Docket 385).

(2) **Trackman J. L. Guarnieri, Jr.** be reinstated with seniority, vacation and all other rights unimpaired, **his** record be cleared **and** he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Mr. J. L. Guarnieri, Jr., the Claimant, was employed as a **trackman** by the Carrier and was assigned as **the** "backhoe" operator for the gang. Claimant was **charged** with insubordination and for **fighting with** a company **employee** while on company property, both incidents occurring on October 4, 1978. Claimant was removed from **service** as of that date. After two delays a trial **and/or investigation** was held on November **3 and 6, 1978.**

Study of **the** record supports Carrier's position **that** proper and timely notice was given the parties as required by **the** Agreement. **A copy** of the transcript of the trial was made a part of the record and it reveals that Claimant was given a fair and impartial hearing. **He was** given full opportunity of representation by his duly accredited representative, presented witnesses in his behalf and was **permitted to** question Carrier's witnesses.

On October 4, 1978 Claimant was assigned to a gang under the supervision of Acting **Foreman C. Cherry**. **The** gang **was** assigned to **cribbing**, removing dirt between the **ties**, and installing switch ties at **Longs Crossover**. About 10:00 A.M., the record **is** not clear as to what occurred prior to that time, Claimant was sitting in the **bus** and Acting Foreman Cherry instructed Claimant to get out of the bus and assist with the cribbing and other work being performed at **that work** location. Claimant refused to do so stating that he had **instructions** to pick up the backhoe located **some** distance from Longs Crossover. The record is confusing as to when or who gave **Claimant** the orders to pick up the backhoe. Y-

X-2
Irrespective, **Claimant** was basically a "**trackman**" and was working under the direct **supervision** of the **Acting Foreman**. When he failed to **respond** to instructions, as the record clearly shows, he was guilty of insubordination. The record shows later in the day that the backhoe would not be needed until after the **cribbing** had been completed, indicating clearly that Cherry was well within his jurisdiction to require **Claimant** to perform as a **trackman** until the backhoe was needed. The controlling factor is that the Claimant was working under the direct supervision of Cherry and he failed to obey a lawful order.

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The charges of **fighting** with a company **employee** while on company property poses **some** problems. The evidence produced in the trial was conflicting; however, the Board concludes, after carefully **studying the** entire record, that Claimant's argument that Cherry was the **aggressor outweighs** the Carrier's argument. [While this Board does not condone fighting between **employees** on the property, it cannot, in view of the evidence produced, condemn the **Claimant** for **defending** himself.] Testimony supports Claimant's claim that he attempted to avoid the onslaughts by Cherry but was unsuccessful **and** had to defend himself.

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The Board held a hearing before this Referee on October 14, 1980 but neither the Claimant nor the Carrier was present.

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While the Board finds Claimant guilty of insubordination, we **find** the punishment excessive. We, therefore, award reinstatement of Claimant **with** full seniority and all other rights unimpaired, but with a one-year penalty without back pay, and we further award compensation for wages **lost, less** outside earnings, **commencing** October 5, 1979 **and** continuing until reinstated.

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 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

Claim sustained in accordance with the Opinion.

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By Order of **Third** Division

ATTEST: *A.W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1980.