NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29471
Docket No. MW-29858
93-3-91-3-226

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employes
(
(CSX Transportation, Inc. (former
(A&WP-WofA-AJT-Georgia Railroads)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Gang Cook E. W. Taylor for alleged violation of CSX Transportation Safety Rule 26 on September 4, 1990 and for alleged violation of CSX Transportation Rule 500 on September 10, 11 and 17, 1990 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.

(2) The Claimant shall be reinstated in the Carrier's service with seniority an all other rights unimpaired; he shall have his personal record cleared of the charges leveled against him and he shall be made whole for all wage and fringe benefits loss suffered as a result of the Carrier's actions."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Prior to his dismissal, Claimant was employed as a Cook for Gang No. 6A28. Previously, the Claimant was found guilty of violating Operating Rules 500 (absent without permission) and 501 (insubordination), and was dismissed. On appeal, a Public Law Board reinstated the Claimant without backpay on a "last chance" basis.

By letter dated September 7, 1990, the Claimant was charged with violating Safety Rule 26 for an incident which occurred on September 4, 1990, when the Claimant's girlfriend was found in his assigned camp car. Safety Rule 26 provides:

> "Only authorized persons may be permitted in buildings, around repair tracks and facilities or other railroad property."

On September 10, 11, and 17, 1990, the Claimant was absent from service as a result of automotive problems with his personal vehicle. Although the Claimant did not have the telephone numbers for his Roadmaster, Assistant Roadmaster, or Foreman, the Claimant telephoned the Assistant Cook and/or left a message for him to advise the Foreman of his intended absence and the reason therefor. By letter dated September 18, 1990, the Claimant was charged with violation of Operating Rule 500 for failing to protect his assignment as Cook and failing to obtain permission to be absent from the proper authority. Rule 500 provides in relevant part:

> "Employees must not absent themselves from duty...without permission from their supervisor."

As a result of the facts adduced during the separate Hearings conducted on September 20, 1990, the Carrier dismissed the Claimant.

The Organization contends the Claimant was disciplined in violation of the Agreement because the decision was not timely rendered. Rule 39, Section 2 states "a decision in writing will be rendered within ten (10) calendar days from the close of the hearing." The Hearings were held on September 20, 1990, and the decisions were issued on October 1, 1990. The Agreement obligates the Carrier to render a decision within ten days of the date of the Hearing. (Fourth Division Award 1995). Time limits are to be construed strictly and they are two-edged swords which cut equally whether to work a forfeiture against an employee or to invalidate action taken by the employer. (Third Division Award 2960). The ten days was fixed by the parties. It is not within the authority or competence of this Board to substitute for it some other arbitrary number of days. (First Division Award 16366). The Carrier has only ten days to render a decision. Failing to do so, it had the effect of exonerating the Claimant on the charge preferred (Third Division Award 24623).

The Carrier concedes it was late in rendering a decision because two weekends intervened. It argues the requested remedy is beyond the scope of the Agreement, and Rule 39, Section 2 lacks a specific penalty that nullifies the entire disciplinary proceeding

for failure of the Carrier to render a decision within ten days. The Carrier asserts it is a basic principle of the common law of damages that absent any specific penalty provision, a remedy for breach of contract must be limited to actual proven damages. If the Rule provides no penalty for failure to comply strictly with its terms, the failure to render the decision in the time allotted is not fatal to the Carrier's position absent some showing of prejudice to the Claimant. (First Division Awards 15579 and 13845).

The Carrier further argued that technical violations do not vitiate the entire discipline unless there is a penalty provision. (Third Division Award 20423). Agreements of this kind, regulating the employer-employe relationship must be given a reasonable, workable construction and not construed so narrowly as to defeat justice. (Second Division Award 2466). If the Agreement imposes a penalty for its violation, we may reasonably assume that the parties intended that its provisions be followed, and the provisions are construed as being mandatory. If the Agreement imposes no penalty and its provisions are not followed, the provisions are directory, not mandatory. (Third Division Award 16172).

