

Award No. 3539

Docket No. 3455

2-MP-FO-'60

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Mortimer Stone when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Firemen and Oilers)**

**MISSOURI PACIFIC RAILROAD COMPANY
Gulf District**

DISPUTE: CLAIM OF EMPLOYEES:

1) That under the current agreement Laborer E. L. Lane at Palestine, Texas was unjustly dismissed from service on September 22, 1958 at Missouri Pacific Shops, Palestine, Texas.

2) That accordingly he is entitled to be reinstated to his former seniority rights with compensation for all time lost, retroactive to September 22, 1958.

EMPLOYEES' STATEMENT OF FACTS: Laborer E. L. Lane, hereinafter referred to as the claimant, was employed as such by the carrier on December 12, 1942 with a continuous seniority dating therefrom. His regular assigned hours were from 7:30 A.M. to 4 P.M. Monday through Friday, with Saturday and Sunday as rest days.

The claimant was summoned to appear for formal investigation on July 25, 1958 to determine facts, and place responsibility for his being insubordinate to Foreman W. A. Guillott about 9:30 A.M. on July 22, 1958.

At the request of the claimant and the employe representing him, this investigation was postponed, and subsequently held on September 15, 1958.

Mr. J. G. Sheppard, superintendent, notified the claimant on September 22, 1958 that he was dismissed from service account being insubordinate to his Foreman, Mr. W. A. Guillott.

This dispute has been handled with the proper officers with result that the highest designated officer has declined to settle it.

The agreement effective September 1, 1949 as subsequently amended, is controlling.

POSITION OF EMPLOYEES: It is submitted that the carrier produced no evidence in the transcript hearing conducted on September 15, 1958 which

"Claimant is entitled to be paid for all time lost November 22, 1949 to February 15, 1950, less any amount earned in outside employment during this period. The organization insists that the agreement prohibits the offsetting of earnings from other employment. The controlling provision is:

'If it is found that charges are not sustained, such employe shall be returned to service and paid for all regular time lost.' (Rule 35. Current Agreement)

This language does not preclude the deduction of outside earnings. Whether the rules provide for the payment of 'time lost,' 'wages lost,' 'earnings lost,' or any other similar statement, it makes no difference as they all can be reduced to a common denominator under the agreement. The rule applies even though the employe was paid a monthly salary. Whatever the method of calculating the compensation may be, a deduction of outside earnings is required unless there is a clear and definite intention that the adjustment is on some other basis. See Award 15765, First Division.

The foregoing is in conformity with the common law rule. It is in accord with the rulings of the state courts of the country. And, lastly, the Supreme Court of the United States recognizes the rule. See *Republic Steel Corp. v. Labor Board*, 311 U.S. 7; *National Labor Relations Board v. Seven-Up Bottling Co.*; 73 S. ct. 287. Making the employe whole simply means he shall suffer no loss. Consequently, the measure of damages for the breach of a collective employment contract is the amount an employe would have earned if he had not been wrongfully discharged, less what he did earn during the period of the breach. This conforms to the rule that the employe should be made whole and, at the same time, eliminates punitive damages which are not favored in law. It conforms to the legal holding that the purpose is to enforce agreements as made and does not include the assessing of penalties in accordance with its own notions to secure what it may conceive to be adequate deterrents against future violations. The power to inflict penalties when they appear to be just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former.

For the reasons fully set forth herein there is no rule support or basis for the request for the reinstatement of Claimant Lane and his request must therefore be denied.

FINDINGS: The Second 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 employe 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 were given due notice of hearing thereon.

After 16 years in service claimant was dismissed after investigation for being insubordinate to his foreman. His former foreman, under whom he had worked previously for 12 or 14 years, stated at the investigation that it had never been necessary to reprimand him and that he did his job as well

as any. Within thirty minutes after going to work for the first time under another foreman occasion was found to reprimand him, (in the foreman's manner of expression, to eat him out), for standing around. Claimant expressed his displeasure at the censure by a metaphoric suggestion not in Harvard idiom and impossible of literal compliance, and refused to go with his foreman to the office of the general car foreman.

The reason for claimant's dismissal was not his disobedience of instruction but his offensive remark. His insubordination did not have to do with the performance of his work but with discipline. His refusal to go to the office was followed shortly by his going there in company with his local chairman and repeated proposals of apology have been made in his behalf, for the offensive remark.

Certainly discipline was proper for claimant's vulgar expression of resentment, even though it may not have been without cause, but in view of the circumstances and claimant's long record of good conduct, dismissal from service was unjustified and a gross abuse of discretion. The time he has now been held out of service is ample punishment.

AWARD

Claim for reinstatement with full seniority rights sustained, but without compensation for wage loss.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of September 1960.