

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22484
Docket Number MW-22692

Paul c. carter, Referee

PARTIES TO DISPUTE: { **Brotherhood of Maintenance of Way Employes**
{ **The Western Pacific Railroad Company**

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

(1) The dismissal of *Foreman Juan Esquivel*

'for your alleged absence without proper
authority from your assigned position as
Foreman of Section Gang No. 102, on Thurs-
day, September 22, 1977'

was without **just or sufficient cause**, on the basis of **unproven charges**
and was exceedingly and excessively **disproportionate** to the charge (System
File Case No. 11174-1978-BMWE Local Case No. 223 Maint. of Way).

(2) **The claimant's record shall be cleared of the charge and**
he shall be reinstated with pay for all time lost and with seniority and
all other rights restored."

OPINION OF BOARD: Claimant had been in Carrier's service since November 1,
1954. He had **seniority** as a foreman from April 12,
1962.

On September 26, 1977, claimant was notified that a **formal**
investigation would be held on September 30, 1977, to determine facts and
place responsibility for claimant's absence from his assigned position as
Foreman of Section Gang No. 102 on September 22, 1977. In the notice
claimant was advised that he could have a **representative and/or witnesses**
as desired. The Investigation was held as scheduled. Claimant was present
at the investigation but did not have a representative present. On
October 11, 1977, he **was** notified of his dismissal **from** the service.

The Board has **carefully reviewed** the transcript of the
investigation and find that Bone of claimant's substantive procedural
right. 8 was violated.

From our review of the transcript of the investigation it is clear that claimant was absent from his gang on September 22, 1977, without permission of the Roadmaster or any other officer. The claimant testified that he left the gang in charge of the Assistant Foreman and went to check on problems at other locations that he considered of importance to the railroad, including the cutting of a branch off of a tree that he had been told was brushing the faces of the engineer and the brakeman. Claimant was performing service for the Carrier even though he was absent from his gang.

X- During the handling of the dispute on the property and after the dispute had been referred to this Board, the Carrier made offers to restore claimant to the service. However, each offer contained certain restrictions on the claimant's exercise of seniority. At any rate, they were compromise offers that were not accepted, and have no standing in proceedings before this Board.

After full consideration of all the facts in the case, and considering claimant's years of service, with no record of being involved in prior disciplinary proceedings, the Board finds that while claimant was subject to some discipline, the penalty of dismissal was excessively severe. A disciplinary suspension of no more than 60 days would have been appropriate.

We will award that the penalty assessed be reduced to a 60-day disciplinary suspension, following which claimant shall be reinstated with seniority rights unimpaired, and compensated for net wage loss, if any, as provided in Rule 20 of the applicable Agreement.

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 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.

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Claim **sustained** to the extent indicated in the **Opinion and Findings.**

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of **Third** Division

ATTEST:

AW Pauls
Executive Secretary

Dated at Chicago, Illinois, this 24th day of **August** 1979.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **22484**
Docket Number M-22692

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of **Maintenance** of Way **Employees**
(The Western Pacific Railroad Company

ON REMAND FROM THE
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
NO. C 80 2084 WWS

INTERPRETATION TO AWARD 22484. DOCKET w-22692

We are called upon to render an interpretative opinion with respect to Award No. **22484** concerning the meaning of the language "net wage loss."

Claimant Esquivel was dismissed from **Carrier's** service on October 11, 1977. In Award No. 22484, issued on August 24, 1979, the Board held:

'We will award that the penalty assessed be reduced to a 60-day disciplinary suspension, following which **claimant** shall be **reinstated** with seniority rights unimpaired, and compensated for net wage loss, **if any**, as provided in Rule 20 of the applicable Agreement."

Rule 20 of the applicable collective bargaining **Agreement** provides in part:

"If **final** decision decrees that charge against the employe is not sustained, the record shall be cleared of the charge. If the employe has been suspended or dismissed, he shall b-s reinstated and paid for net wage loss, if any, suffered by him. If employe **is** suspended, suspension shall date from the time taken out of service."

The **record shows** that the 60-day **disciplinary** suspension extended from September 22, 1977 to November 22, 1977. The record now **shows** that the **period** of **time** involved, in excess of the 60-day disciplinary suspension, was November **23** 1977 to October 1, 1979.

The Carrier contends that in arriving at **claimant's "net wage loss"** for the period that he was out of service beyond the **60-day** disciplinary suspension, it is entitled to take credit for claimant's earnings from his privately owned and operated landscaping business. The Organization contends that in computing "**net wage loss**" only amounts earned as wages from employment for another employer **may** be offset against the gross earnings otherwise payable pursuant to the Award.

The Organization points out that claimant **owned and, along** with another member of his family, operated a landscaping business both prior to and during part of the time involved and contends that it would not be proper to deduct earnings from **that** business in arriving at claimant's "net wage loss."

The Board has been furnished no figures **showing** claimant's wage loss from the Carrier for the **period** November 23, 1977 to October 1, 1979; nor have any figures **been** furnished showing claimant's earnings from the **landscaping** business during that period. The Carrier states that **information** furnished indicated that **claimant's** landscaping business generated, during the period that he was out of service, income substantially in excess of the amounts generated in the four years prior to the date of claimant's discharge. It would appear logical that with claimant being able to devote his entire **time** to the landscaping business while out of Carrier's service, the business would generate more income. There is evidence in the record that claimant made no effort to seek other employment to mitigate his **damages** other than his business.

The Board holds that Carrier is entitled to take credit for any increased earnings of claimant's landscaping business for the period November 23, 1977 to October 1, 1979 in arriving at the "net wage loss" of claimant. This would make claimant whole for any wage loss that he suffered. The claimant should furnish to the Carrier proper information, or copies of his **income** tax returns, for the four-year period prior to his discharge, and for the period involved herein, so that such determination can properly be made.

This interpretation is also in response to Carrier's request for interpretation as contained in its letter to the Board dated October 30, 1980.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this **16th** day of March **1981.**