The Carrier also notes the damages for procedural violations must be limited to the time of delay. (First Division Award 16007, Second Division Award 6360, Third Division Awards 19842, 14348, 11775). The remedy for violation of that provision is damages for any delay that may have occurred, not reinstatement with an unassailable record or damages for an indeterminate period on the theory that the proceedings otherwise properly held were a nullity. Atlantic Coast Line v. BRAC, 210 F.2d 812 (4th Cir. 1954).

The Organization further maintains the decision of the Hearing held on September 20, 1990, was improperly rendered by the Division Engineer. The Claimant was denied due process, because, although the Division Engineer was not present at the Hearings, he rendered the decision. (Third Division Award 17901).

The Organization asserts the Carrier failed to present any evidence to support its position. When the Carrier charges an employee with a Rule violation or an act of negligence, the burden of proof is upon the Carrier to prove the charge. (Third Division Awards 14120, 13306). The Carrier must show 1) what the complete content of the cited Rules were, 2) that those Rules were transmitted to the Claimant and/or that he had full knowledge of their content, and 3) that he violated the Rules. Although a portion of Safety Rule 26 and Operating Rule 500 were cited within the charge and Hearing notice, the complete content of the Rules

was not divulged at either Hearing held on September 20, 1990. Therefore, the Carrier could not prove the Claimant violated the Rules. The Third Division held: "It cannot be ascertained which of Claimant's activities could have violated provisions of Rule 'G' because the contents of the Rule do not appear in the record." (Award 26060)

The Organization finds no basis for discipline in connection with the charges concerning an unauthorized individual found on the Claimant's camp car because Claimant was not present at the time the unauthorized person was seen, Claimant denied any knowledge thereof, and the Carrier failed to present any evidence to substantiate or corroborate the testimony of the Assistant Roadmaster. In Third Division Award 24336, the Board held: "A review of the whole record reveals that the Carrier did not make the case and failed in its burden of proving a violation of the rules stated...for want of clear proof the claim will be sustained." (Third Division Awards 14120, 20048).

In response, the Carrier notes "once charged and accused of a violation, let not the claimant or his representative fail to prepare their defense to said charge, by ignoring their procedural rights under the controlling agreement to present witnesses in support of their defense and other credible evidence." (Fourth Division Award 3578). The Claimant in this case offered no corroborating evidence.

The Organization notes the Claimant's absences on September 10, 11, and 17, 1990, were the direct result of car trouble. The Third Division has consistently held that absences as a result of car trouble are considered justifiable cause. (Awards 19589 and 20198). Even if discipline was appropriate, dismissal was arbitrary, capricious, and extremely harsh under the circumstances. It was common knowledge that Claimant was experiencing problems with his personal vehicle, and he was actively trying to repair his vehicle and meet is obligations to the Carrier. Although the Claimant was not provided with the telephone number of his Foreman until after the absences, the Claimant attempted to notify the Carrier of his absences by telephoning the Assistant Cook and/or leaving a message for him to notify the Foreman of his absences and reasons therefor.

The Carrier argues the Board has consistently held that Carriers are entitled to reliable attendance from its employees, and it has declined to interfere with disciplinary action imposed by a Carrier against employees who are absent without proper authority. (Second Division Awards 9576, 9072, 6710, 9471 and 8796; Third Division Award 24552). Further the Carrier notes the Claimant had been reinstated on a last chance basis.

With respect to the substantive charges, this Board finds that there is sufficient probative evidence in the record to establish that the Claimant is guilty of the charge against him. The Carrier demonstrated the Claimant violated Rule 26 for permitting an unauthorized person in the camp car. The Carrier demonstrated the Claimant violated Rule 500 by failing to obtain permission from his immediate supervisor to absent himself from his duties as Cook on September 10, 11, and 17, 1990. In addition, the Carrier demonstrated sufficient persuasive precedent to excuse the delay in rendering the discipline, absent a provision in the Agreement specifying a remedy.

