

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19488
Docket Number CL-19736

Alfred H. Brent, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express & Station Employees
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7081) that:

(1) Carrier violated the rules of the Clerks' Agreement when it dismissed Mr. J. F. Giovinazzo from the service of the company on September 27, 1968.

(2) Mr. J. F. Giovinazzo shall be paid one day's pay (at the rate attached to position of Janitor) for August 28, 1968, and each subsequent date, 5 days per week (except for the period September 18 to September 27, 1968) until he is restored to the service of Carrier with all rights unimpaired.

OPINION OF BOARD: On September 2, 1968 the claimant was charged with leaving Company property prior to termination of duty, falsifying work reports and neglect of duty on August 15, 1968 and August 27, 1968 and was given notice to appear for an investigation on September 5, 1968. At the request of the Local Chairman of the Clerk's Organization, these investigations were postponed until September 16, 1968. Investigations were held on September 16 and 17, 1968 and on September 27, 1968 the claimant was advised that he was dismissed from the Carrier's service.

The Organization claims that these investigations were improperly adjourned in violation of Rule 47(a) of the Agreement between the parties and that Rule 47(1) of the Agreement only provides for adjournments beyond the ten day period when there is mutual agreement between the Management and the General Chairman. The Organization contends that these investigations would have been timely held if they were held on September 12 and 13, 1968 rather than on September 16 and 17, 1968.

The procedural objections by the Organization are not impressive in view of the fact that the request for adjournment was initiated by the Local Chairman of the Clerk's Organization and was intended to assist in the presentation of the claimant's case.

The Carrier's complaint that the claimant was off the property on August 15 and August 27, 1968 is mitigated by the fact that the trainmaster had condoned similar offenses previously, on some 20 occasions. The Carrier had the responsibility of indicating to the claimant that it would no longer condone his being off the property during working hours. Since there was no warning to the claimant prior to his termination, the punishment is excessive.

"Awards of this Board, impressive in number, have held that the severity of punishment must be reasonably related to the gravity of the offense. We have repeatedly observed that misdemeanors do not require life sentences. Long experience has demonstrated that certainty of punishment is usually more of a deterrent to wrongdoing than the severity of the penalty." (Award #18016, Referee Quinn)

The Board therefore directs that the claimant be restored to service of the Carrier with seniority and other rights unimpaired and that his record indicate that he was given a two-weeks suspension without pay, for being off the property without permission. Under Rule #47(g) of the Clerks' Agreement the claimant would be entitled to receive lost wages, less the amount of earnings in other employment during the time out of service. He therefore shall be compensated for all lost wages, less 2 weeks unpaid suspension, and less any compensation earned by the Claimant in outside employment. Interest shall not be allowed.

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 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

That the Agreement was violated.

A W A R D

Claim to be modified in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 17th day of November 1972.

CARRIER MEMBERS' DISSENT TO AWARD NO. 19488
DOCKET NO. CL-19736

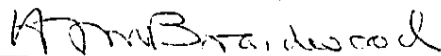
On April 11, 1967, Carrier offered to reinstate the claimant on a leniency basis with no pay for time lost; however, the offer was not accepted and Carrier declined the claim in its entirety.

This Board has, on numerous occasions, issued Awards to the effect that claimants had an obligation to mitigate damages and, by failing to accept Carrier's compromise proposal, they unnecessarily added to the damages.

The majority in this case unnecessarily compounded Carrier's liability.

The imposition of discipline is within managerial discretion and leniency is a matter properly within the province of the Carrier. Therefore, the majority clearly erred in substituting its judgment for that of the Carrier in the instant dispute.

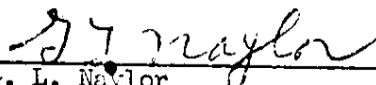
We dissent.



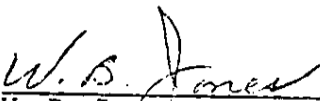
H. F. M. Braidwood



P. C. Carter



G. L. Naylor



W. B. Jones

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT TO AWARD NO. 19488 (CL-19736)

The Dissent of Carrier Members is neither justified nor supported by either the record or the Award. It is so palpably erroneous it requires correction. The Dissent seeks to impeach the Award on the ground that Carrier's so-called "offer" to reinstate Claimant on a leniency basis should have been construed as an opportunity for Claimant to mitigate damages which was refused at his peril. The acceptance by Claimant of Carrier's "generous offer" of "leniency" would have meant that Claimant would have lost approximately seven months' wages, and would have implied a recognition of substantial guilt on the part of Claimant. The offer was not unconditional, nor was it made with the understanding that the monetary portion of Claimant's claim could be pursued. It was properly rejected and the rejection does not create a failure to mitigate damages.

The second paragraph of the Dissent improperly states:

"This Board has, on numerous occasions, issued Awards to the effect that claimants had an obligation to mitigate damages and, by failing to accept Carrier's compromise proposal, they unnecessarily added to the damages." (Underscoring added).

Four Carrier Members signed this Dissent; one would think that at least one of the four would be in a position to provide at least a single Award Number covering the "numerous occasions" alluded to. Obviously, it is easy to generalize, but an attempt to impeach an Award should be precise and offer evidence to

support generalities. There are Awards on this matter; for instance, Award No. 13683, Referee Coburn. Here, it was held:

***Her acceptance of the June 29 offer would have constituted a request for leniency and, consequently, an admission of guilt which, in turn, would have furnished the Carrier with an air-tight defense to the claim when later considered by this Board."


Referee Brent's dismissal of Carrier's leniency argument in the instant case is compatible with Referee Coburn's conclusions cited above.

The third paragraph of Carrier Members' Dissent accuses the Majority of unnecessarily compounding Carrier's liability. This is sophomoric rhetoric attempting to blame someone else for one's own shortcomings. The Carrier created their own liability by preferring flimsy charges against a long-service employe, holding an imperfect investigation, and dismissing him for what, at best, would be considered a minor discretion. Carrier compounded its own liability by refusing to sensibly settle the matter on the property before the dispute was referred to this Board.

The final paragraph of the Dissent accuses the Majority of making a mistake and substituting our judgement for that of the Carrier. In dismissal cases of this nature, the Railway Labor Act clearly gives the National Railroad Adjustment Board complete and full authority to find a violation of the Agreement where the Carrier was obviously wrong. Obviously, if we were unable to do so, there would never be a need to bring a dis-

cipline case to this Board.

The Dissent is unsound, unsupported by authority, and is pure and simple gibberish. It detracts nothing from the decision in Award 19488.



J. C. Fletcher, Labor Member
December 19, 1972