With respect to the disciplinary action, the Board will not set aside discipline imposed by a Carrier unless it is unreasonable, arbitrary, or capricious. Third Division Award 26160. In this case, the Claimant had been reinstated on a last chance basis. As a result, the violation of Rules 26 and 500 justifies dismissal.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of January 1993.

MARKS
3rd Div Kept
6-7-23

LABOR MEMBER'S DISSENT
TO
AWARD 29471, DOCKET MW-29858
(Referee DiLauro)

The Majority denied this docket in honoring the palpably erroneous presumption that Rule 39, Section 2 is "directory" and not "mandatory" in nature. For ready reference, Rule 39 reads:

"RULE 39

DISCIPLINE AND GRIEVANCES

Section 1

An employee who has been in the service sixty (60) calendar days or more will not be disciplined or dismissed without a proper hearing as provided for in Section 2 of this Rule. He **may**, however, be held out of service pending such hearing.

Section 2

An employee against whom charges are preferred, or who may consider himself unjustly treated, shall be granted a fair and impartial hearing by a designated official of the Company. Such hearing shall take place within ten (10) calendar days after notice by either party. Such notice shall be in writing, with copy to General Chairman, and shall clearly specify the charge or nature of the complaint. He shall be given reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented by the duly accredited representatives of the employees. All witnesses except the one testifying will be excluded from the hearing both before and after testifying. No testimony or statements will be admitted in evidence at the hearing except such as may bear directly upon the precise charge against the employee, except that the official service record of the employee involved will always be admissible. No evidence or statements will be admitted to the record of hearing, or used in assessing discipline, except such as have been introduced at the

"hearing, and which have been subject to cross-examination. A decision in writing will be rendered in writing within ten (10) calendar days from the close of the hearing. A copy of the transcript of evidence taken at the hearing, and a copy of the decision, will be furnished the employee affected and his representative.

Section 3

If the decision be in favor of the employee, his record shall be cleared of the charge, and if suspended or dismissed, he will be reinstated to his former position with seniority unimpaired and shall be compensated in the amount he would have earned had he continued in the service less the amount earned in other employment.

Section 4

If the decision is not satisfactory, the case may be appealed provided written notice of appeal is given the official rendering the decision within ten (10) calendar days thereafter. The conferences on appeal will be held within fifteen (15) calendar days from date of written notice of appeal. The right of appeal in the usual manner up to and including the highest official designated by the Railroad to whom appeals may be made is hereby established.

If the charge against the employee is sustained and he is dismissed and later reinstated, the manner of his exercising his seniority will be subject to agreement between the General Chairman and the Management.

Section 5

At the hearing or on appeal, the handling of the case must be by the employee affected or by one or more duly accredited representatives as defined in Rule 49.

Section 6

Whenever charges are preferred against an employee, they will be filed within ten (10) days of the date violation becomes known to Management. Of course, this

> "would not preclude the possibility of the parties reaching agreement to extend the ten-day limit."

What is abundantly clear from an uncomplicated reading of the above-quoted rule is that an employee who has been in service sixty (60) calendar days or more will not be disciplined or dismissed without a proper hearing as provided for in Section 2 of said rule. What is equally clear from an uncomplicated reading of the above-quoted rule is that the words "will" and "shall" are mandatory, not directory. In support of our position in this regard are Third Division Awards 11225, 12092, 12397, 12632, 16799, 18352 and 23482 which are but a mere sampling of the plethora of decisions of this Board which held to the effect that "will" is **MANDATORY** vis-a-vis "directory". See also Third Division Awards 10852, 13097, 13721, 13959, 14204, 17947, 22258, 22898, 23459, 23496, 25465, 25888, 28133 and 28927 which held to the effect that "shall" is **MANDATORY** vis-a-vis "directory". See also awards concerning "shall" and "will" relative to the time limits for claims handling which also support our position and are so numerous as to preclude the necessity of citation herein. Moreover, it is abundantly clear that where the parties intended for the contractual provisions of Rule 39 to be permissive and/or directory, the word "may" appears.

The salient point here is that the Majority's findings in Award 29471 are plainly grounded on an erroneous premise.

In the dispute which precipitated the award in question, the Carrier conceded its nonfeasance, i.e., that its decision of discipline was rendered outside the specifically stipulated ten (10) day time limits agreed to by the Parties in Rule 39, Section 2. Therefore, from an uncomplicated reading of the record of this case, due process in accordance with the provisions of Section 2 of Rule 39 did **NOT** occur. However, instead of sustaining the claim based on the Organization's properly presented procedural argument, the Majority ignored the literal, common and ordinary meaning of the above-quoted Rule 39 and improperly considered the merits of the discipline. Moreover, as if to add insult to injury, the Majority found the Carrier's stated reason for late issuance of its disciplinary decision remarkable, i.e., that two weekends had occurred within the ten (10) calendar days following the close of the hearing involved. In other words, the Majority found the Carrier's view concerning two (2) Saturdays and two (2) Sundays noteworthy, as if those days were something other than calendar days when it came to rendering a decision of discipline pursuant to Rule 39, Section 2. Obviously, the Carrier's stated reason for its

admitted violation bordered on the absurd. The point is, the Majority modified the agreed to language of Rule 39. A modification which finds no essence in the Agreement. Inasmuch as it is a fundamental axiom that the Board is without authority to amend or modify the Agreement, it is crystal clear that the Majority exceeded its jurisdiction by adding a condition to the Agreement in this instance and rendering Rule 39, Section 2 ineffectual. The condition which the erroneous "directory" premise led the Majority to devise was that the Carrier's violation had not prejudiced the Claimant. While not altogether new, this conclusion runs contrary to the clearly predominant view of arbitral authority with regard to the identical contractual language, including substantial and recent precedent involving this Carrier and on this property. In this instance, the Majority displayed naivete in departing from both time honored and recent decisions of arbitrators well-versed in the railroad industry. The findings demonstrate conclusively that the Majority attempted to look behind the clear contractual language of Rule 39 to fashion its anomalous brand of industrial justice. Such maverick views of individualized industrial justice violated a hornbook principle of How Arbitration Works (Elkouri, et al.) and rendered the findings palpably erroneous and of no precedential value whatsoever.

To emphasize just how wrongheaded Award 29471 is, we invite attention to a sampling of the awards which considered the same issue, the same contractual language and which sustained the claim for the Employes. The below listed sampling of such awards represents the mainstream, predominant view of the Board on this issue:

First Division Award

16366 (**Daugherty**) Apache Railway

Third Division Awards

2590 (**Blake**) SPW
3502 (**Douglas**) Pullman
3697 (**Miller**) TRR
3736 (**Wenke**) TRR
5472 (**Carter**) ICG
8160 (**Bailer**) NYC
8714 (**Weston**) MP
10035 (**Daly**) MP

Public Law Boards

2960 (**Vernon**) CNW, Award 3
3397 (**J. Sickles**) ICG, Award 69
1844 (**Eischen**) CNW, Award 19
1844 (**Eischen**) CNW, Award 28
1844 (**Eischen**) CNW, Award 58

Second Division Award

2364 (**Carter**) NP

Third Division Awards (cont)

11019 (**Ray**) MP
14496 (**Rohman**) Valdosta Southern
14497 (**Rohman**) Valdosta Southern
19796 (**J. Sickles**) DTS
21040 (**J. Sickles**) CNW
21675 (**Blackwell**) BN
21873 (**Zumas**) BN
23553 (**Dennis**) Belt Railway

Public Law Boards (cont)

1844 (**Eischen**) CNW, Award 62
1844 (**Eischen**) CNW, Award 79
1844 (**Eischen**) CNW, Award 80

More importantly, in addition to the above-cited awards, we invite **PARTICULAR** attention to awards involving this issue and this Carrier (and/or former properties of this Carrier) which sustained the position of the Employes:

Third Division Awards	Fourth Division Awards
21996 (J. Sickles) L&N	**4211 (Scheinman) B&O**
24623 (Silagi) B&OCT	**4295 (Muessig) SSY**
29161 (Fletcher) SBD	**4662 (Fletcher) CSX - Nashville Terminal**

Special Board of Adjustment

1037 (Meyers) A&WP, Award 29

Typical thereof are **Third Division Award 29161 (Fletcher)**, rendered **April 3, 1992**, which held:

> "The record before the Board supports the contentions of the Organization that Carrier was late in rendering its decision following Claimant's Investigation. Accordingly, the Claim will be sustained without consideration of the merits of the matter.
>
> A W A R D
>
> Claim sustained."

and **Award 29 of Special Board of Adjustment No. 1037 (Meyers),**

rendered **April** 13, 1992, which held:

"Claimant was charged with several rule violations including Operating Rule 501, and CSX Transportation Rules 40, 920, and 922 in connection with charges covering dishonesty, making false statements concerning facts under investigation, and failure to immediately report an on-the-job injury. The hearing into the charges took place on October 31, 1991. Subsequent to the investigation, the Carrier dismissed the Claimant from service on November 18, 1991.

This Board has reviewed the file and we discover that Rule 39 states in Section 2 that:

> **...A decision in writing will be rendered within ten (10) calendar days from the close of the hearing. A copy of the transcript of the evidence taken at the hearing, and a copy of the decision, will be furnished the employee affected and his representative.**

In this case, the decision in writing was not issued by the Carrier until eighteen days after the hearing. Since the rules require that a written decision be issued within ten days, the procedural rights of the Claimant were seriously violated.

This Board hereby orders that the Claimant be reinstated to service upon successful completion of a return-to-duty physical and he be compensated for any time lost from November 7, 1991 which is ten days following the date that Claimant was approved to return to duty with no restriction following the examination by his personal physician.

Additionally, Mr. Dudley's personal record shall be cleared of any reference to this incident.

"AWARD

Claim sustained in part in accordance with the above findings."

Juxtaposed to the **THIRTY-THREE** (33) awards cited above, which decided disputes involving specific time limits for a carrier's decision of discipline (seven of which involved this Carrier) which found them to be **MANDATORY**, is the Majority's findings in this instance. We are inexorably led to conclude that there is *something radically wrong with this picture, i.e.,* **Award 29471.**

However, support for the Organization's position does not stop at decisions involving this Carrier's disciplinary decisions rendered outside the contractually mandated time limits. Support is also found in decisions involving this Carrier's violations of the contractually mandated time limits for providing notice of an investigation, holding investigations and providing transcripts of investigations. For example:

First Division Awards	Third Division Awards
318 L&N	19275 SBD
5555 Atlanta & St. Andrews Bay	23539 SCL
20711 B&O	24925 C&O
	26772 C&O

The above-cited awards involving this Carrier (and/or its former properties) sustained the mandatory time limits and the position of the Employes.

Unfortunately, the Majority's erroneous findings did not stop at illegally altering the language of the Agreement. The Majority compounded its error by applying principles of "common law" while citing Atlantic Coast Line v. BRAC, 210 F.2d 812 (4th Cir. 1954) with favor. However, "common law" predates industrial labor relations by some five or six hundred years and has no valid application to disputes of this nature. Notwithstanding, the Majority applied them to this case in the absence of a specific penalty provision or express remedy within the Agreement. In this connection, we invite particular attention to the Labor Member's Dissent to Award 22194, which held:

> "In Union Pacific vs. Price, 360 U.S. 601 (1959), the Court held that an employe who had received an adverse decision in pursuing his claim before the Board could not maintain a common-law action for damages on the same issue.
>
> In Pennsylvania Railroad vs. Day, 360 U.S. 548 (1959), the Court held that a retired employe could not maintain action in federal court relative to time claims filed during his active work period and that the Adjustment Board has exclusive primary jurisdiction.

"In Brotherhood of Locomotive Engineers, et al. vs. Louisville and Nashville, 373 U.S. 33 (1963), the Court held that the union could not strike to enforce an Adjustment Board award.

In Gunther vs. San Diego & Arizona Eastern, 382 U.S. 257 (1965), enforcing First Division Award 17646 (and Interpretation) wherein the Carrier contended (1) that no rule required the appointment of a medical board and (2) that the decision of its chief surgeon was not subject to review, the Supreme Court said, as to (1) above:

> 'The Courts below were also of the opinion that the Board went beyond its jurisdiction in appointing a medical board of three physicians to decide for it the question of fact relating to petitioner's physical qualifications to act as an engineer. We do not agree. The Adjustment Board, of course, is not limited to common-law rules of evidence in obtaining information....'

and as to (2) above:

> 'The District Court, whose opinion was affirmed by the Court of Appeals, however, refused to accept the Board's interpretation of this contract. Paying strict attention only to the bare words of the contract and invoking old common-law rules for the interpretation of private employment contracts, the District Court found nothing in the agreement restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians. Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason. We hold that the District Court and the Court of Appeals as well went beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement. As hereafter pointed out Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and

> "plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, acting on the Adjustment Board with their long experience and accepted expertise in this field.'

Andrews vs. Louisville and Nashville, 406 U.S. 420 (1972), held that the Adjustment Board is the exclusive forum for redress, overruling Moore vs. Illinois Central, 312 U.S. 630 (1941) which held that a railroad employe alleging wrongful discharge had an option to treat the discharge as final and file a common-law action for damages, or pursue the dispute before the National Railroad Adjustment Board.

The Court, in construing the Railway Labor Act provisions establishing the Board, relied in part upon testimony before Congressional committees which revealed the powers to be granted the National Board. It is clear that the Board was to resolve disputes involving interpretation of the collective bargaining agreements. The resolution of disputes included a remedy. One need not cite authority to know that issuance of declarations of rule violations would be an extreme exercise in futility without providing an appropriate remedy.

In both Price and Gunther, involving awards of this Board, the Court expressly stated that principles of common law, with reference to employment contracts, were not appropriate guidelines for interpreting collective bargaining agreements. In ORT vs. REA, supra, the lower courts applied common-law principles and held that the claimants were estopped by their individual agreements. Not so, the Supreme Court said, in upholding the award as rendered. See, also, J. I. Case Company vs. N.L.R.B., 321 U.S. 332, decided on the same day.

* * *

In Brotherhood of Railroad Signalmen vs. Southern Railway, 380 F.2d 59 (1967) the United States Court of Appeals, in a proceeding to enforce Third Division Awards 11733 and 12300, said:

"'Courts have uniformly held that Gunther precludes judicial re-examination of the merits of a Board award. Thus, beyond question, it is not within our province, or that of the District Court, to reappraise the record and determine independently whether Southern violated its obligations under the collective bargaining agreement when it denied Brotherhood members the opportunity to perform the work in question. Southern insists, however, that with respect to the monetary portions of the awards, the District Court acted not in conflict with Gunther in limiting Brotherhood to nominal damages on its findings that the records in both cases contain "no evidence of any loss of time, work or pay" by any of the employees who were designated to receive compensation for the lost work. In accepting this contention of Southern, the District Court relied on the common law rule that damages recoverable for breach of an employment contract are limited to compensation for lost earnings. The court reasoned that since Gunther permits judicial computation of the size of the monetary awards, it could exercise a discretion to allow Brotherhood nominal damages only where its members lost no time.

'This approach, however, completely ignores the loss of opportunities for earnings resulting from the contracting out of work allocated by agreement to Brotherhood members -- a deprivation amounting to a tangible loss of work and pay for which the Board is not precluded from granting compensation. Nothing in the record establishes the unavailability of signalmen to perform the work contracted out by the railroad. The vast number of factual possibilities which arise in the field of labor relations, and which must be considered by the Board in cases of this kind, clearly reflects the wisdom of the Gunther rule.'

"The principle enunciated in Signalmen has been consistently followed by this Board. Some Third Division awards are:

Award 15689 (Dorsey):

Claimants were assigned to do the signal work in the installation of automatic electrically-operated flashing-light highway crossing protective devices. Carrier contracted out the work of breaking concrete, digging, and lifting required on the project. Awards 9749, 13236, 14121, 15062, and 15497 were cited and it was held:

'... However, in those cases the Awards are in conflict as to whether Claimants were entitled to compensation for breach of the Agreement during a period they were on duty and under pay....

'In Award No. 10963 (1962)....(1) this Board was without jurisdiction to impose a penalty; (2) the common law of damages for breach of contract applied; (3) damages were limited to actual proven loss of earnings. In Award No. 13236 (1965), involving the parties herein, we reached the same conclusions; and citing Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, 338 F.2d 407 (C.A. 10, 1964), in which certiorari was later denied, 85 S. Ct. 1330, we awarded nominal damages.

[Gunther (1965) cited.]

'...on June 20, 1966 [Railway Labor Act amendment] was enacted. It provided for severe restraints on the scope of judicial review of awards of the Railroad Adjustment Board, all of which is spelled out in Brotherhood of Railroad Trainmen, et al v. Denver and Rio Grande, etc., 370 F.2d 866 (C.A. 10, 1966), cert. den. 87 S. Ct. 1315. In this second

"'Denver and Rio Grande case, involving the same parties and issue as in the 1964 case, supra, the court held "the Board's determination of the amount of the award is final absent a jurisdictional defect. The measure of the damages, like the application of affirmative defenses, offers no jurisdictional question."

'In the period between the Gunther case and the second Denver and Rio Grande case, the Supreme Court on December 5, 1966, handed down its Opinion in Transportation-Communication Employees Union v. Union Pacific Railroad Company, 385 U.S. 157, wherein it stated:

> "... A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common law concepts which control such private contracts [cases cited]. It is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate.... The collective agreement covers the whole employment relationship. It calls into being a new common law - the common law of a particular industry or a particular plant." (Emphasis ours.)

'Shortly thereafter, the Fourth Circuit.... decided Brotherhood of Railroad Signalmen of America v. Southern Railway Company. In that case the parties herein were parties therein. The same issues were raised relative to two of our Awards as in the instant case both as to the merits and damages - the record contained no evidence of any loss of time, work or pay by any of the employes who were designated in the Awards to receive compensation for the lost work. The court reversed the holding of the District Court that since Gunther permitted judicial computation of the size of monetary awards it could exercise a discretion to

> "'allow Claimants only nominal damages where they had lost no time. The court held.....
>
> 'In the light of the amendments of the Act and the judicial development of the law, cited above, we hold that when the Railroad Adjustment Board finds a violation of an agreement, it has jurisdiction to award compensation to Claimants during a period they were on duty and under pay.' (Interpolations ours.)

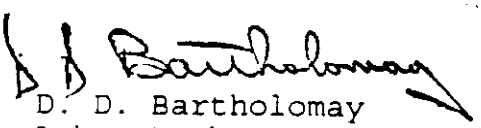
Award 16009 (Ives):

> 'The most recent judicial pronouncement on the issue of damages for contract violations where no actual losses were alleged or shown and the controlling agreement contains no penalty provisions is found in Brotherhood of Railroad Signalmen of America v. Southern Railway Company...(C.A. 4, decided May 1, 1967). Therein, the court disavowed the common law rule that damages recoverable for breach of an employment contract are limited to compensation for lost earnings and stated that this Board is not precluded from granting compensation for the loss of opportunities of earnings resulting from the contracting out of work under circumstances similar to those found in this dispute. We find the Fourth Circuit decision applicable in this case and will sustain the claim with certain modifications.'" (Emphasis in original)

Clear from a review of the foregoing is that no less an authority than the United States Supreme Court, in concert with a substantial number of arbitration awards, have found "common law" no impediment to sustaining claims for agreement violations. Suffice it to say that railroad arbitration is, or should be, a long way from the

days of kings, surfs and fiefdoms and common law is simply irrelevant. For all the foregoing reasons, I dissent.

Respectfully submitted,



D. D. Bartholomay
Labor Member